



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1322 OF 2014

RODGERS TITUS WASIKE CLAIMANT

VERSUS

GENERAL MOTORS E.A. LIMITEDRESPONDENT

JUDGEMENT

1. Company as a Receiving Clerk in the Parts and Accessories Section in November, 2004 as a monthly salary of Kshs.25, 000.00. Upon confirmation into employment the Claimant became eligible for the company Retirement Benefit Scheme where he would contribute and the employer as well. The Claimant had work benefits which included a medical cover.

2. On 1st August, 2012 the Claimant was appointed Parts Sales Executive and salary increased to Kshs.77, 181.00 and reporting to the Retail Operations Manager. On 24th February, 2014 the Claimant was advised that following a review of the Respondent business – General Motors East Africa Limited and General Motors Company (CMC) 2013, the market competitiveness and objectives, his salary was increased to Kshs.102, 516.00.

3. On 9th July, 2014 the Claimant was summarily dismissed from his employment without notice, reasons or hearing but due to alleged gross misconduct and unauthorised absenteeism and absconding duty. The termination was unfair and not justified and the Claimant is seeking compensation; salary for period service for 10 years worked; special damages for lost years all 26; and costs of the suit.

4. The Claimant testified in support of his case that upon employment he worked diligently and was promoted over the years. His salary was increased and other work benefits which included a medical cover for self and 5 family members. The cover had an inpatient amount of Kshs.1 million per year and an outpatient of Kshs.100, 000.00.

5. The duties allocated required the Claimant to pick parts slips and take to the warehouse to pick what the customer wanted. On 11th July, 2014 the Claimant was not in the office. The Claimant remained unwell from 9th to 11th July, 2014. He was attended at Avenue Medical Hospital a branch authorised by the Respondent to treat employees. He was diagnosed with tonsils and could not eat due to swollen throat. On 11th July, 2014 the Claimant was given a sick off but on this date the Respondent issued a termination letter, summary dismissal for gross misconduct due to absenteeism. That had the Respondent been aware that the Claimant was sick and had been attended to at their appointed hospital, the summary dismissal was unnecessary. The reason for termination was not valid.

6. The Respondent failed to use its internal systems to establish the Claimant was sick. When the Claimant reported back to work he was bundled into a vehicle and taken to a police station. He was never given a

hearing at the shop floor to defend himself before termination hence the claim and remedies sought.

7. That the dismissal has affected the Claimant and seeks damages. At the time of termination he had a Sacco loan and guarantors have been following him to repay. His 3 children were affected in school due to lack of school fees; there is a car loan and insurance that has to be paid; he has been unable to pay rent; he is the sole family bread winner and been taking care of his widowed mother-in-law and thus seek damages for the wrongful termination of employment.

8. In cross-examination the Claimant testified that when absent from work he was required to inform his supervisor as his work was regulated by a code of conduct. Work hours were 7.30am to 4pm and where he needed to leave early the supervisor had to approve. On 8th July, 2014 he left work at 4pm and informed his supervisor. When leaving early, a gate pass had to be issued and since the Claimant was not feeling well he needed to leave early. After this date the Claimant was unwell and unable to report to work until 16th July, 2014. Nobody knew where the Claimant was from 8th to 14th July, 2014.

9. The Claimant also testified that his supervisor, Mr Ikenye called him on 14th July, 2014. A message was sent. The Claimant had not been able to communicate before this date. When he sent a text message to Mr Ikenye he did not tell him he had been sick.

10. The Claimant also testified that on 8th July, 2014 he attended a client Mr Chege Mwangi but cannot recall the transaction and where he got parts from the warehouse he must have paid for them and the Claimant was the last person to issue the parts paid for. The security team must ascertain the goods before a client can leave the Respondent premises.

11. While home attending hospital the Claimant learnt that the Respondent officers were looking for him with intention to have him arrested but he had not done anything wrong. He did not attend work for fear of arrest. The Claimant filed CMCC No.4059 of 2014 to stop his arrest and termination.

Defence

12. In defence, the Respondent case is that the Claimant was terminated from his employment due to gross misconduct as permitted by section 41 and 44 of the Employment Act. That upon employment, the Claimant was issued with an employment contract was also governed by a code of conduct and other work regulations that were brought to his attention. He was required to obey lawful orders and directions of the employer/respondent. The Claimant was prompted and his salary increased over time.

13. During the employment, there the Claimant had incidents of spare parts theft from the Respondent warehouse. When this theft was discovered the Claimant fled from his place of work and absconded work. Thereafter without leave or lawful cause the Claimant continued to be absent from work until the date of his termination from employment a dismissal letter date 11th July, 2014 was issued to the Claimant for gross misconduct. The Claimant was informed to collect his terminal dues upon clearance but has refused to collect these dues. The termination was lawful and the circumstances leading to the same well within the law.

14. The prayers sought are not due as the termination was within the context of section 44 of the Employment Act and no compensation is due. The Claimant had a contract with provision for termination in a case of misconduct. Terminal dues available have been offered to the Claimant for his collection upon clearance.

15. In evidence, the Respondent called Mr George Muhia Ikenye the Service Manager and who supervised the claimant. On 8th July, 2014 he had a meeting outside the office when his colleague Samoei called with information that the Claimant had left work before time as he was required to be on duty from 7.30am to 4pm. Due to work load, when the Claimant worked beyond allocated hours he was paid overtime so as to complete what was pending for the day. On this day he left at 3.30pm. The witness called his supervisor, Samuel Nyoro and it was agreed to call the Claimant the following day, 9th July, 2014.

16. When the Claimant was called, he did not come to work. Efforts to reach him through the phone number he used at the office were futile as his phone was off. A text message was sent to his number, 0721 833 136 as the number on the Respondent records but there was no reply.

17. On 15th July, 2014 the Claimant called the witness with information that he was away attending to private matters.

18. Between 9th to 15th July, 2014 there was no information about the claimant's whereabouts. The matter was reported to the human resource department to deal per procedure. A meeting was convened between the witness, human resource officer, the supervisor and the managing director – Mr Ikenye, Margaret Ndungu, Samuel Nyoro. It was noted that the Claimant could not be reached and had been absent from work since 9th July, 2014 and on 8th July he had left work early without approval. The Claimant was supposed to have been helping with investigations on missing spare parts. That the Claimant had communicated that he was absent from work attending to personal matters. It was thus resolved to dismiss the claimant.

19. Mr Ikenye also testified that where an employee wishes to go on leave, this must be applied for and approved before taking such leave of absence. In case of an emergency, one is allowed to call immediately or send a text message as the first option. In this case the Claimant was absent and nobody had information of his whereabouts.

19. The 2nd witness was Maritim Collins Kimtai the Security and Investigations manager at the respondent. He testified that he is in charge of the outsourced security service providers at the Respondent business and does conduct investigations. He knew the Claimant well and on 8th July, 2014 he was notified of an incident in the warehouse involving spare parts and that the Claimant was involved. A guard at the gate got a motor bike operator and while checking what he had carried from the warehouse he was found carrying 4 liners but the delivery note was not for the same. The client was informed that there was a problem as the goods and delivery notes had different details and that he should go back to the warehouse for a correction. The witness also confirmed the same and told the client to go back. The delivery note dated 8th July, 2014 issued to Chege Mwangi was different from what he had been issued with.

20. The employees in the spare parts department leave at 4pm and when the client was sent back he was supposed to be attended to but when security went to the warehouse at 4pm they found Mr Chege seating and waiting. That he had contacted the Claimant to change and replace the delivery but he had not come back to attend to him. The Claimant had signed that the client had paid for goods he issued and when the security team found him waiting, they checked the camera details and saw the Claimant had gone out to the sales counter and came with the goods issued to Mr Chege and then he disappeared and had already left the Respondent premises.

21. The next day he had hoped to address the matter but the Claimant never reported to work. The client was to come back the next day to collect the correct purchased spare parts upon making a confirmation with the claimant. When the Claimant finally reported back on 16th July, 2014 he refused to state where he had been. The human resource office followed up on the case and the matter was also reported to the police.

22. The third witness was Mr Fred Wasike the General Manager, Human Resource and in charge of disciplinary matters. Staff relations are regulated under a code of conduct and the Claimant signed the same. Every year the employees are made to sign on the code to remind them of its contents.

23. In this case, the Claimant absconded duty, he did not communicate about his whereabouts and when contacted by his supervisor he was not available and eventually he sent text message that he was attending to personal matters. At the Respondent each department has procedures in addressing employee misconduct and in this case the claimant's supervisor reported the case of his absence and absconding duty before it was escalated to the human resource department. When the matter came before the witness

and the legal department advice, the Claimant did not state then that he had been hospitalised or at the hospital, this only arose later. The Claimant refused to cooperate leaving the Respondent with no choice but to issue the letter of summary dismissal. The Claimant was paid his terminal dues less what he owed and statutory deduction, and which he has refused to collect.

24.Both parties filed written submissions

25.The Claimant has relied on the case of **Swinstone okum Wasike and another versus General Motors East Africa Limited, Cause No.294 of 2014.**

26.The Respondent submits that under section 44 of the Employment Act an employer is justified to summarily dismiss an employee who absents himself from work and thus neglects to do his duties as allocated to him. The Claimant was absent from duty from 9th to 16th July, 2014 without due cause and hence warranted summary dismissal as held in **Ann Njoroge versus Topez Petroleum Limited [2013] eKLR; Kenya Shoe and Leather Workers union versus Fast Track Management Consultants Limited [2015] eKLR.**

27.The Claimant is not entitled to the remedies sought as he failed to prove that he was wrongfully dismissed as held in **Elizabeth Wangare Gathoni and 2 others versus Andrew Nighale and Kembu E.A. Ltd [2014] eKLR.**

Determination

28.When an employee is sick, the duty is on the employer to ensure that there is sufficient medical attention and time off for the employee to recuperate. Where an employee has to attend for medical attention, such has to be brought to the attention of the employer within a reasonable time and even a third party is allowed to communicate such information to the employer. See **Dorothy Ndung'u versus Machakos University College [2016] eKLR.**

29.Section 34 of the Employment Act addresses the right to medical attention and the requirements to be met by an employer and an employee thus;

34. Medical attention

(1) Subject to subsection (2), an employer shall ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill. [Emphasis added].

30.There is evidence that the Respondent offered a medical cover and a list of medical facilities where employees could be attended to. When the Claimant remained absent from work there were efforts to reach him by phone, text message and his supervisor called him. The Claimant remained absent from work, there was no information about his sickness communicated to the employer which resulted in his summary dismissal on the grounds of absenteeism and absconding duty.

31.In **Dorothy Njoki Ndungu case**, cited above, the court held;

A third party is allowed to attend before an employer and make presentations on the same [when an employee is sick]. Indeed the law goes further to allow an employee who is sick or unwell to

have up to 30 days away but upon return must submit particular documents, a medical certificate from a medical practitioner. Such I find to be quite open and generous to meet. Otherwise, an employee will claim illness without taking the necessary steps and absconds duty and when put to task, claim a violation of constitutional and legal right. The law is not only meant to address an employee's rights, the law serves both parties to an employment relationship and rights at the work place.

32.The above is restated with approval in **Fred M Shilanga versus Emco Billets & Steel Ltd, Cause No.2327 of 2012** held that;

*Section 30(2) of the Act requires an employee who seeks sick leave to notify the employer of their absence as soon as is reasonably practical. ... in **Banking, Insurance & Finance Union (Kenya) Vs Barclays Bank of Kenya Limited [2014] eKLR** [the Court held that] failure by an employee to notify their employer of their illness avails the employer a good defence in a claim for unlawful termination of employment.*

33.On the one hand the Claimant asserts that he was absent from work from 9th to 16th July, 2014 due to being sick and attending Avenue hospital. On cross-examination he asserted that he did not attend work due to fear of arrest over allegation that he issued a customer Chege Mwangi with parts not paid for and since he was the breadwinner for his family and since he had seen fellow colleagues being arrested he decided not to attend work until 16h July, 2014.

34.The Claimant also confirmed that he filed CMCC 4059 of 2014 to stop the Respondent from terminating his employment. He also testified that it was not a policy to terminate the employees while out sick. He was also seeking to stop the police from harassing him. He did not attend work due to being afraid and for being sick.

35.Why was the Claimant afraid of being arrested upon return to work? This details is not given much attention but crucial here with regard to the claimants conduct just before his termination. Where indeed the Claimant fell sick on 8th July, 2014 and was forced to leave work early, he did not communicate this fact to his employer or supervisor or indeed any other employee of the respondent. Around this time a client Chege Mwangi was also issued with goods that apparently were not paid for and the Claimant was involved. Could this be related to his absence? In any event the Claimant has since been arrested and handed over to the police due to this incident. In work relations, an employee who absents himself without authorisation commits gross misconduct and liable to summary dismissal.

36.Also, what is apparent, the Claimant filed CMCC No.4059 of 2014 to forestall his termination and stop police harassment. The Claimant was at the Respondent premises on 16th July, 2014 not to attend work by to follow up with the service of summons in CMCC No.4059 of 2014. Why this necessary if the Claimant was knew he had been sick and had not done anything wrong or criminal to warrant a termination or an arrest?

37.The Claimant by his conduct on or before his termination dos not speak well of him. A diligent and honest employee, even when faced with illness does not attend court to stop termination as instead such an employee should attend at the workplace and explain their whereabouts to the employer. Nothing stopped the Claimant from sending a text message, sending a relative, calling his supervisor with information of his ill-health. When Mr Ikenye made effort to contact the Claimant his phone was off, he only replied to text and even then the Claimant did not disclose the fact of his being sick. In totality, I find the Claimant was the maker of his own dismissal by his conduct and failure to attend work as required and also by failure to communicate to the employer about his circumstances if indeed he was sick. The Respondent was therefore justified to dismiss the Claimant in this case.

Remedies

38.In the termination letter, the Respondent computed terminal dues to include;

Pay for days worked;

Payment for leave days due;

Savings refund;

Impress on savings; and

Less due deductions.

39. On a case of summary dismissal, these are sufficient dues. A claim for compensation when the termination of employment is justified does not arise. Equally, claims for damages for wrongful termination are not available to the claimant.

In conclusion, the claim is hereby dismissed with costs to the Respondent.

Dated, delivered in open court at Nairobi this 23rd day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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