REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2091 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

NANCY MUTHOGA.....CLAIMANT

VERSUS

CHANDARANA SUPERMARKETS.....RESPONDENT

JUDGMENT

The Claimant filed an Amended Claim on 8th February 2018 alleging unfair termination by the Respondent. The Claimant seeks the following reliefs:

a. Terminal dues of Kshs.1,147.776.00

b. Costs of the suit.

c. Interest (a) and (b) above calculated at the courts

d. Any other or further relief that this Court may deem fit and just to grant in the circumstances.

The Respondent filed its Amended Memorandum of Response in which it avers that the Claimant was summarily dismissed for absconding work.

Claimant's Case

The Claimant avers that on or about 14th February 2007 she was employed by the Respondent in the position of Branches Co-ordinator.

The Claimant avers in October 2012 she contracted a bacterial infection on the face but the Respondent declined to give her leave. The Claimant avers that she was granted leave on 22nd October 2012 which was to commence on 23rd October 2012 to 13th November 2012. The claimant avers that she was admitted to hospital hence she could not report back to work at the end of her leave. Consequently, the Respondent terminated her on 8th January 2013.

During the hearing the Claimant testified that her employer informed her that she was terminated as it was not aware of her whereabouts. She testified that she called the employer but her calls were not answered. That is why she sent text messages. She testified that she also sent text messages to the Human Resource Assistant, Mr. Shikuku and the Human Resource Manager, Mr. Joseph, who acknowledged receipt of her messages.

The Claimant testified that on 14th November 2013 she sent text messages to Mr. Dipan, the Director and Mr. Hanif, the Operational Manager seeking leave but she never received a response. The Claimant testified that in her telephone conversation with Mr. Dipan on 22nd October 2012 he informed her that she could go on leave thus she did not fill a leave form. She testified that after a series of hospital visits she was admitted at Nairobi West Hospital on 14th to 30th November 2012 and later given a week's sick-off effective 1st December 2012 to 8th December 2012. She testified that her sick-off was extended twice from 8th November 2012 for 14 days and from 22nd December 2012 to 31st December 2012.

She testified that she reported to work on 8th January 2013 but was denied access in the work place until Mr. Dipan arrived. She testified that

she presented her sick sheets to the Mr. Shikuku the Human Resource Assistant and was instructed to write a letter explaining to the Respondent her whereabouts during the period she was away. She testified that she was neither issued with a notice nor was she invited for a disciplinary hearing. She testified that she was offered Kshs.100,000 as terminal dues, and that her net salary was Kshs.55,000.

Respondent's Case

The Respondent avers that the Claimant applied for 18 days leaves which was to commence on 17th October 212 but it approved the Claimant's leave application to start on 19th October 2012 to 8th November 2012. The Respondent avers that the Claimant was to resume work on 8th November 2012 but did not resume work until 7th January 2013. The Respondent avers that it did not receive any communication from the Claimant to explain her absence from work for 60 days.

RW1, **Michael Shikuku Ong'ong'o**, the Respondent's Human Resource Assistant testified on behalf of the Respondent.

He testified that the Claimant did not explain her absence and did not get permission to be away from work. He testified that he could not remember if the Claimant's messages were delivered to him. He testified that the Claimant submitted her medical documents when she reported to work. He testified that the Claimant's terminal dues were computed but the Claimant did not collected her cheque.

In cross- examination, he denied having visited the Claimant in hospital. He testified that the Respondent did not investigate the matter. He testified that the respondent does not issue notices in instances of termination but the Claimant was issued given notice and was paid notice pay. He further testified that there was a disciplinary hearing before the Directors and the Human Resource Manager, Mr. Joseph. He testified that the Claimant had previous disciplinary issues but the evidence was not produced in court.

In re-examination he testified that notice pay was factored in the Claimant's payslip.

Claimant's Submissions

The Claimant submitted that she was unable to report to work on 13th November 2012 as she was unwell and she communicated her absence to the Respondent via text message. She further submitted that sick leave is not like annual leave and is not planned, that there was evidence that she had been unwell. She submitted that she ought to have been paid while on sick leave and that she still had a 12 months grace period in terms of sick leave.

The Claimant submitted that she was neither subjected to any disciplinary hearing nor issued with a show cause letter. She further submitted that the reason for her termination was not communicated to her as required under Section 41(1) of the Employment Act. She relied on the decisions in ***Hosea Njeru Kagondu v Kenya Union of Commercial Food and Allied Workers [2012] eKLR*** and ***Alphonce Machanga Mwachanya v Operation 680 Limited [2013] eKLR***.

The Claimant submitted that her employment ought to have been terminated in accordance with Clause 11 of her contract of employment and section 36 of Employment Act. The Claimant submitted that Respondent did not accord her guaranteed right to fair labour practices thus it had contravened Articles 41, 47 and 10 of the Constitution. The Claimant relied on the decision ***Kennedy Nyangucha Omanga v Bob Morgan Services Limited [2013] eKLR.***

The Claimant submitted that the evidence of the Respondent's witness ought to be discredited as he gave a false testimony. The Claimant further submitted that the Respondent had not proved that the termination of her employment was fair. She relied on the decision in ***George Onyangi Akuti v G4S Securrity Services Limited [2013] eKLR*** where the Court held:

> *"Unlike the practice and procedure of the High Court and Magistrates Court under the regime of the Civil Procedure Rules and the Evidence Act where a Plaintiff has to prove his case on a balance of probabilities, the Employment Act has explicitly placed certain legal burdens upon employers. Examples of these are sections 10(7), 41, 43, 45, 47(5) of the Act."*

The Claimant submitted that her dismissal was procedurally unfair and she is entitled to one month's salary and service pay since her NSSF contribution was never remitted, that she was also entitled to her unpaid dues when she was on leave, costs of the suit and interest, one year compensation and Certificate of Service.

Respondent's submission

The Respondent submitted that the Claimant was requested to give a written explanation of her absence which she did in her letter dated 8th January 2013. That a disciplinary hearing was conducted after the Claimant submitted her written explanation. The Respondent further submitted that it prepared the Claimant's last pay cheques of Kshs.200,487.00 which comprised basic salary, absent days, service pay and notice pay but the she declined to collect the cheque.

The Respondent submitted that though the Claimant was absent for 60 days she was paid her salary for the month of October, November and December 2012 and was therefore not entitled to the sum of Kshs.211,680 as claimed.

The Respondent further submitted that the text messages relied upon by the Claimant do not meet the threshold set out under Section 106B of the Evidence Act. Therefore, the evidence ought not be admitted.

The Respondent submitted that the Claimant is not entitled to the reliefs sought as the Respondent had proved that the reasons for termination were valid. It relied on the Court of Appeal decision in ***CMC Aviation Limited v Mohamed Noor (2015)*** where the Court held:

"Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation."

The Respondent further relied on the Court of Appeal decision in ***United States International University v Eric Rading Outa*** and submitted that the Claimant's one month notice pay was factored in the computation of her dues. It submitted that should the Court find that the Claimant is entitled to damages, the same ought to be pegged o the Claimant's contract which provides one month.

Determination

Issues for determination

a. Whether the Claimant's evidence should be admitted.

b. Whether the Claimant was wrongfully dismissed.

c. Whether the Claimant is entitle to the reliefs sought.

a. Whether the Claimant's evidence should be admitted.

The Claimant sought to rely on text messages she had allegedly sent to RW1, Mr. Dipan and Mr. Joseph on diverse dates in the months of August, November and December informing them of her illness and her resultant absence from work. In agreeing with the Respondent, the authenticity of the text messages cannot be ascertained as it is not clear who or which number belonged to the sender and who the exact recipient was. In addition to this it is no doubt that the text messages printed by the Claimant emanate from an electronic device and such evidence ought to comply with the provisions of Sections 106B (1) and (2) of the Evidence Act which provides:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

Having failed to satisfy the provisions of Section 106B (2) and (4) of the Evidence Act, the Claimant's text messages cannot be admitted. The Court is persuaded by the decision in ***William Odhiambo Oduol V Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR*** where Muchelule J. held;

"Coming back to section 106B(4), even if it were to be taken that the verifying affidavit is a certificate, the petitioner has to show that it meets the conditions in subsection (2) and in (a) and (b) of subsection (4). From the evidence of PW7 it does appear that the video was first recorded and saved in internal memory of the phone. The phone must then have been connected to a computer using a micro USB data cable; the video file was accessed from a computer through the cable, the file was copied to the computer's hard disk; an empty CD was inserted into the computer's CD-writer RAM; and the video file was then written on the CD as a VCD using a CD writing software.

PW7 may be the owner of the phone handset, but said nothing about its working condition. There was no evidence regarding the computer used, its condition or reliability. There was no evidence to show that PW7 was the one who owned, operated and managed the computer. The particulars of the computer were not given."

b. Whether the Claimant was wrongfully dismissed.

The Claimant's dismissal is grounded on the fact that she had been away from duty for 60 days and had therefore absconded duty. It is the Claimant's case that she was not in a position to report back to work on 15th November 2012 for reasons that she had been admitted at hospital. She testified that she was admitted at Nairobi West Hospital on 14th November 2012 to 30th November 2012. She further testified that after discharge she was issued with one week sick off effective from 1st December 2012 to 8th December 2012 and when she visited the hospital on 8th December 2012 she was issued with a sick off sheet for 14 days. She was further issued with another sick off sheet from 22nd December 2012 to 31st December 2012.

The Claimant avers that she did not report to work as she was unwell and that she had served all her sick sheets through RW1 who was her neighbour. However, RW1 denied both receiving documents from the Claimant or visiting the Claimant in hospital. It is undisputed that the Claimant only gave a written explanation on her illness and subsequent absence from work after she reported back to work on 8th January 2013. The Claimant was obligated inform her employer of her illness and present a medical certificate of her incapacity to work. Section 30 of the Employment Act provides:

(1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

(3) For the purposes of subsections (1) and (2) "full pay" includes wages at the basic rate excluding deductions from the wages allowable under section 19.

(4) For purposes of subsection (1), the twelve continuous months of service shall be deemed to commence on the date of the employment of the employee and on such subsequent anniversary dates of employment.

(5) An employer shall have the right to place all his employees on an annual cycle of an anniversary date falling on a day to be determined by the employer.

Clause 7 of the Claimant's Letter of Appointment dated 12th February 2007 states:

(a) "After two six months consecutive service, you will be entitled to sick leave with full pay up to maximum of 30 days and thereafter with half pay to the maximum of 15 days in each period of twelve months consecutive service.

(b) You shall be entitled to such payment upon production of authorised doctor's certificate of incapacity covering the period of sick leave claimed, signed by duly qualified medical practitioner in charge of sick leave claimed, signed by duly qualified medical practitioner in charge of a dispensary or medical aid centre.

(c) You shall not be eligible for sick leave under this clause in respect of any incapacity due to gross neglect on your part.

(d) While you remain so absent the company may in its discretion terminate this appointment forthwith and without notice in the grounds of your continued or incapacity without prejudice to any benefits accrued to date."

The Claimant avers that she was expected to get back to work on 13th November 2012 while the RW1 testified that she was to report back to work on 8th November 2012. The crux of the matter is that she did not report to work or inform the respondent of her sickness until 8th January 2013. From her evidence she only expected that her sick sheet would be presented to the Respondent by RW1 who denied having being given the responsibility by the Claimant. The off duty records presented by the Claimant only indicate that the Claimant was to be off duty as she was unable to perform regular duties. From the evidence presented the Claimant did not ensure that her medical condition and reports were duly delivered to the Respondent as expected under Section 30(1) of the Employment Act and Clause 7(b) of her Letter of Appointment.

The Claimant avers that despite explaining that she was ill, the Respondent neither issued her with a notice to show cause nor invite her to a disciplinary hearing. The RW1 testified that the Respondent did not investigate whether the alleged illness was true but he stated that they had indeed held disciplinary hearing after the Claimant issued her written explanation. However, the minutes and findings of this disciplinary

proceedings were presented in Court.

Clause 11 (b) of the Claimant's Letter of Appointment entitled the Respondent to terminate the Claimant's appointment under Clause 7 on grounds of the Claimant's continued sickness or incapacity. In determining whether the Claimant's dismissal was wrongful the Court is to be guided by the decision in ***Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR*** where Ndolo J. held:

> *"While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee's inability to work amounts to unfair termination for want of procedural fairness."*

From the foregoing, the Court is persuaded that the Respondent never invited the Claimant to a disciplinary hearing prior to her summary dismissal for absconding duty under Section 44(4)(a) of the Employment Act. The termination of employment was therefore unfair for want of fair procedure.

c. Whether the Claimant is entitled to the reliefs sought.

The Claimant having being unfairly terminated she entitled one month's salary in lieu of notice which the Respondent does not dispute and is willing to pay the Claimant Kshs.70,560 as per payslip for the month of October 2012 filed in court by the respondent.

The Claimant submitted that service pay is payable as the Respondent never remitted her NSSF. However, the payslip produced by the Respondent indicate that NSSF was deducted. The Claimant did not produce her NSSF Statement to prove that the amounts were never remitted.

The Claimant prayed that she worked for 8 days in January 2013 but it is her testimony that she reported to work on 8th January 2013 which is the same day she is said to have been terminated. This claim fails.

Having found the termination of the claimant unfair and considering that it was on medical grounds and considering the length of service, I award the claimant 5 months' salary as compensation in the sum of Kshs.352,800. This is in addition to her terminal dues of Kshs.278,399 as admitted by RW1 in his witness statement filed in court and at paragraph 11 of the memorandum of response.

The Claimant is also entitled to a Certificate of Service and costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE