



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 354 OF 2017

DOUGLAS K. MUTUA.....CLAIMANT

VS

MILLY GLASS WORKS LTD.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Douglas K. Mutua and his former employer, Milly Glass Works Ltd. Mutua’s claim is documented by a Statement of Claim dated 2nd May 2017. The employer’s defence is contained in a Memorandum of Response dated 18th May 2017 and filed in court on even date.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Georgina Kilonzo. The parties further filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent effective 1st November 2012, in the position of Information Technology Officer. He was confirmed in his appointment by letter dated 18th April 2013. The Claimant earned a gross monthly salary of Kshs. 39,200.

4. On 9th February 2017, the Claimant was issued with a letter asking him to show cause why disciplinary action should not be taken against him for failure to advise the Respondent on renewal of the subscription for its Cyberoam facility, which had expired on 31st December 2016.

5. The Claimant responded to the show cause letter and on 15th February 2017, he attended a disciplinary meeting with the Respondent’s Human Resource Manager, Georgina Kilonzo and Human Resource Assistant, Purity Wakini.

6. During the disciplinary hearing, the Claimant stated that his superior, Mohamed had decided that the Cyberoam services would be handled by a third party, Overdrive Consultants (K) Limited, with one Joshua being in charge. The Claimant states that his user rights were limited and that he had to rely on Joshua. He adds that due to this limitation, he had no way of knowing that the Cyberoam subscription had expired.

7. The Claimant claims that the disciplinary meeting of 15th February 2017 was adjourned at 11.30 am to reconvene on 17th February 2017 at 3.00 pm. Upon being given the minutes of the disciplinary meeting, the Claimant noted that they had been doctored and tampered with, to deliberately omit some vital information.

8. The Claimant took the liberty to make handwritten inclusions in the minutes, an act that did not augur well with the Respondent’s Human Resource Manager. The Claimant rejected the minutes and refused to append his signature, unless the omitted information was included.

9. The Claimant’s employment was subsequently terminated by letter dated 2nd March 2017. The Claimant avers that the termination of his employment was unfair and in breach of his statutory rights as set out in the Employment Act.

10. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 39,200.10
- b) 12 months’ salary in compensation.....470,400.00

c) Leave pay for 15.5 days.....20,253.33

d) Costs plus interest

The Respondent's Case

11. In its Memorandum of Response filed in court on 18th May 2017, the Respondent states that the Claimant breached the terms and conditions of his employment contract by:

- a) Failure/refusal to ensure that the IT security was not compromised at any time;
- b) Failure/refusal to take the necessary steps to ensure prompt renewal of the appropriate licence.

12. Following a notice to show cause issued to the Claimant and his response thereto, the Respondent's Human Resource Manager wrote a memorandum dated 10th February 2017, asking the Claimant to attend a disciplinary hearing on 15th February 2017.

13. The Respondent states that at the disciplinary hearing, the Claimant was questioned on his misconduct based on complaints by the Vice Chairman, Mr. Mohamed and Joshua of Overdrive Consultants (K) Limited.

14. The Respondent accuses the Claimant of gross misconduct and laxity in the performance of his duties. The Respondent adds that the Claimant was accorded ample time to defend himself. The Respondent's case therefore is that the termination of the Claimant's employment was lawful and fair.

Findings and Determination

15. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Claimant's employment was terminated by letter dated 2nd March 2017 stating:

"Dear Douglas,

Re: Termination of Employment

The show cause dated 9th February 2017, your subsequent response and the disciplinary hearing held on 15th February 2017 refers (sic).

The cyberoam for internet gateway and protection expired on 31/12/2016. According to you, you were not privy to the contract details and therefore did not know when the subscription was due to expire. This was eventually diagnosed by the external IT consultants when they were troubleshooting on why the internet speeds are slow in the period December 2016-January 2017. It is worthy to note that you were among those who suggested the installation of the cyberoam to the management and it was approved. However, though it was being monitored externally you did not make any effort to find out the duration of the subscription to ensure for (sic) seamless continuity of service and commence renewal process well in advance. It is noted that there are other service contracts which you are privy to but have not taken time to know when the subscription ends; inevitably the company may end up finding itself in the same predicament. You have confirmed that you are only aware of the MYOB, MFI and photocopier service agreement; however you do not know the duration of the photocopier agreement, and have made no effort to know to date. The lack of foresight and pre-emptiveness demonstrated by you passing the buck on your responsibilities to external providers cannot be condoned any further.

It is on the above premises that management has decided to terminate your services for failure/refusal on your part to proactively take charge of the IT function and hence ensure uninterrupted internet connectivity to support the business functions denotes (sic) carelessness and negligence in the performance of your duties; which constitutes gross misconduct in accordance with the Employment Act 2007 Section 44-4c.

Kindly arrange to return all company property before payment of your final dues as follows:

- Salary upto and including 2nd March 2017
- Leave earned and not taken 15.5 days as at 2nd March 2017
- One month's salary in lieu of notice

Less:

- Any other monies owed to the company

Please be guided accordingly.

Yours faithfully,

For: Milly Glass Works Ltd

(Signed)

Ms. Georgina Kilonzo

Human Resources Manager

17. This letter was preceded by a show cause memorandum dated 9th February 2017, to which the Claimant responded on the same day. In his response, the Claimant stated that he was restricted in access to the Cyberoam device which limited him on internet connection troubleshooting. He further stated that he had no way of knowing that the Respondent's subscription had expired. In the same letter, the Claimant apologised for any mistake made.

18. By a memorandum dated 10th February 2017, the Claimant was invited to a disciplinary hearing on 15th February 2017. The Respondent's Human Resource Manager, Georgina Kilonzo told the Court that after the meeting of 15th February 2017, a further meeting took place on 2nd March 2017, at which the Claimant was notified of the decision to terminate his employment.

19. On his part, the Claimant contested the record of the proceedings of 15th February 2017, citing omission of crucial material to his detriment. He therefore declined to append his signature to the record.

20. From the evidence on record, the termination of the Claimant's employment had to do with non-renewal of subscription to the Respondent's internet gateway and firewall provided by a device known as Cyberoam.

21. In his defence, the Claimant stated that he had no access rights to the Cyberoam, which was under the management of an external service provider by the name Overdrive Consultants (K) Limited. The Claimant told the Court that he had no way of knowing the expiry date of the Cyberoam subscription which could only be detected by a login into the system, for which he had no access rights.

22. The Respondent did not contradict the Claimant's evidence that he had no access rights to Cyberoam. The Claimant filed an email dated 5th September 2016, by which he had requested for such rights. In subsequent mail dated 7th September 2016 addressed to 'IT Support' and Geoffrey N. Kimaru, the Respondent's Director, Mohamed S Rashid issued the following warning

"Please note that the right is not a child's play and it's a security breach.

Please DON'T give rights to anyone without my consent as per agreement or you will be breaching the contract."

23. From the foregoing, the Court has arrived at the conclusion that the Claimant had no access rights which could have enabled him to track and monitor the duration of the Cyberoam subscription. The only question that remains is whether, upon learning of the expiry of the subscription from the external service provider, the Claimant took appropriate action towards renewal.

24. On 11th January 2017, Joshua Kiniu of Overdrive Consultants (K) Limited wrote to the Claimant as follows:

"As discussed, your Cyberoam's subscriptions are expired and are due for renewal. Please find attached the quotation for the same."

25. By a return mail dated 13th January 2017, the Claimant notified Kiniu that the issue was under discussion by his bosses.

26. On 19th January 2017, Kiniu wrote a follow up mail to the Claimant enquiring if a decision had been made and on 7th February 2017, he wrote directly to Mohamed asking him to give a go-ahead for the subscription to be renewed.

27. From this trail of emails, it seems to me that once the Claimant learnt of the expiry of the Cyberoam subscription, he made every effort within his power to get a renewal. Clearly, the final decision did not lie with him; all he could do was raise the issue. Having done so, he could not be expected to do more.

28. The Court was therefore unable to find any fault on the part of the Claimant which would warrant termination of his employment. He asked for access rights which were denied and when he relayed the message from the external service provider to his bosses, he was ignored.

29. What is more, even assuming that the Claimant was indeed a poor performer as alleged, the correct procedure would have been to point out his weaknesses and allow him reasonable time to improve. This was the holding in *Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)* with which I fully agree.

30. In the instant case, the Court did not see any effort by the Respondent to support the Claimant to improve in his performance. The Respondent cannot therefore be allowed to rely on the Claimant's performance as a ground for termination of his employment.

31. With regard to the procedure adopted by the Respondent in effecting the termination, the glaring issue is the Respondent's failure to consider the Claimant's representations both in the response to the show cause memorandum and at the disciplinary hearing.

32. Moreover, although the disciplinary proceedings of 15th February 2017 were adjourned first to 22nd February 2017 and later to 2nd March 2017, it would appear that no further proceedings took place. The Respondent's Human Resource Manager, Georgina Kilonzo testified that the purpose of the meeting of 2nd March 2017 was to communicate to the Claimant the decision of the management to terminate his employment.

33. What is clear is that the disciplinary proceedings were never concluded and as held in *Moses O. Ogila v Mwalimu Co-operative Savings & Credit Society Limited [2018] eKLR* an incomplete disciplinary process flies in the face of the procedural fairness requirements set under Section 41 of the Employment Act.

34. In light of the foregoing findings, the Court finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

35. Consequently, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service, his employment record as well as the Respondent's conduct in the termination transaction.

36. The claims for one (1) month's salary in lieu of notice and leave pay were admitted. In the absence of evidence of prior payment, these claims are due and payable.

37. Finally, I enter judgement in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 235,200
b) 1 month's salary in lieu of notice.....	39,200
c) Leave pay for 15.5 days (39,200/30x15.5).....	<u>20,253</u>
Total.....	294,653

38. This amount will attract interest at court rates from the date of judgment until payment in full.

39. The Claimant will have the costs of the case.

40. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2019

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JUDGE

Appearance:

Miss Kamau for the Claimant

Mr. Waweru for the Respondent