



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 30 OF 2015

BETWEEN

DANIEL WAMALWA CLAIMANT

VERSUS

1. THE CHAIRMAN, BOARD OF GOVERNORS RGC

OASIS MEDICAL CENTER

2. RGC OASIS MEDICAL CENTERRESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Nyange Sharia Advocate instructed by KITUO CHA SHERIA, Advocates for the Claimant

Birir & Company Advocates for the Respondents

JUDGMENT

1. The Claimant filed his Statement of Claim on 27th January 2015. He avers he was employed by the Respondents as a Lab Technologist on 19th January 2012, working until 16th October 2014 when his contract was unfairly terminated by the Respondents. He earned a monthly salary of Kshs. 30,250 as of the date of termination. He was summarily dismissed on the grounds of absenteeism and failure to follow written work schedule. He asks the Court to declare termination was unfair and unlawful, and order the Respondents to pay him 1 month salary in lieu of notice at Kshs. 30,250; 6 extra days worked in September 2014 at Kshs. 6,049; acting allowance for April, May, and June 2014 at Kshs. 7,875; and compensation calculated at the equivalent of 12 months' salary at Kshs. 363,000- total Kshs. 407,174. He prays for certificate of service, costs and any other suitable relief.

2. The Respondents filed their Statement of Response on 11th March 2015. They state that the Claimant was their Employee, but deny they unfairly dismissed him. He was summarily dismissed on 16th October 2004 for gross misconduct. He worked within his job group and is not entitled to acting allowance. He was dismissed for absenteeism and failure to follow the working schedule. Additionally, he fought a Colleague while on duty. He was accorded fair hearing. He was paid all terminal dues. The Claim should be dismissed with costs to the Respondents.

3. The Claimant testified, and rested his case, on 9th July 2015. Fellow Lab Technologist, John Kitilili, testified for the Respondents on 16th March 2017 when hearing closed. The matter was last mentioned on 28th July 2017 when Parties confirmed the filing of their Closing Submissions and Judgment date given.
4. The Claimant told the Court he was issued a letter of employment, staff policy and additional regulations, on employment. He was issued a warning letter on 25th May 2014, on allegation that he had fought a colleague. He wrote a letter of apology. On 7th October 2014, he received another warning. It was alleged by the Respondents that the Claimant had interfered with working schedules. He had requested to go on leave. There was no reply. He went on leave for 2 days on 4th and 5th October 2014. This was the basis for the 2nd warning. It was not the Claimant's role to make working schedules. There were new regulations introduced by the Respondents at the workplace. He was not given the opportunity to explain his position. He would have compensated the days he was absent. He had provided an alternative Lab Technologist to do his work in his absence. He had more than 40 days of accumulated annual leave. Whenever he was absent, the days would be deducted from his leave entitlement. He was paid a total of Kshs. 31,399 as terminal dues. He acted in the place of Joyce as Head of Department, when Joyce was on maternity leave in April, May and June 2014. He claims acting allowance, being the difference between what he was paid and what Joyce earned.
5. The Claimant admitted on cross-examination that he was warned, and apologized twice, over the particular accusations. He admitted he altered working schedules and wrote explaining why he did so. He was forbidden under the workplace regulations from altering working schedules. It is true he left work without the leave of the Respondents. He was pursuing a degree course in management. The Respondents were aware about this. He did so during his leave days. Joyce was at the same level as the Claimant. The Claimant was dismissed on 16th October 2014, but was paid his salary up to 31st October 2014. He did not fight a Colleague. He was compelled to write an apology. 6 extra days worked were captured in the schedule of September 2014, which was not availed to the Court. The employment contract had a summary dismissal clause. Termination was unfair. He was paid terminal dues of Kshs. 31,393. Redirected, he told the Court the Respondents were aware he was attending classes. He was not given an opportunity to explain why he altered the working schedule.
6. John Kitilili Nzau told the Court the Claimant was employed by the Respondents on the date and position given in his Claim. He was not unfairly dismissed by the Respondents.
7. He used to study at Jomo Kenyatta University. He would appear at work on certain days. He had not informed the Respondents that he was studying. He would call Nzau to stand in for him at the workplace. The Head of Department went on maternity leave. The Claimant acted in her place. He would admonish Nzau, saying Nzau was causing him problems. Nzau was still on probation. The Claimant hit Nzau, asking Nzau who Nzau thought Nzau was, at the workplace. This was on 19th May 2014. Nzau called the Administrator and Manager, who convened a meeting with the 2 Employees. The Claimant conceded he caused the altercation.
8. The Claimant had confided in Nzau that he was involved in studies. He was supposed to be on night shift. He told Nzau this was not suitable to him, as he used to study at night. Nzau advised the Claimant to consult Management. Nzau was called by Management on one occasion and told the Claimant was not at work. There was a clocking system. The Claimant came and altered the clocking system, indicating he was at work at night, in the same shift as Nzau. The 2 Employees were shown to have signed the schedule. On 2nd October 2014, Nzau did night and evening shift. The Claimant inserted his name in the schedule, indicating he worked on this shift also. It was not possible to have 2 Officers on shift at the same time. On 2 occasions- 2nd and 9th October 2014 - the Claimant inserted his name, to indicate he was on duty at the same time as Nzau. He would on other occasions bring in strangers to work for him.
9. Cross-examined, Nzau testified that the Claimant fought him. Nzau was not motivated by ill-will to testify against the Claimant. He did not say in his Witness Statement that the Claimant brought strangers to hold his brief at the workplace. Dismissal letter gave 2 grounds for the decision- non-adherence to the

work schedule, and absenteeism. There were 2 warning letters issued upon the Claimant- on absenteeism and fighting. The last issued on 7th October 2014. 9 days later, the Claimant was dismissed. Joyce was the In-Charge of laboratory. She went for maternity leave. The Claimant acted in her place. Nzau was not called to give any evidence against the Claimant, in any disciplinary proceedings. The working schedule of 2nd October 2014 shows when the Claimant checked out; it does not show when he checked in. Redirected, Nzau stated Claimant altered date on 9th October 2014, after the warning.

The Court Finds:-

10. The Claimant was employed by the Respondents as a Lab Technologist on 19th January 2012, leaving on 16th October 2014. His last salary was Kshs. 30,250.

11. He was dismissed by the Respondents on account of 2 grounds- absenteeism and alteration of working schedules.

12. The issues are whether termination was based on valid grounds; fairly carried out; and whether the Claimant merits the prayers sought.

13. There is common evidence from the Claimant and fellow Lab Technologist Nzau, that the Claimant was absent from work on certain occasions, without the leave of the Respondents.

14. His explanation is that he was studying for a degree course in management, and that the Respondents were aware of this. It was wrong, and an employment offence, under Section 44 [4] of the Employment Act 2007, for the Claimant to absent himself from his appointed place of work, for whatever reason, without the leave of his Employer.

15. He went off the rails, by altering working schedules, to falsely indicate he was at work, while he was absent. His study, however useful and noble, would not justify the means he adopted to create time to achieve his purpose. He does not deny he absented himself without the leave of his Employer. His other explanation for this was that he would compensate his days of absence by putting in extra hours, at a later date. He stated further that he provided the Respondents with an alternative Lab Technologist to work in his absence. He did not give details of such a reliever. Nzau alluded to the Claimant bringing in strangers to work in his place. This aspect of the evidence was hazy. However, it is clear that the Claimant on certain occasions just altered the working schedules, to create an illusion that he was on duty, while he was not physically at work. He went to great lengths, at carving out study time, but went about doing this the wrong way. He ought to have discussed his intention with the Employer, and received clear approval to be absent. He committed serious offences at the workplace, and the Respondents had reason to summarily dismiss the Claimant. Both grounds stated in justifying termination are, in the eyes of the Court, valid grounds. The Respondents satisfied the test for substantive justification under Section 43 and 45 of the Employment Act 2007.

16. The Respondents did not show they arrived at termination decision fairly, in accordance with Section 41 and 45 of the Employment Act 2007. There was no hearing before the Claimant was dismissed. He was not called to show cause why, he should not be dismissed, after 7th October 2014 when the last warning issued. He was not presented with charges, and required to answer to those charges. He did not attend any disciplinary hearing, accompanied by a Person indentified under Section 41 of the Employment Act. This section was disregarded in all aspects. It is not surprising that the Respondents did not bring any Management Witness to show how the decision was arrived at. Instead, the Respondents only presented Nzau, a fellow Lab Technologist of the Claimant. His evidence was helpful in confirming there were valid grounds justifying termination, but beyond saying he was not called to give evidence at any disciplinary hearing, Nzau was not helpful in determining whether procedure was fair. His evidence about being fought by the Claimant was equally unhelpful, as termination was not based on this ground. Termination was not based on fair procedure, and was to that extent, unfair. ***The Claimant is granted the equivalent of 4 ½ months' salary in compensation for unfair termination at Kshs. 136, 125.***

17. Both Witnesses confirmed the Claimant acted in place of the Head of Department Joyce, when she was on maternity leave. The period is given to comprise the months of April, May and June 2014. The Claimant however, told the Court that on cross-examination he was at the same level as Joyce. He merely relieved Joyce, rather than act in her position. He has no reason to pursue acting allowance, as the Officer he relieved, was at the same level with him. The prayer for acting allowance is declined.

18. The Claimant was not able to show which extra 6 days, he worked in September 2014. He did not supply the Court with the Schedule for the month, and even if he did, its authenticity would be in doubt considering his propensity at alteration of Schedules. It is noted also that he was paid salary for the whole of October 2014, while he did not work the whole month.

19. He is denied the prayer for notice pay. He was dismissed over an act of gross misconduct, which under Section 44[4] of the Employment Act, would justify summary dismissal. Summary dismissal is defined as termination without notice, or with less notice than is merited under the law or contract of employment.

20. *Certificate of Service shall be released to the Claimant by the Respondents, under Section 51 of the Employment Act.*

21. No order on the costs.

22. *Interest granted at 14% per annum from the date of Judgment till payment is made in full.*

IN SUM, IT IS ORDERED:-

a) Termination was unfair on account of procedure.

b) The Respondent shall pay to the Claimant the equivalent of 4 ½ months' salary in compensation for unfair termination at Kshs. 136,125.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 17th day of November 2017

James Rika

Judge