



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 48 OF 2018

THOMAS DZOMBO KIRUNGA.....CLAIMANT

VS

KRYSTALLINE SALT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 30th April 2018 and filed in court on 14th May 2018, the Claimant sued the Respondent for wrongful and unfair dismissal. The Respondent filed a Response on 20th January 2020.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Phylister Mwamuye.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent sometime in May 1997, in the position of Pump Attendant.

4. The Claimant claims to have worked continuously up to 16th December 2017, when he was dismissed.

5. As at the time of dismissal, the Claimant earned a monthly salary of Kshs. 29,200 plus a house allowance of Kshs. 4,380.

6. On 16th December 2017, the Claimant was served with a letter asking him to explain why he had absented himself from work.

7. In response, the Claimant stated that he had been admitted at the Coast General Hospital. He claims to have supplied treatment documents confirming this fact.

8. The Claimant avers that he was dismissed on 16th December 2017 and was not paid any terminal dues.

9. The Claimant terms his dismissal wrongful and unfair and now claims the following:

- a. One month's salary in lieu of notice.....Kshs. 29,200.00
- b. House allowance.....4,380.00
- c. Unpaid leave for 16 days.....12,572.54
- d. Severance pay/years of service.....292,000.00
- e. 12 months' salary in compensation.....350,400.00
- f. Certificate of service

g. Costs plus interest

The Respondent's Case

10. In its Response dated and filed in court on 20th January 2020, the Respondent denies that the Claimant worked for it from the year 1997.
11. The Respondent states that the Claimant was dismissed for absconding duty. The Respondent adds that prior to dismissal, the Claimant was given a chance to explain his absence from work and a disciplinary hearing held on 18th December 2017.
12. The Respondent's case is as follows:
 - a. The Claimant was a habitual absentee, who wilfully refused to attend to his duties during the period between 5th December 2017 and 14th December 2017, without a valid reason;
 - b. On 14th December 2017, the Respondent sent to the Claimant a show cause letter of the same date, asking him to explain why he had been absent from work for a duration of 10 days, from 5th December 2017;
 - c. In response to the show cause letter, the Claimant sent a letter to the Respondent, stating that his absence was occasioned by the fact that he had been tending to his sick child, an allegation the Claimant could not substantiate;
 - d. The Claimant was summoned to a disciplinary meeting on 18th December 2017, where he admitted having a drinking problem that made him abscond his duties;
 - e. The Respondent, upon looking at the Claimant's character, in its entirety and upon giving him a chance to make representations and be heard, made a decision to dismiss him on 19th December 2018;
 - f. The Claimant was issued with a certificate of service;
 - g. The Claimant's dues were calculated and payment made to the County Labour Office;
 - h. The Respondent had a valid reason for dismissing the Claimant being absenteeism, of which the Claimant was informed by the show cause letter dated 14th December 2017;
 - i. The Claimant was given a chance to respond to the allegations and a disciplinary hearing was held on 18th December 2017, where the Claimant had an opportunity to make his representations and further admitted having a drinking problem and being absent from his place of work;
 - j. The Respondent followed due process in dismissing the Claimant.

Findings and Determination

13. There are two (2) issues for determination in this case:
 - a. Whether the Claimant's dismissal was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

14. The Claimant's dismissal was communicated by letter dated 19th December 2017 stating as follows:

"Dear Thomas

RE: ABSCONDING DUTY

Our Show Cause letter dated 14th December 2017 refers.

On 19th December 2017, we held a disciplinary hearing to give a hearing as per section 41 of Employment Act 2007. During the hearing, it was noted that you absented yourself from duty since 5th December 2017 without prior permission from neither your immediate supervisor nor the HR office.

Based on the above and as stipulated in the Employment Act 2007 section 44 (a), if an employee, without leave or other lawful cause absents himself from the place appointed for the performance of his work, constitutes to (sic) justifiable grounds for summary dismissal.

This letter is therefore intended to inform you that you are summarily dismissed from your position with immediate effect.

You will therefore be entitled to:-

- Salary for the month of December 2017,
- Any accrued and unutilized leave,
- Less one month salary in lieu of notice.

We take this opportunity to thank you for the service and effort you have rendered this organization and wish you all the best in your future endeavours.

Yours faithfully

KRYSTALLINE SALT LTD

(signed)

Phylister Mwamuye

HR OFFICER”

15. According to this letter, the Claimant’s dismissal was occasioned by unauthorised absence from work.
16. Prior to the dismissal, the Claimant had been issued with a show cause letter dated 14th December 2017, requiring him to show cause why disciplinary action should not be taken against him. The Claimant was to respond by end of business on 16th December 2017.
17. In his Memorandum of Claim and witness statement filed in court, the Claimant states that he failed to report to work from 5th December 2017 because he had fallen ill and was therefore admitted at Coast General Hospital for several days.
18. However, in his response to the show cause letter, the Claimant changed his story to state that, he failed to report to work on 5th December 2017 because he was attending to his sick child, who had fallen ill suddenly and therefore required emergency medical treatment.
19. Further still, the Claimant produced a medical certificate from Kijanaheri Medical Centre (Marereni Branch) dated 10th December 2017, showing that he had sought treatment due to an injury.
20. Moreover, the Claimant stated in cross examination that he was not admitted in hospital, contrary to his averment in the Memorandum of Claim and witness statement.
21. The Claimant did not offer any explanation for the glaring contradictions in his pleadings and testimony.
22. This, coupled with the Claimant’s admission that he was away from work from 5th December 2017 until 14th December 2017 and that his employer was not aware of his whereabouts during this period, presented a valid reason for dismissal from employment.
23. Even assuming that the Claimant was indeed unwell as claimed, he was under a duty to notify his employer of his whereabouts and the reason for absence from work (see **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR** and **Evans Musyoki Mutua v Shreeji Enterprises (K) Ltd [2020] eKLR**).
24. The Court was referred to the decision in **Nicholas Otinyu Muruka v Equity Bank Limited [2013] eKLR** where the prerogative of the employer to take disciplinary action against an employee for good cause was affirmed.
25. From the evidence adduced before the Court, it is evident that the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act.
26. That settled, the only other question to ask is whether, in effecting the dismissal, the Respondent observed the procedural fairness requirements set out under Section 41 of the Act.
27. From the record, the Claimant was issued with a show cause letter to which he duly responded. Additionally, he was invited to a personal disciplinary hearing which he attended. It seems to me therefore that the requirements of Section 41 of the Employment Act were fully satisfied.
28. Overall, I find and hold that the Claimant’s dismissal was lawful and fair.
29. The claims for compensation and notice pay are therefore without basis and are dismissed.

Other Claims

30. No basis was laid for the claims for house allowance and severance pay/years of service which therefore fail and are dismissed.
31. The claim for unutilized leave pay is admitted and is payable. This is in addition to salary for days worked in December 2017, which the Respondent agrees is owing to the Claimant.
32. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs. 35,582.00** as admitted by the Respondent.
33. The Claimant is also entitled to a certificate of service.
34. Each party will bear their own costs.
35. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF SEPTEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Atiang h/b for Miss Kamau for the Claimant

Mr. Otieno for the Respondent