



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1135 OF 2013

ANDREW OGOLA MAKOMERE.....CLAIMANT

VERSUS

AGRO INDUSTRIAL TOOLS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent as a Welder and Fitter from January, 2012 at a daily wage of Kshs.400.00. on march, 2013 the Claimant was detailed by the Respondent to carry out works at the business premises. As the Claimant was carrying his duties, a heavy metallic shaft he was lifting caused injuries to his back and chest and was immediately rushed to the hospital where he received medical attention for 10 days.

2. On 2nd April, 2013 and after the Claimant had been treated and returned to work, he was summarily dismissed from employment for alleged absconding duty from 21st march, 2013 to 2nd April, 2013. As a result of the unlawful termination of employment the Claimant lost all his employment benefits of;

- a) Notice pay at Kshs.12,000.00;
- b) Sick leave pay for 10 days Kshs.4,000.00; and
- c) Compensation for 12 months at Kshs.144,000.00.

3. The dismissal was contrary to the law, there was no valid reason for the same and there was no notice. The dismissal was therefore not procedural and contrary to the law. The claim if for terminal dues; pension scheme employers' contribution since 2012 all at Kshs.5,600.00; and costs of the suit.

4. The Claimant testified in support of his claim that upon employment by the Respondent he served diligently until 21st March, 2013 when he was injured while at work. He got permission to attend hospital. On 21st March, 2013 to 30th March, 2013 the Claimant was not at work. Upon return from sick leave he was not allowed back at work. The Respondent said he had been terminated from his employment. At the time, the Claimant had taken a loan based on his employment and it was from the bank that he learnt that he had been dismissed from his employment with the Respondent on 2nd April, 2013. There was no notice, hearing of reasons given.

Defence

5. The defence is that the Claimant was employed on 2nd February, 2012 at a daily wage of Kshs.400.00 payable every fortnight. The Claimant was not on duty on 21st March, 2013 and only attended work on

18th March, 2013 but left around 10.20am without permission and only reported back on 2nd April, 2013 and demanded to be paid for 3 days on 15th, 16th and 18th March, 2013. This amount was paid to him as demanded. On 21st March, 2013 the Claimant was not on duty and any injury to him did not occur while at work with the Respondent premises. Despite absconding duty from 21st March, he Claimant reported back on 2nd April, 2013 and was paid form work done on 16th and 18th March, 2013.

6. Upon payment for days worked, the Claimant indicated that he had found new employment and he left. He was not dismissed by the respondent. The claim should be dismissed with costs.

7. In evidence, the Respondent witness was Dadison Muthua Kariuki who testified that he is an employee of the Respondent and worked with the Claimant who was employed on 2nd February, 2012. The Claimant worked until 18th March, 2013 when he left at around 10am by walking out and without telling anyone. He came back on 2nd April, 2013 and demanded to be paid for his dues. For days worked, the Claimant was paid Kshs.1,200.00 which he acknowledged. This was a final payment. On the 18th March, 2013 there was no reported accident at the Respondent premises. Had he been injured, there were other employee who should have witnessed. The Claimant absconded duty without any god reason. Such warranted summary dismissal.

8. Both parties filed written submissions.

Determination

9. I have taken into account the pleadings, the evidence and the written submissions.

10. The claim is premised on the facts that on 21st march, 2013 the Claimant was injured while at work and rushed to hospital where he was admitted for 10 days. Upon report to work he was dismissed. The defence is that there Claimant was not at work after the 18th march, 2013 when he left at around 10am and only came back on 2nd April, 2013 to demand for pay for days worked. There was no injury of any employee on 21st march, 2013 as the Claimant was not at work.

11. The Claimant admitted that for every day he was at work, the Respondent kept a record and there was a tick for being present. He also admitted that he was not at work from 21st March to 30th March due to work injury that forced him to attend hospital.

12. Section 34 of the Employment Act addresses the right to medical attention and the requirements to be met by an employer and an employee where medical attention is required.

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].

13. In **Dorothy Ndung’u versus Machakos University College [2016] eKLR**, the court held that;

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

14. Further and in enjoying the right to medical attention, the court in **Rodgers Titus Wasike versus General Motors E.A. Limited, Cause No.1322 of 2014** held that;

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.

15. The Claimant has attached a report from *Morningside Medical Clinic – Healthcare Services*. The report is stamped by *Morningside Medical Clinic and Maternity*. The Claimant has also attached a receipt dated 10th April, 2013 for an amount of Kshs.400.00. it indicates that this was for laboratory services.

16. In my view, the law with regard to an employee receiving treatment and being absent from work due to illness and in need of treatment is most generous. Such time is allowed to be absent for the employee to receive treatment. The only requirement of the employee is to inform the employer within a reasonable time of such illness and upon resumption of duty to submit a Medical Certificate from a Medical practitioner. The employee is allowed to be away for up to 30 days subject to letting the employer know the circumstances of the illness or sickness and such information can be communicated through a third party.

17. The report from *Morningside Medical Clinic Healthcare Services* and which is stamped by a different entity *Morningside Medical Clinic and Maternity*, is not a Medical Certificate envisaged under section 34 of the Employment Act. Had this been the intention of Parliament to make it possible for any clinic, facility such as a maternity clinic to issue medical reports to show an employee who is sick and is absent from work can produce such a report, nothing stopped out legislators from making such a provision.

18. The rationale of the law is clear. Where an employee is absent from work without authorisation or permission of an employer, section 44 of the Employment Act make such a matter for summary dismissal. Therefore, where an employee is absent from work, the reason must be genuine, reasonable and valid to justify such absence.

19. Where the Claimant was absent from work due to illness and required medical attention, nothing stopped him from communicating with the employer by himself or through a third party. The Claimant did not give any evidence that he submitted any medical certificate upon resuming duty. As such, the summary dismissal that followed I find to be justified in the circumstances.

20. The remedies sought of notice pay; sick leave pay; pension contribution; compensation and costs is not due.

The claim is hereby dismissed in its entirety. Each party to bear own costs.

Delivered in open court and dated this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:.....