



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.144 OF 2017

WESLEY C KOSKEY.....CLAIMANT

VERSUS

STYLE INDUSTRIES LTD.....RESPONDENT

JUDGEMENT

The claimant filed his Memorandum of Claim on 7th April, 2017. On equal date the respondent was served through the Human Resource Manager Mr Tony Koome and in the presence of Scholastica Kendi and who received and signed the same. An Affidavit of Service was filed by George Rasugu to confirm service.

The respondent did not enter appearance or file defence.

The matter came for hearing and formal proof on 5th June, 2018, the respondent had been served with a hearing notice on 30th April, 2018 and which was accepted but was absent. The claimant was heard on his evidence and case closed. The matter was fixed for mention on 12th June, 2018 to confirm the filing of written submissions.

On 12th June, 2018 Mr Opar attended and holding brief for Mr Masese for the respondent and applied to be allowed to file defence and re-open the claimant's case. However there is no appearance by the respondent herein and the judgement is due on the above background. The attendance by the respondent's representative on 12th June, 2018 is confirmation that the respondent has been aware of these proceedings.

Claim

The claimant, an adult male was employed by the respondent company as a General Worker from May, 2014 to 25th January, 2017 when his employment was terminated by the respondent. The claimant was earning a wage of Kshs.10, 000.00 per month and was issued with a payment statement the last being for January, 2017.

The claim is that on the morning of 25th January, 2017 the claimant reported to work but had severe pains to his neck where he sought medical attention at Upendo Medical Clinic and where he was treated and given three (3) days off. Treatment cards are attached to the Memorandum of Claim.

On 27th January, 2017 while the claimant was on sick off he sent his wife to deliver the treatment card to the respondent. The treatment card was received and returned to the claimant.

On 30th January, 2017 the claimant reported on duty at 7.30am and worked until 10.00am when the human resource manager summoned him and informed him that he had been suspended from duty for 3 days on the grounds that he should not have gone for treatment at a private clinic resulting from pain to his neck and following work injury on 11th January, 2017. The claimant was advised to report back to work on 2nd February, 2017 and on which day the claimant was informed his employment had been terminated. No reasons were given. There was no hearing or notice issued.

The claimant reported the matter to the County Labour Office which wrote to the respondent but there was no response.

The claim is that the termination of employment was contrary to the law, unfair and without justification. The same failed to follow the provisions of section 41 of the Employment Act, 2007.

The claimant is seeking;

- a) A declaration that the dismissal from employment was unfair;
- b) Notice pay of Kshs.10, 108.00;
- c) Compensation for 12 months at kshs.121, 296.00
- d) Costs of the suit.

The claimant testified in support of his claim.

At the close of the hearing, the claimant was to file written submissions.

No submissions are on file.

In the absence of the respondent entering appearance, the court is left with the claimant's case only. There being no defence, the claim is not contested. However the same must be addressed with regard to the applicable law.

The claim is that the claimant got unwell while at work on 25th January, 2017 following a work injury on 11th January, 2017. He attends treatment at Upendo Medical clinic and on 27th January, 2017 he sent his wife with the treatment cards which were returned to him.

Without any defence, the court is left at a loss as to how the claimant obtained time off to attend to his severe next pains. Whether this was on his own accord or with verbal authorisation by the respondent is a matter denied of this court. However, where an employee is unwell and requires being away from work, section 30 of the Employment Act, 2007 requires that;

30. Sick leave

(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.

The right to sick off is secured in law. Such rights come with responsibility on the part of the employee. Upon taking sick off, the employee must submit a certificate of incapacity to the employer and such certificate must be signed by a dully qualified medical practitioner.

The rationale is that absence from work without authority and or approval of the employer is a god ground for summary dismissal under section 44(4) of the Employment Act, 2007. Where an employee is absent from work and the basis is sickness, for the employee to be protected, section 30 provisions must be adhered to.

In the case of **Calister Nyatichi Oriku versus Epcu Builders Ltd, Cause No.1082 of 2016** the court is addressing the provisions of section 30 and 34 of the Employment Act, 2007 held as follows;

*An employee who is sick, unwell or requires attending and seeking medical attention has the right secured under section 30 and 34 of the Employment Act, 2007. Where the employee is absent from work due to sickness and has proceeded on to seek medical assistance, she must inform the employer of her circumstances within a reasonable time. In this regard, the law allows the employee to use a third party to communicate his circumstances to the employer. Such is to allow an otherwise seriously sick employee have the chance to let the employer know that they are unable to be at work following sickness as held in **Dorothy Ndung'u versus Machakos University [2016] eKLR**.*

This position is reiterated in the case of herein in the case of **Stephen Kariuki and another versus Michael Njoroge and Sandstone Logistic Limited/Cylinder Works Limited, Cause No.888 of 2010** held that;

[where an employee is sick and away from work] Upon resumption of duty, an employee who has been sick must submit a medical certificate from an authorised medical practitioner. The essence of section 30 and 34 of the Act is essentially to give an explanation for absence from work by providing the requisite documents as otherwise; absence from work without a just cause is a subject for summary dismissal under section 44(4) of the Employment Act, 2007.

In this case the medical treatment records attached to the claim from Upendo Clinic is not a Certificate by a Medical practitioner as required under section 30 of the Employment Act, 2007. Treatment notes or treatment cards are not to be construed as a Medical Certificate allowing an employee the latitude to be absent from work. Had the drafters of the law intended to have such treatment notes to apply and to secure time off work, then the law should have been categorical in this regard.

As noted above, without any defence, there being no letter terminating the claimant's employment with the respondent save for the sworn evidence by the claimant, I take it he was not issued with notice, reason or a hearing for him to be able to respondent to any issues that may have arisen between him and the respondent and before his employment court be terminated. Even in a serious case of absence from work that warranted summary dismissal under section 44(4) of the Act, the procedural safeguards under section 41(2) of the Act required the respondent to give the claimant a hearing. Where such a hearing was not possible, the circumstances constraining the same were for the respondent to address with the court. None is given.

I take it the claimant's employment failed to meet procedural safeguard under the law in terms of section 41 of the Employment Act, 2007 and with that it became procedurally unfair pursuant to the provisions of section 45 of the Act.

Where termination of employment is fraught with procedural unfairness, notice pay is due. The claimant was earning Kshs.10, 108.00 in terms of his last pay statement for January, 2017. Pursuant to section 35 of the Act, he is entitled to one (1) months' notice pay awarded at Kshs.10, 108.00. Compensation is due where employment is terminated unfairly. In this case an award of three (3) months gross wage is found appropriate and the claimant awarded Kshs.30, 324.00.

Accordingly, judgement is herein entered for the claimant against the respondent for compensation award of Kshs.30, 324.00 and notice pay at Kshs.10, 108.00 and costs of the suit.

Delivered in open court at Nakuru this 14th day of June, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant: