



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1080 OF 2016**

**VICTOR S. AGESA ..... CLAIMANT**

**VERSUS**

**HENKEL CHEMICALS (E.A) ..... RESPONDENT**

**JUDGEMENT**

The issues in dispute are;

- (1) Wrongful suspension (lock out) or termination
- (2) Refusal to lift suspension.

1. The Claimant as employed by the Respondent on 1<sup>st</sup> September, 2011 as a driver at a salary of Kshs.18, 000.00 per month on a one (1) year contract. There was no house allowance paid but the Claimant was registered with NSSF.

2. The Claimant was arrested and charged in court and released on cash bail. The suit herein was filed while the criminal suit was still pending. On 21<sup>st</sup> May, 2016 the Claimant while on duty was ordered by the Respondent to vacate the premises without any reason. He was thus unlawfully suspended and or looked out or was terminated from his employment wrongfully.

3. The Claimant is seeking;

- a) Notice pay at Kshs.99,885.00;
- b) Compensation Kshs.399,540.00;
- c) General damages Kshs.399,540.00;
- d) *Gratitude dues* Kshs.96,043.26
- e) Certificate of service; and
- f) Costs.

4. In evidence, the Claimant testified that upon employment he worked diligently and was issued with a contract of employment as a driver. In the course of work, he wrongly used a cash sale to which he admitted and the amount deducted from his salary. He was then issued with the first and final warning

letters on 4<sup>th</sup> December, 2015. The Claimant also made an apology so as to keep his job.

5. On 5<sup>th</sup> May, 2016 the Claimant had an incident at Peponi School. He called his supervisor as he was arrested and taken to Ruiru police station. He thus called to indicate that he would be late to report for work. The Respondent called Peponi School to know the circumstances of the incident as the Claimant had the company vehicle. The Claimant was bailed out on 10<sup>th</sup> May, 2016 and on the next day when he reported to work and was verbally told to go to the head office as he was based at the office in Westlands. On 12<sup>th</sup> May, 2016 he went back to the office and found a new human resource officer, Anne as Samson Onyango was on leave. He was told to go home and would be called back.

6. The Claimant got concerned with the verbal communication on his case and went back to the office. Anne told him to write down the reasons he was at home and that he would then be returned to work which he did but he was not returned at work. The Claimant was accused of being absent from work. He due salary was not paid and thus filed the suit herein. There is no letter of termination.

7. On cross-examination, the Claimant admit that he wrote a letter to the Respondent stating that he had been at home for personal reason but he did not know that this letter would be used against him. That he wrote the letter under duress and upon the promise by Anne that once he wrote it he would be returned to work. He personally wrote the letter voluntarily and confirms he was not at work from 5<sup>th</sup> May, 2016 to 11<sup>th</sup> May, 2016.

8. The Claimant also called Kennedy Walingula who testified that he was working with the Claimant and based an Industrial Area office. The Claimant was a driver but he recalls that he came to the office on foot and said that he had been summoned by the human resource officer. He went inside the office and after 5 minutes he was out. The witness did not know what was discussed. After a week and Claimant came back and was in the office for 5 minutes. He gave the Claimant Samson's number.

## **Defence**

9. In defence, the Respondent case is that on 5<sup>th</sup> May, 2016 the Claimant was asked to write a statement regarding a case of theft at Peponi School, one of the respondent's clients. Upon writing the statement he disappeared from work. On 16<sup>th</sup> May, 2016 the Respondent wrote to the Claimant requesting him to show cause why disciplinary action should not be taken against him for absenteeism from 5<sup>th</sup> May, 2016. On 25<sup>th</sup> May, 2016 the Claimant responded and admitted that he had been absent from work as he had to deal with a personal issue.

10. On 25<sup>th</sup> May, 2016 the Claimant was invited to attend a disciplinary hearing set for 31<sup>st</sup> May, 2016. At the hearing the Claimant admitted that he had made a mistake but declined to sign the minutes. On 3<sup>rd</sup> June, 2016 the Claimant wrote to the Respondent alleging that he had been locked out from employment on 12<sup>th</sup> May, 2016 and failed to recall that he had admitted to having been absent from work for personal reasons. The Claimant then proceeded to file suit.

11. That the claimant's work history has been poor as on 4<sup>th</sup> November, 2015 he was issued with warning for using a cash sale for personal use and failing to repay the respondent.

12. By admission that the Claimant was absent from work without due cause, the Claimant was in breach of his employment contract. He was issued with a show cause and accorded a hearing where he chose to destroy his own employment by filing suit and making false allegations against the respondent. The claims set out are thus not due. Suit should be dismissed with costs.

13. In evidence the Respondent called Samson Wanyangu the human resource manager for the respondent. He testified that he worked with the Claimant since 2011. While on leave from April to May, 2016 the Claimant had an incident while at a client's site. The staff at the office looked for the Claimant but he could not be reached. They called the witness and he directed them to another employee who knew

his house, Harrison Kafuna. On 25<sup>th</sup> May, 2016 the Claimant came to the office, Anne had written a show cause on 16<sup>th</sup> May, 2016 but could not serve the Claimant as he could not be reached. He was issued with the letter and invited for hearing on 31<sup>st</sup> May, 2016 which he attended to. The Claimant admitted to have been absent from work.

14. The Claimant was invited for a hearing as he had been absent from work and heard by David Onditi and the operations manager, Anne. The Claimant refused to sign the minutes of the disciplinary hearing.

15. The 2<sup>nd</sup> witness for the Respondent was Anne Waithiru who testified that he serves in the respondent's human resource office for the last 6 months. She was employed on 23<sup>rd</sup> April, 2016. On 5<sup>th</sup> May, 2016 she was informed that one of the drivers was arrested for theft while at a client's site at Peponi Schools]. Nobody could reach the Claimant by phone. Samson who knew the Claimant well reported back on duty on 24<sup>th</sup> May, 2016 and was able to help trace the Claimant through another employee, Kafuna. On 25<sup>th</sup> May, 2016 the Claimant came to the office and was issued with a show cause letter and invited for hearing on 31<sup>st</sup> May, 2016. Present at the hearing were Allan the Chief accountant; David in operations, the Claimant and the witness.

16. At the hearing the Claimant did not want the issue of his absence discussed. He only wanted to have a letter to his bank where he had a loan. He threatened that he knew so much about the Respondent but did not wish to disclose the hearing could not proceed as what the entire Claimant wanted was the letter to the bank and was insistent on this issue. The Claimant was thus not sent away or locked out. The Claimant walked out of his own employment and thus not entitled to his claims.

17. The Respondent also called Allen Wabwire as the third witness. He testified that as the Chief accountant for the Respondent he is aware that on 5<sup>th</sup> May, 2016 he got a call from Peponi schools at 10am that they had arrested the Claimant and was taken to Ruiru police station. Nobody could reach the claimant. On 31<sup>st</sup> May 2016 he attended a hearing where the Claimant was present. The Claimant demanded to have his termination letter as he had a bank loan. Previously the Claimant had failed to account for a cash sale and a warning letter was issued to him.

18. Both parties filed written submissions.

### **Determination**

19. The Claimant admit that on 5<sup>th</sup> May, 2016 he had an incident at Peponi school and was arrested and taken to Ruiru police station where he remained and was bailed out on 10<sup>th</sup> May, 2016 upon production in court. The Claimant does not set out what offence he had committed to warrant the arrest or that he gave the employer an explanation as to his whereabouts. What he did was to call his office as he had the company vehicle.

20. I take it that upon arrest on 5<sup>th</sup> May, 2016 the Claimant was not able to report on duty until 11<sup>th</sup> May, 2016 when he was bailed out. For the 5 working days, save for weekends, the Claimant was not at work.

21. This set out; the Claimant admitted to writing letter dated 25<sup>th</sup> May, 2016 stating that;

*In response to the letter dated 16/05/16, I had personal issue to deal with and due to the nature of the matter I couldn't make it to the management to pass my apology of my absence.*

22. With the admission thus set out by the claimant, the same being voluntary, the absence from work is admitted. The Claimant does not in his memorandum of claim or evidence set out why he was absent from work without prior approval or knowledge of the employer as to his whereabouts. I therefore take it the Claimant had to attend to *personal issue* and this should not be disturbed.

23. However, the law allow an employer at given instances to issue summary dismissal to an employee.

Such instances are under section 44(3) and (4) of the Employment Act. Where an employee has fundamentally breached the employment contract due to gross misconduct or is absent from work for no due cause, summary dismissal can issue.

*(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.*

*(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, 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; \_*

*[Emphasis added].*

24. When the Claimant admitted to being absent from work from 5<sup>th</sup> to 25<sup>th</sup> May, 2016 and then chose not to give any reasons for such absence, having been invited to show cause, the Respondent was at liberty to issue summary dismissal. Any action taken after this date of setting down the claimant’s case for hearing became discretionary upon the Respondent as by the letter of 25<sup>th</sup> May, 2016 the Claimant had confirmed breach of his contract of employment.

25. When the Claimant moved the court seeking various remedies, the foundation for the same was lost with his breach of his own employment contract. The basis set out for notice pay, compensation, general damages and *gratitude dues* does not arise.

**The claim must fail in its entirety save for salaries due and owing if not paid for 5 days worked in May, 2016. Each party to bear own costs.**

Judgement read in open court at Nairobi this 2<sup>nd</sup> February, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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