



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**CAUSE NO. 2189 OF 2014**

**MOSES DANIEL KYALO.....CLAIMANT**

**VERSUS**

**TREADSETTERS TYRES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant was employed by the respondent as a Service Coordinator earning Kshs.21,708 per month. On 25.8.2014 he resumed duty after about one-month sick-off only to be served with a letter dated 13/08/2014 terminating his employment with effect from 31/08/2014. He averred that no reason was cited for the termination, the notice given was not sufficient and only Kshs.40,000 was paid to him as terminal dues. He therefore filed this suit on 09/12/2014 alleging that his contract of service was wrongfully and unlawfully terminated by the respondent on and prayed for the following reliefs:

- a) One Month in lieu of Notice.....Kshs. 21,708**
- b) Accrued leave days.....Kshs. 90,465**
- c) House Allowance for 1 month.....Kshs. 3,500**
- d) Service Gratuity.....Kshs. 434,160**
- e) Severance Pay.....Kshs. 43,416**
- f) 12 months' salary for unlawful termination.....Kshs. 260,496**
- g) Issuance of certificate of service**
- h) Costs and interest**

2. The Claimant also avers that the Respondent did not consider the loan advanced to him by Barclays Bank and which he was servicing through his salary and that he had a balance of Kshs. 400,000. That he was subjected to trauma and stress since he had no other source of income and prays for judgment against the Respondent for the terminal dues as computed together with interest thereon, cost of this suit and any other relief as the court may deem fit and just to grant.

3. The Respondent filed its Defence to Claimant's Memorandum of Claim dated 12/01/2015 denying the Claimant's claim and averring that the Claimant's suit is fatally defective and that it shall in the first instance be seeking to have it struck out on a point of law. It averred that the Claimant was summarily dismissed after he failed to report to work for one month without informing the Respondent of his whereabouts and only appeared to the office after being served with the termination letter, alleging that he was sick. It further averred that before the termination, the claimant had been served with several verbal and written warnings for his misconduct but he failed to heed to the same.

4. The suit was heard on 13.11.2018 when the claimant testified as Cw1 and the respondent called its Chief Accountant M/s Mary Njeri Kiburi who testified as Rw1. Thereafter both parties filed written submissions.

**Claimant's evidence**

5. The Claimant (CW1) testified that he joined the respondent in 2009 and his salary was Kshs21708 per month. That from 31.7.2014 he fell sick and was placed under daily injection by Doctor Isaac who also gave him 2 weeks sick off. However, he was served with a letter dated 13.8.2014 terminating his employment with effect from 31.8.2014. That the termination letter never stated any reasons, it was less than one month notice and he was not given any hearing. He stated that his termination was unfair and unlawful because he was terminated for being sick and in great pain. Finally, he stated that the warning letters he was given were not related to the department he was in before the termination.

6. In cross examination, CW1 contended that he never missed work except when he was sick. He further contended that when he fell sick, he notified the respondent and gave it the original medical documents which it endorsed and paid all the bills. However, on 25.8.2014, he was shocked to be served with the letter dated 13.8.2014 terminating his services effective from 31.8.2014. He maintained that the warnings he had received were in relation to another department and denied ever being served with any warning in the department he was before the termination.

7. He admitted that after the termination, he was paid salary for August 2014, 5 years' service, one month's salary in lieu of notice, 28 leave days but contended that he acknowledged the payment of Kshs.78,421/= by his letter dated 29/08/2014 which was written by the employer and he was only required to sign it. He further contended that he was not given a chance to dispute the said letter because it was part of the clearance which he was told to complete.

### **Defence evidence**

8. RW1 testified that the Claimant was employed by the respondent on 1.11.2009 as a Service Coordinator and later confirmed as a permanent staff from July 2011. That during his employment, the claimant had the habit of leaving the Yard unmanned and the customers unattended before his reliever in the next shift reported for which he was served with warning letters. That the claimant promised to improve but he failed to heed to the warnings and instead threatened his supervisor.

9. RW1 further testified that upon termination of the employment contract, the Claimant was paid one month's salary in lieu of notice due to the short notice served plus salary, service for 4 years and pension among other dues as computed in the defence documents filed on 14/01/2015. That the total minus the pension was Kshs.113,369.14. That after deducting the statutory deductions and the Barclays loan, the net balance of Kshs.78,421 was paid to the claimant by *Cheque number 046480* which he acknowledged in his letter dated 29/08/2014 as his full payment.

10. In cross examination, she admitted that the termination letter never cited any reasons for termination and that she is not the one who wrote the warning letters. She further admitted that the claimant fell ill in July 2014 but denied knowledge of how long he remained ill. She also admitted that the claimant brought the receipts for his medication to the respondent. She maintained that the claimant was paid his one month salary in lieu of notice plus terminal dues computed from 2009 to 2014.

### **Claimant's Submissions**

11. The claimant submitted that the circumstances surrounding his termination pointed to an unfair termination since the letter of termination was written on 13.8.2014 while he was lawfully away on sick leave and handed to him when he resumed work on 25.8.2014. He contended that RW1 confirmed that he was sick in July 2014 and that he brought the medical expenses receipts to the respondent. He further submitted that he was not given sufficient notice or paid one month's notice and neither was he called to attend any meeting by the employer to be explained the reason for the abrupt termination. He therefore contended that his termination was in breach of **Section 45(2) of the Employment Act** because the respondent did not prove that it terminated his employment for a valid and fair reason and after following fair procedure. For the foregoing reason, the claimant prayed for the reliefs sought in his suit including house allowance in arrears under **section 31(1) of the Employment Act**.

### **Respondent's submissions**

12. The Respondent submitted that the claimant admitted that he was served with warning letters for his misconduct. It further submitted that the claimant breached his contract of employment by absenting himself from work and failing to notify it of his illness and only availed the medical receipts after his termination. That the absence from work without a justifiable reason or permission and or notice to it warranted and justified its action to summarily dismiss the Claimant under **Section 44(4) of the Employment Act**.

13. The respondent relied on **Banking, Insurance & Finance Union (Kenya) –vs- Barclays Bank of Kenya Ltd [2014] eKLR** where Mbaru J held that:

*“The aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorization or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer. In the South Africa Labour Court in SACWU v Dyasi [2001] 7 BLLR 731 (LAC) the Court held that desertion amounts to repudiation of the contract of employment which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if employee fails to render service. Failing to contact the respondent constitutes unexplained absence from the period the grievant was away....”*

14. The respondent further submitted that it followed due process in terminating the Claimant's employment as provided for under **Section 41 of the Employment Act**. That in previous Warning Notices dated 06/10/2013 and 24/02/2014, the Claimant was advised to appear before the management to address his behaviour and offer explanation but he ignored the directives and failed to heed the same. That having been given an opportunity to be heard and refusing to attend a disciplinary hearing, the termination is fair and procedural.

15. It relied on Lydia Wambui Wahome -vs- 2NK Sacco Society Limited & Another [2017] eKLR where the court stated as follows:

***“...In addition the second respondent has contended that she followed fair procedure by inviting the Claimant to a disciplinary hearing by the Board of Directors but she refused to attend. The Claimant has admitted in her evidence that she received the letter dated 2/4/2014 inviting her for the hearing but she never attended.***

***In view of the foregoing evidence, I find that the second respondent has proved that the reasons for termination was valid and fair and that the procedure followed before dismissing the Claimant was fair within the meaning the Section 45 of the Act....”***

16. The Respondent further submitted that since the termination was fair, justified and procedural, the Claimant is not entitled to any of the reliefs sought. In addition, it submitted that the claimant was paid all his terminal dues after termination as tabulated in *document 7* in the Respondent's bundle of documents and his payslip for August 2014 including accrued leave of Kshs.23,937.24. As for Service Gratuity, it submitted that the contract of service did not provide for the same and further contended that **Section 35(6) of the Employment Act** disqualified him from that benefit because he was a member of NSSF. It relied on the payslip produced by the claimant to contend that he was indeed a member of the NSSF. It cited Hosea Akunga Ombwori -vs- Bidco Oil Refineries Limited [2017] eKLR where Justice Radido dismissed the claim for service gratuity because the Claimant was a contributor to the National Social Security Fund.

17. The Respondent also submits that it paid Severance Pay as indicated under *item 11* of the abovementioned tabulation and that the claim for 12 months' salary for unlawful termination is a discretionary remedy whose factors for consideration by the Court have been set out in **Section 49(4) of the Employment Act** and that since the dismissal was lawful, the Claimant is not entitled to this claim. It finally urged the court to dismiss the suit with cost because it was dragged to this suit unnecessarily.

### **Analysis and determination**

18. After careful consideration of the pleadings, evidence and submissions from both sides, there is no dispute that the claimant was employed by the respondent from 1.11.2009 to 31.8.2014 when he was dismissed by the respondent. The issues for determination are:

- a) Whether the termination of the Claimant's contract of employment was wrongful and unlawful.
- b) Whether the Claimant is entitled to the reliefs sought.

### **Wrongful and unlawful termination**

19. There is no dispute that the respondent terminated the services of the claimant by its letter dated 13.8.2014. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility, or based on the employer's operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.

20. The termination letter was not produced as exhibit but both Cw1 and Rw1 admitted that it never stated the reason for the termination of the claimant's employment. However, the respondent pleaded in paragraph 6 of the defence that she dismissed the claimant after he absented himself from work for one month without any information of his whereabouts and only came to the office after being served with the termination, alleging that he was sick. That before the termination, the claimant had committed a series of misconduct including poor working relations with other employees, late reporting and leaving before his reliever in the next shift reports, and insubordination and failed to heed to the warnings given.

21. The claimant testified that he fell ill around the start of August 2014 and he was given sick off for 2 weeks by Doctor Isaac and gave the originals to the employer who paid his medical bills. He produced copies of the treatment card, notes, medical receipt and the Recommendation for the sick off sheet. Rw1 admitted that the claimant was sick in July 2014 and that he indeed brought medical receipts to the office. Neither the claimant nor Rw1 stated when the receipts were brought to the office and who received them. The burden of proving that he notified the employer of his sickness and availed a Certificate of incapacity in good time lies with the claimant. He has however failed to discharge that burden on a balance of probability by rebutting the defence case that he only availed the documents after being served with the termination letter.

22. The failure by the claimant to notify the employer that he was sick and incapacitated in good time amounted to absconding from work which is a repudiatory breach of the contract of service. Section 44(4) (a) of the Employment Act entitles the employer to dismiss his employee summarily if without leave or other lawful cause, he absents himself from the place appointed for the performance of his work. I therefore agree with Mbaru J in Banking, Insurance & Finance Union (Kenya) -vs- Barclays Bank of Kenya Ltd [2014]eKLR and return that the respondent had a valid reason for terminating the services of the claimant.

23. Without prejudice to the foregoing, even if the claimant had notified the employer of his sickness and the doctor's recommendation for 2 weeks sick off, the court would still have found that he absconded duty. The reason for the foregoing is that the copy of recommendation for 2 weeks sick off was issued on 31.7.2014, meaning that the claimant was supposed to report by 14.8.2014. However, he admitted on oath that he reported back on 25.8.2014 and he failed to account for the extra days. After considering the issue, whichever way, I am satisfied that on the preponderance of evidence, that the respondent has proved a valid and fair reason that warranted the termination of the claimant's services.

### **The procedure followed**

24. Section 41 of the Employment Act provides in mandatory terms that before terminating an employee's contract on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of another employee of his choice or shop floor union official, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

25. The Claimant has submitted that the Respondent did not follow a fair procedure while terminating his employment thus rendering his dismissal wrongful and unlawful. He contended that he was not given a chance to defend himself before the termination and that he was not given one month termination notice. Rw1 did not dispute the foregoing contentions and instead stated that the claimant was paid one month salary in lieu of notice. The said procedure was however in breach of the mandatory provision section 41 of the Employment Act, which requires in mandatory terms that the employee be accorded an oral hearing in the presence of another employee or union official of his choice.

26. In my view, it is immaterial that the employee had absconded and failed to notify the employer his whereabouts. The employer knew his address for service and that is why it was possible to serve him with the termination before he reappeared to the office as per the testimony of the Rw1. It is now trite that the failure to accord the employee a hearing as provided by section 41 of the Employment Act, like in this case, renders the termination unfair even if there was a valid reason for the termination. In **Kenfreight (E.A.) Ltd –vs- Benson K. Nguti [2016] eKLR** the Court of Appeal stated as follows:-

*“The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts”.*

27. The foregoing decision binds this court and has been followed in many cases including **Geoffrey Gikonyo Mathu –vs- Intex Construction Company Ltd [2017] eKLR** where the Court held that:

*“The KENFREIGHT decision affirms the right to be heard which was disregarded by the respondent herein, in favour of dismissal at will. We are able to discern inter alia: - the absence of a specific charge framed for the appellant to respond to; the absence of findings as to demonstrate that the respondent had directed its mind to the case; and the absence of a formal notice to show cause which would have set the disciplinary process in motion. We are also persuaded by the reasoning of this Court in HEMA HOSPITAL V WILSON MAKONGO MARWA [2015] eKLR and in CMC AVIATION LIMITED V MOHAMMED NOOR [2015] eKLR with regard to the right to be heard. Accordingly, we find and hold that the appellant was not given a fair hearing which would have attached the stamp of legality to the termination of the appellant's employment for cause.”*

28. In view of the fact that the respondent has not proved that it accorded the claimant any hearing or at least a letter requiring him to show why disciplinary action should be taken against him for failing report to work for over a month, I proceed to hold that the termination of the claimant for the misconduct pleaded in the defence was unfair and wrongful and therefore unlawful.

#### **Reliefs sought**

29. The Respondent filed documents showing that it had paid all the Claimant's dues upon terminating his employment that included salary in lieu of notice, accrued leave days and severance pay and he signed an agreement discharging the employer from further claims. However, the Claimant testified that the signing of the discharge was not voluntary but he was compelled to sign the acknowledgment letter of receipt of payment for clearance purposes. The alleged involuntary signing was not disputed by Rw1. In **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR**, the Court of Appeal stated as follows:

*“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial court from inquiring into the fairness of the termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge”.*

30. In **Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR** Court of Appeal, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:

*“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”*

31. More recently in **Coastal Bottlers v Kimathi Muthika [2018] eKLR**, the Court of Appeal held as follows:-

*“21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties.”*

32. In view of the foregoing precedents and my earlier observation herein above that the claimant's contention that he did not sign the discharge letter voluntarily, I return that this court can treat the discharge as vitiated by undue influence or coercion and proceed to award the

claimant compensation for the unfair termination under section 49 (1) of the Employment Act. I award him 4 months' salary considering his service for almost 5 years, that he was paid an ex-gratia payment after termination and also because he caused his termination through misconduct.

33. The claim for certificate of service is also granted as prayed but the claims for accrued leave and house allowance for one month lack particulars and it is dismissed. The claim for salary in lieu of notice and severance pay are dismissed because they were fully paid after the termination.

### **Conclusion and disposition**

34. I have found that there was a valid and fair reason for terminating the claimant's employment, however the termination was rendered unfair by the failure on the part of the respondent to follow a fair procedure. I have also found that the letter by the claimant discharging the respondent from further claims was not voluntarily signed and proceeded to award him compensation for the unfair termination plus certificate of service.

Consequently, I enter judgment for the claimant in the sum of **Kshs. 86,832 plus costs** and interest at court rates from the date hereof.

The award is subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 29th day of March 2019**

**ONESMUS N. MAKAU**

**JUDGE**