



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 851 OF 2014

MACLYSON MUSUNDI MASIGA.....CLAIMANT

v

WELLS FARGO LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 22 January 2020 and Judgment was reserved to 17 March 2020 but due to the present COVID19 pandemic could not be delivered. The Deputy Registrar gave a notice for delivery of judgment for 24 April 2020 but none of the parties responded. A fresh notice was issued for delivery today.

2. Maclyson Musundi Masiga (the Claimant), the Human Resources Manager and a Controller with Wells Fargo Ltd (Respondent) testified.

3. The Claimant filed his submissions on 28 January 2020 while the Respondent submissions were not on file by 21 February 2020 as had been directed.

4. The Court has considered all the material placed before and will adopt the Issues as identified by the Claimant in his submissions.

Unfair termination of employment

Procedural fairness

5. Unless it is a case of summary dismissal, section 35(1)(c) of the Employment Act, 2007 contemplates *written notice of termination of employment* while section 41 of the Act calls for affording the employee an opportunity to make representations before a decision to terminate employment is taken.

6. The Claimant testified that on 25 October 2011 he fell ill and was given a *leave-pass* for one day and that he sought treatment at Kisumu District Hospital and Kapsabet District Hospital and was diagnosed with pneumonia and typhoid and was given 4 days off (copy of medical certificate produced).

7. The Claimant asserted that upon returning to work on 3 November 2011, his employment was verbally ended by the Respondent's Office Administrator on the instructions of the Area Manager, Kisumu. He also testified that there was no prior notice.

8. The Respondent's case was that the Claimant absconded from duty with effect from 26 October 2011 and that he was declared a *deserter* on 3 November 2011. A termination letter was issued on 12 November 2011.

9. The Claimant testified that upon recovering he reported to the office on 3 November 2011 but was instructed by the Office Administrator to go back home because his services had been terminated.

10. The Respondent was aware that the Claimant was ill and had issued him with a *leave-pass*. It tried to contact him through the Controller/dispatch team and phone but he was unreachable.

11. The Respondent's Administrator was not called to rebut the Claimant's testimony and the failure to call him was not explained.

12. The Court, therefore, finds that the Claimant reported back on 3 November 2011 and was dismissed verbally despite showing he had lawful cause to be away.

13. But even assuming that the Claimant failed to report to work from 26 October 2011 and therefore warranted being subjected to

summarily dismiss by dint of section 44(4)(a) of the Employment Act, 2007, pursuant to the demand of section 41(2) of the Employment Act, 2007, there was a need for a mandatory oral hearing before he was instructed to clear (Respondent did not deny that the Claimant went through the clearance process).

14. The dismissal was procedurally tainted, and the Court so finds.

Substantive fairness

15. The Respondent's given reason for terminating the Claimant's employment was *desertion*.

16. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent was required to not only prove the reason but prove it as valid and fair.

17. The Respondent had issued to the Claimant a *leave-pass* for him to seek medical attention.

18. The Claimant was attended to at Kisumu District Hospital and Kapsabet District Hospital. He was diagnosed with typhoid and pneumonia.

19. The Respondent was aware of the medical situation of the Claimant as it had given him leave to seek medical attention.

20. It could not have been fair of the Respondent as a reasonable employer to expect with certainty that the Claimant would report the next day.

21. A reasonable employer would have requested the Claimant to produce a medical certificate. There was no evidence that the Respondent requested the Claimant to produce such evidence of medical incapacity before taking the decision to declare him a *deserter* and ultimately dismissing him.

22. In the view of the Court, and the Court so finds, the termination of the Claimant's was not only substantively unfair but was not in accord with justice and equity as demanded by section 45(4)(b) of the Employment Act, 2007.

Compensation

23. The Claimant served the Respondent for about 14 years and in light of the length of service, the Court is of the view that compensation equivalent to 12 months would be fair (gross salary at separation was Kshs 29,366/-).

Salary in lieu of notice

24. The Claimant pleaded for 3 months' salary in lieu of notice. He did not disclose any contractual foundation for the same and in lieu, the Court would award the equivalent of 1-month salary as notice (basic salary was Kshs 12,994/-).

Unpaid leave 2011/2012

25. On account of unpaid leave, the Claimant sought Kshs 24,978/-.

26. The Respondent indicated in the termination letter that the Claimant had 40 accrued leave days without disclosing the cash equivalent.

27. The Court will allow the head of the claim as pleaded by the Claimant.

House allowance

28. The copy of payslip produced by the Claimant indicated that he was earning house allowance and since the Respondent offered him wages up to 24 October 2011, nothing turns on this head of the claim.

Gratuity

29. Under gratuity, the Claimant prayed for Kshs 13,321/60 but the payslip produced shows he was contributing to the National Social Security Fund.

30. By dint of section 35(5) & (6) of the Employment Act, 2007, the Claimant would not be eligible for gratuity. If there was another basis for payment of gratuity, it was not proved.

Unpaid salaries

31. The separation between the Claimant and Respondent was in October 2011, and the Court finds no legal basis for the claim for wages for November and December 2011.

Unremitted NSSF deductions

32. The National Social Security Fund has elaborate provisions under its establishing Act for addressing unremitted contributions and the Claimant should utilise those provisions by making a formal complaint to the Fund.

Cash in Transit allowance

33. The Claimant sought Kshs 2,300/- being cash in transit allowance. Because the same was contractual, the Claimant is entitled to the same.

Refund of expenses of Kshs 11,050/-

34. The Claimant claimed Kshs 11,050/- expenses allegedly incurred on transport to the Respondent's offices and he produced copies of receipts.

35. The Claimant did not prove that the expenses were in respect of the official business of the Respondent. Relief is declined.

Certificate of Service

36. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 15 days.

37. The Claimant, a layperson with no legal background or training disclosed, gallantly prosecuted his case.

Conclusion and Orders

38. The Court finds and declares that the termination of the Claimant's employment was not only unfair but not in accord with justice and equity.

39. The Claimant is awarded

(a) Compensation	Kshs 352,392/-
(b) Pay in lieu of notice	Kshs 12,994/-
(c) Unpaid leave	Kshs 24,978/-
(d) CIT allowance	Kshs 2,300/-
TOTAL	Kshs 392,664/-

40. For clarity, the Respondent should pay the Claimant the terminal dues indicated in the letter of 12 November 2011 and deduct what would amount to double payment from this award.

41. Each party to bear own costs.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 5th day of June 2020.

Radido Stephen

Judge

Appearances

Claimant in person

For Respondent Mr. Omino instructed by Walker Kontos Advocates

Court Assistant Judy Maina