



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1260 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

FELIX MUCHEMI THIRIMA.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

JUDGMENT

The Claimant was employed by the Respondent on 29th May 2006 as clerical officer 1 and deployed to the administrative section. He was summarily dismissed from service on 5th May 2016 on grounds of desertion of duty from 26th April 2016. At the time of termination, he was earning Kshs.77,000.00.

The claimant avers that he was on annual leave in March and April 2016 when he is alleged to have deserted duty. In the memorandum of claim dated 23rd and filed on 28th June 2016, the claimant seeks the following reliefs –

i. An order directing that the Respondent unconditionally reinstate the Claimant to his employment services and former position with the Respondent without any loss of benefits or seniority and without any conditionality.

ii. An order for the Claimant to be adequately compensated for the time lost out of employment.

In the alternative and without any prejudice to the foregoing

iii. The Respondent be ordered to fully compensate the Claimant for unfair, unlawful and wrongful termination of employment services of the Claimant with all attendant benefits as pleaded.

iv. The balance of the salary not paid for the month of May 2016 of Kshs.77,247.65.

v. Salary for 12 months in the sum of Kshs.926,971.80.

vi. Unpaid leave days amounting to Kshs.69,523.00.

vii. Costs of the suit.

viii. Any other relief this Honourable Court deems fit.

The Respondent filed a response to the averments in the memorandum of claim save for the fact that the claimant was its employee and was dismissed for desertion of duty.

The Claimant's Case

During trial, the Claimant testified that the printout from the company system indicated that he took leave between October 2014 and February 2015. He denied receiving a show cause letter or summons to appear before the disciplinary committee.

He testified that he was unwell between March and April 2016 and was given sick-off. That at the time of his summary dismissal, he was

admitted in Aga Khan hospital, a fact the Respondent was aware about and even signed a letter of undertaking to pay his hospital bills, and received daily reports from the hospital and thereafter settled the bill.

It was his testimony that he was not paid his terminal dues or issued with a certificate of service at the time of termination.

Upon cross examination, the Claimant conceded that he had been absent from work on various occasions in the past but maintained that he never received the letter to show cause of 29th April 2016. He admitted that he reported to work for only 13 days between 1st March 2016 and 17th April 2016 but contended that he had sick-off as well as his supervisor's permission to be absent. He conceded that there was no evidence on record to prove that the Respondent had been aware of his condition.

The claimant testified that he never presented the documents required to facilitate payment of his terminal dues.

Upon re-examination, the Claimant clarified that his summary dismissal related to his absence in March 2016 which he had explained to his Chief Administration Officer as he was attending hospital and was to take his leave days.

The Respondent closed its case within for calling any witness as it was unable to secure the attendance of the witness.

The Respondent's Case

In the statement of defence, the Respondent denies granting the Claimant leave and instead contends that the Claimant was a chronic absentee and was issued with numerous letters regarding the same. The Respondent avers that because of his absenteeism, the Claimant was deployed to Administration (welfare and transport section) for up close supervision. He was also referred to counselling as his work performance degenerated due to his absenteeism.

It is the Respondent's case that the show cause letter issued to the Claimant on 29th April 2016 was based on the 28 days the Claimant had absented himself from work in March and April 2016. The respondent denies that it was informed of the Claimant's hospital admission and contends that it discovered the Claimant's admission on 10th May 2016 on its own initiative and settled the bill due to its benevolence.

It is averred that the Claimant was subjected to disciplinary proceedings in April 2015. That he was in the habit of ignoring summons to appear before the disciplinary committee. It is the Respondent's contention that the Claimant's summary dismissal was lawful and in compliance with the employment laws.

It is the Respondent's position that for the Claimant to be paid his dues, he must comply with its staff rules and regulations under clause 9.0 (i), (ii) and (iii).

The Claimant's Submissions

The Claimant relies on the case of **Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Limited [2013] eKLR** where the Court observed that the onus of proof in employment matters rests upon the employer who is required to prove the reasons for termination, their validity, fairness and justifiability. He also relies on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited; Cause 74 of 2013** where the Court observed that an employee must be subjected to the proceedings under section 41, whatever the reason(s) for their termination.

The Claimant urged to be granted the reliefs sought, save for an order for reinstatement which had been overtaken by events.

The Respondent's Submissions

The Respondent submits that the reason for terminating the Claimant's employment on the ground of gross misconduct was valid as he was guilty of chronic absenteeism, a fact he admitted to during trial. It urged this Court to find that it had discharged the standard of proof required in Section 43(1) of the Employment Act.

The Respondent further submits that the Claimant was afforded an opportunity to explain himself vide the show cause letter of 29th April 2016 but never responded to the same and relies on the Court of Appeal case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** to fortify this position.

It is the Respondent's submission that the Claimant has failed to demonstrate that he was unfairly dismissed hence not entitled to the reliefs sought. It is submitted that an order for reinstatement is not tenable since more than 5 years have lapsed since the Claimant's summary dismissal. Further, that the other reliefs sought have no basis.

Analysis and Determination

I have carefully considered the pleadings, evidence and submissions of the parties and the following are the issues arising for determination-

- a. Whether the termination of the Claimant was lawful and for a valid and justifiable cause.
- b. Whether the Claimant is entitled to the reliefs sought.

Termination

1. Reason

The Claimant contended that he was suffering from bipolar disorder and asthmatic condition which required constant medical attention. He further submitted that the Respondent was aware of his medical condition. However, no medical report was adduced to buttress his assertion that he was bipolar and asthmatic hence the same remains a mere allegation.

The memo relied upon which appears at page 15 of the Respondent's bundle of documents, did not prove the alleged medical conditions and only indicated that the Claimant had a "*pathological relationship with mood altering substances*" a fact which the Claimant admitted to during trial.

The Claimant asserted that the Respondent was aware of his bipolar disorder and that before his employment was terminated, the Respondent had undertaken to pay his bill. In his opinion, this was sufficient proof that the Respondent knew of his condition otherwise it would not have offered to pay the bill.

Clause 19 of the Respondent's CBA with the Kenya Petroleum Oil Workers Union provides that the Respondent bears the hospitalization costs of its staff and registered dependants, paid directly to the hospital. As stated in the defence, settling of the Claimant's hospital bill was out of benevolence and as pleaded in the defence, the respondent discovered the claimant's hospitalisation through due diligence. The claimant did not inform the respondent of his hospitalisation. Further, as submitted by the respondent, the hospitalisation was in May while the absenteeism that is the subject of the summary dismissal was in March and April 2016, before the hospitalisation as is evident in the letter of dismissal.

Section 44(3) of the Employment Act allows an employer to summarily dismiss an employee whose conduct indicates that he has fundamentally breached his contractual obligations. Under sub-Section (4)(a), absence from work without permission or lawful cause amounts to gross misconduct warranting summary dismissal.

The Claimant's termination letter states that he was dismissed for gross misconduct for deliberate desertion of duty in March and April 2016 without permission from his supervisor. The Claimant contended that he was on leave during that time. The printout of the Respondent's leave system annexed at page 10 of the Respondent's bundle of documents indicates that the Claimant did not take any leave days in 2016. The Claimant did not adduce any evidence to controvert this assertion. Instead, he admitted during trial to being away without leave. He contended that his supervisor had given him permission to be away and he was yet to apply for leave but did not adduce any evidence to prove this averment.

Further, from the Respondent's bundle of documents, it is indeed evident that the Claimant was a habitual absentee. In 2011 he was issued with a surcharge letter for absconding duty. In 2012 he was issued with a final warning letter for the same offence. In 2013 his salary was stopped and he was referred for counselling due to his absenteeism. Lastly, in 2015 disciplinary action was taken against him for absconding duty between October 2014 and February 2015. The Claimant admitted to this during cross examination.

In light of the foregoing, it is my finding that the Respondent had valid reason to summarily dismiss the Claimant.

2. Termination Procedure

The Claimant submitted that he was not subjected to due procedure before he was summarily dismissed. On the other hand, the Respondent submitted that the Claimant was given an opportunity to explain himself but never responded to the same.

The respondent's Staff Rules and Regulations Manual at clause 8.1.11 provides for absence without permission as follows –

“8.1.11 ABSENCE WITHOUT PERMISSION

- i. Where an employee is absent from duty without approved leave or reasonable or lawful cause and cannot be traced within three (3) days, or if traced, no reply to a charge of absence without leave is received from him within ten (10) days after the dispatch of the charge to him, the Company may summarily dismiss him.*
- ii. An employee who has been absent from duty without leave or reasonable excuse for less than the seven (7) days may be required to forego an equivalent of the salary for the period of absence.*
- iii. When an employee has been absent from duty without permission and has continued to be paid leading to over payment, the amount in question may be recovered from his salary or any other monies due to him from the Company or may be sued for and recovered in any Court of Law.”*

Further clause 8.5.5(i) on summary dismissal provides for summary dismissal in terms of Section 44(4) as follows –

“8.5.5 SUMMARY DISMISSAL

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from alleging or disputing whether the facts giving rise to the same, or whether other matters not mentioned in this section, constitute justifiable or lawful grounds for the

dismissal. Under such circumstances the employee leaves the Company's service immediately and is only entitled to salary and allowances up to the day of leaving the Company's service plus any leave earned.

i. Absenteeism

If without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work for seven (7) continuous working days."

Clause 8.5.6 further provides of desertion as follows –

"8.5.6 DESERTION

In the event of an employee not reporting for duty for seven (7) continuous working days and failing to communicate with his Head of Department/Section explaining the reasons for absence, the employee shall be deemed to have deserted his employment and his services considered terminated with the Company. Such disciplinary action shall only be taken after reasonable effort has been made by the Company to ascertain the circumstances surrounding the absence.

The Head of Department must advise the HR & Administration Division Head of the circumstances promptly so that any further payment to the individual is stopped.

Where an employee has been charged on desertion of duty, the letter shall be addressed to his last known address by registered mail. Employees are required to notify the HR & Administration Division Head immediately they change their contact address."

The manual further provides for appeals at clause 8.6 as follows –

"Appeals

Employees may appeal against any disciplinary action taken against them to the Managing Director or the Board. The appeal must be made in accordance with the following laid down procedures:

i. Appeals by aggrieved staff shall be within 28 days from the date the disciplinary action is taken.

ii. Results of the appeal will be communicated to the affected employee within 30 days of receipt of the appeal.

ii. Results of the appeal shall be approved by the Managing Director. The Managing Director's decision on this matter shall be final."

The Claimant denied receiving the show cause letter but did not deny receiving all the other communication from the Respondent regarding his absenteeism. Like the show cause letter, the previous correspondences did not have any acknowledgement of receipt. I further note that the Claimant's summary dismissal letter made reference to the show cause letter of 29th April 2016. The Claimant did not raise any queries after receipt of this letter. He did not take advantage of the appeals process to contest the dismissal letter or process.

It is my finding that he has failed to controvert the Respondent's assertion that he was issued with a letter to show cause. This leads to the conclusion that he received the letter but failed to respond. He thus failed to subject himself to the Respondent's disciplinary procedure. He cannot therefore fault the Respondent for failing to follow procedure that he did not subject himself to. In light of this, I find that the termination of the claimant's employment was lawful.

Reliefs

The Claimant sought a myriad of reliefs. However, he is only entitled to the balance of the salary not paid and his unpaid leave days. This is because the Respondent admitted that his dues had not been paid to him and was willing to pay the same subject to him clearing with the company.

The Claimant did not pray for payment of one months' salary in lieu of notice. However, his termination letter sets out the payments he was entitled to including pay in lieu of notice, which the Respondent admitted it is ready to pay subject to claimant's clearance. The claimant is awarded the same.

This court declines to issue an order for reinstatement, compensation for unlawful termination and compensation for time lost out of employment as the Claimant has not established a case to warrant granting of the orders. Additionally, it is more than 3 years since the Claimant was summarily dismissed hence an award of reinstatement would be untenable as correctly pointed out in the claimant's submissions where it is submitted that he is no longer seeking the prayer for reinstatement.

For the foregoing reasons, the court orders that the claimant submits to the clearance procedure to facilitate the payment of his terminal dues as set out in the letter of termination. Other than this, the rest of the claim is dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE