



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 159 OF 2015**

*(Before D. K. N. Marete)*

**GILBERT KIPNGENO SANG.....CLAIMANT**

**VERSUS**

**UKWALA SUPERMARKET LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Claim dated 9th January, 2015. It does not disclose an issue in dispute on its face.

The respondent in a Respondent's Memorandum of Claim dated 7th March, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent on a permanent basis on 1st January, 2007. This was as a general labourer at the respondent's Kericho Branch.

The claimant's further case is that towards the end of 2012, he fell sick and was hospitalised at Tenwek Hospital for a period of twelve (12) months with a discharge from hospital on 16th November, 2013. On 19th January, 2014 he obtained a clearance letter from the hospital indicating that he was fit to resume work.

The claimant avers that he thereon presented the said clearance letter to the respondent whereupon he was refused resumption and instead summarily dismissed from employment. It is his position that this dismissal was malicious and unwarranted and he now claims compensation for wrongful dismissal.

He prays as follows;

- a) Unpaid balances of the plaintiff's salary and compensation for wrongful dismissal.*
- b) Cost of the suit.*
- c) Interest on (a) & (b) above at the present commercial rates.*

The respondent's case is that this suit is bad in law, inept, ambiguous and does not sufficiently disclose proper particulars of the claim or cause of action and may be struck out with costs.

It is the claimant's further case that she is a separate and distinct entity from the claimant's employer at Kericho and will at the appropriate time raise a preliminary objection on the subject. Notice of preliminary objection is issued on the face of the response.

The respondent again denies the employment and the allegations thereof and puts the burden of proof on the claimant. It is her case that even if this was true, the claimant was summarily dismissed for gross misconduct and particularly absconding/ absenteeism from work for a whole year without permission. She *in toto* denies knowledge of hospitalization or even the clearance letter from Tenwek Hospital as alleged by the claimant.

The respondent denies the claim *in toto* and prays that the same be dismissed with costs.

The matter came to court variously until the 28th July, 2016 when it was heard *inter partes*.

The issues for determination therefore are;

- a) Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
- b) Whether the claimant is entitled to the relief sought?
- c) Who bears the costs of the suit?

The claimant at the hearing and written submissions dated 13th December, 2016 reiterates his case for unlawful termination of employment. He puts it as follows;

*It is clear from the foregoing that the claimant's summarily dismissal was not carried out fairly. There was not good reason for the dismissal. The claimant was not given reasonable notice. He was just summoned by the respondent and was sent home wait for the outcome/decision of the respondents, which never came.*

*The respondent did not give the claimant a genuine opportunity to tell his side of the story before they made their decision. The claimant was not told what the problem was and that dismissal or other disciplinary action was a possibility.*

*The respondent did not prove any allegations of misconduct. The claimant was not given any clear standards to aim for an a genuine opportunity to improve.*

*Also there was no written statement from the respondent for the reasons for dismissing the claimant.*

*Section 44 (4) (a) clearly states gives the pre-condition for summary dismissal;*

*“without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.”*

*In the present case the employee had lawful cause for absenting himself from work and that being his medical condition which he informed his employer by the most convenient means available at the time, phone conversation.*

*The witness for the respondent who introduced himself as the respondent's administrative manager, testified that the claimant was not given a show cause letter and that he would have been given the same had he shown up for work. And now this begs the question **“what is the point of issuing a show cause letter if the employer has already reported to work***

The respondent in her evidence at trial and written submissions also go out of her way to reiterate her case

as pleaded. It is her submission that the claimant was dismissed from employment due to absenteeism from work for twelve (12) months. The dismissal was therefore in tandem and congruence with S. 44 (1) of the Employment Act, 2007 which provides as follows;

*(4)“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause... constitute justifiable or lawful grounds for the dismissal if:-*

*(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*

She relies on the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** this Court held that;

*“for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. This court will appreciate that the respondent met this threshold.”*

It is the respondent's submission that the claimant does not discharge the burden of proof of his case and therefore falls short of the finding in **Wareham T/A Af Wareham & 2 Others vs. Kenya Post Office Bank (2004)2 KLR 91** which observed as follows;

*“In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”*

The respondent further buttresses her case by relying on Section 107 of Evidence Act, Chapter 80 Laws of Kenya is clear on this point as follows;

*1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

It was always the burden of the claimant to prove his case on a test of balance of probabilities. In the circumstances, the claimant has failed to discharge this burden as required by Section 47 (5) of the Employment Act, 2007 as follows;

*“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”*

The respondent's case overwhelms the claimant's. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment, the claimant becomes disentitled to the relief sought. Issue No.2 is therefore accomplished.

I am therefore inclined to dismiss this claim with costs to the respondent. And this answers all the issues for determination.

Delivered, dated and signed this 6th day of February , 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Mutai instructed by M/s Wambui, Chelule & Company Advocates for the Claimant.
2. Mr. Muchela instructed by Ms Murimi, Ndumia, Mbago & Muchela Advocates for the Respondent.