



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

Cause No. 124 Of 2016

(Before D. K. N. Marete)

ABRAHAM KIMUTAI CHERUIYOT.....CLAIMANT

VERSUS

THE AGA KHAN HOSPITAL KISUMU.....RESPONDENT

JUDGEMENT

This matter came to court vide a Statement of Claim dated 22nd July, 2016. It does not disclose any issue in dispute on its face.

The respondent in a Reply/Defence to Memorandum/Statement of Claim dated 17th October, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on 6th January, 2009 he was employed by the respondent as a Clinical Nurse in the Acute Care Unit (ACU) for six months. He was then deployed to the Acute and Emergency Department where he served until his unprecedented and unconditional dismissal on 25th May, 2016. At the time of termination, he earned Kshs.60,372.00 and an allowance of Kshs.2,000.00 a month.

It is the claimant's further case that in April, 2012 the respondent through the Nursing Director, Mr. Vinodh and the management entered into an agreement with the Agha Khan University Hospital – Nairobi, (AKUH) which agreement was formalized in an internal advertisement with the hospital for nursing BSCN upgrading sponsorship programme starting in July, 2012. There were many applicants, including the claimant and this was a surprise to many.

The claimant's other case is that the training programme involved two and half years of training and a bond for four years – working with the Agha Khan Hospital Kisumu (AKHK) for a period of four years upon completion of training.

The claimant further avers that in November, 2015, frustration at the work place ensued forcing him to approach a colleague, Scholastica Olal on exchange of duties so that he could attend urgent family issues. She accepted. He later learnt that Ms. Olal had been informed by a Mr. Ileri not to report to work so that the claimant was marked absent leading to absconding of duty. He was dismissed on 25th May, 2016.

The claimant's other case is that on 29th May, 2016 as he prepared to go back to work he received a call from his colleague that he had been assigned duty in the A/E Rota and upon enquiry on the same, he realized that his name was not appearing on the duty rota within the other departments of the hospital. A

look at his email revealed communication, including his unprocedural and unlawful dismissal from employment without his knowledge or consent.

It is his further averment that the respondent had been frustrating him on several occasions and overworked him thereby occasioning his request for unpaid leave and not resignation as alleged by the respondent in a reply to a letter dated 8th June, 2016.

The claimant's penultimate case is that his dismissal is unconstitutional, unfair, unlawful and without legal basis and has occasioned him irreparable loss.

He prays as follows;

- a) An Order for the Claimant to be adequately compensated for the time loss out of employment and/or in the alternative and without any prejudice to the foregoing the Respondent be ordered to fully compensated the claimant for unfair, unlawful and wrongful termination of the employment services of the Claimant with all attendant benefits as pleaded.*
- b) One month salary in lieu of notice at Kshs.62,372/=*
- c) Costs of this suit;*
- d) Any other relief this Honourable Court deems fit and just to grant.*

The respondent's case is one of denial of the claim.

It is the respondent's further case that correspondence between the parties was regularly and ordinarily by way of email and letters (advance copies of which were sent by email) and therefore the claimant's contention that he did not receive the email letters is a blatant untruth and dishonest. This is an afterthought and raised to create a course of action where none exist.

The respondent's other case is the claimant was procedurally and lawfully summary dismissed after numerous warnings and he being awarded an opportunity to respond to allegations against him. This is as follows;

- a) On the 17/1/2014 the claimant was warned and taken to tasks on several issues including;
--present of forged receipts;
--Delayed submissions of expenditure receipts;
--Failure to provide feedback or clarification on the queries on presented receipts;*
- b) On the 18th and 19th November 2015 the claimant failed to follow the procedure for exchange through a 3rd party, failing to inform his superior and failed to report on duty in respect of which he was issued with a warning letter dated 23/11/2015.*
- c) On the 26th and 27th November 2015 the claimant was to be on duty in the Outpatient department. He did not report and claimed that he had filled unpaid leave forms for two days. Upon being advised by his superior to discuss with the nursing director he stated that he was unable to do so and absented himself without authority no approval for leave having been given.*
- d) On the 10th and 11th December 2015 the claimant absented himself from duty without approval of unpaid leave despite being informed by his superior to get approval. He further declined to see the nursing director stating that he was out of town.*

e) Vide letter dated 19/12/2015 (an advance copy of which was e-mailed to him) the claimant was issued with a show cause letter in respect of his having taken unpaid leave without approval on the 10th & 11th December 2015. The claimant replied that he needed to meet with his legal team before replying

f) Vide letter dated 22/12/2015 (an advance copy of which was e-mailed to him) the claimant was issued with a suspension letter for failing to respond to the letter dated 19/12/2015.

g) On the 19/12/2015 the claimant applied for 11 days unpaid leave from 25/12/2015 by leaving the leave forms in the shift leaders book. On the 20/12/2015 the claimant called his superior to inform him that he had cancelled his leave and hence the leave forms should not be acted on. The claimant further sent an SMS to his superior apologizing and promising to change.

h) Vide letter dated 28/12/2015 the respondent suspended the claimant and invited him for a disciplinary hearing on the 4/1/2016 for failure to provide a written statement for his action as requested vide letters dated 19/12/2015 & 22/12/2015.

i) Subsequent to the disciplinary hearing held on the 4/1/2016 the respondent, vide letter dated 7/1/2016 informed the claimant of the procedures to be followed and requested certain specified information to be supplied by 11/1/2016. The said information was not availed by the claimant and yet on 10/3/2016 he applied for night duties from Thursday to Sundays. The respondent replied vide letter dated 17/3/2016 reminding the claimant of the disciplinary hearing on 4/1/2016 and letter of 7/1/2016 and pointing out that the requested for information had not been availed and hence the rota would be arranged without special consideration to the claimant's request.

j) Vide a confusing and disjointed e-mail of 2/5/2016 the claimant informed the respondent that he was unable to continue working for the month of May 2016 until June 2016 due to his busy schedule and further thanked the respondent for opportunity to serve. The respondent, in reply, vide email of 3/5/2016 informed the claimant that his request to be absent for 30 days has not been accepted and he was required to return to work as per the scheduled Rota.

k) The claimant absconded duty without permission form the 4/5/2016. Vide letter dated 9/5/2016 the respondent informed the claimant that he had been absent without permission from 4/5/2016 despite the fact that his application for leave had not been approved and efforts to reach him had been fruitless. The letter also informed the claimant that should he not get in touch within the next 4 days he would be treated as having absconded duty.

l) No response having been received from the claimant vide letter dated 18/5/2016 the respondent wrote to the claimant inviting him for a disciplinary hearing to be held on 23/5/2016.

m) Vide letter dated 25/5/2016 the respondent having not received any response from the claimant and the claimant having failed to attend the disciplinary hearing the claimant was deemed to have absconded duty and was summarily dismissed in terms of section 44 (4) (a) of the Employment Act, 2007.

n) The claimant's advocates issued a demand letter dated 4/6/2016 to the respondent which letter was replied by the respondent's advocates vide letter dated 8/6/2016.

It is the respondent's penultimate case that the claimant having resigned and having also applied for leave which was refused and having absented himself from duty without excuse, he was taken to have absconded duty and therefore summarily dismissed. This was lawful and procedural and in compliance with the Employment Act, 2010. No claim therefore arises against herself.

The matter came to court severally till 5th December, 2017 when it was heard *inter partes*.

At the hearing, CW 1 Abraham Kimutai Cheruiyot, the claimant reiterated his case. He also adopted his

witness statement dated 18th July, 2016 and the annexed list of documents as evidence before court.

The claimant further discounted the response to the claim and branded it as untruthful. However, at cross-examination he admitted that he was issued with a suspension and show cause letter. This sharply contrast and contradicts his fervent denial of the defence.

The respondent produced three witnesses to proffer the defence. DW 1 – Jane Wanyama opened by adopting her witness statements as part of her testimony. She testified in his disagreement to the claim which she rubbished as untenable. Her evidence was that the claimant was lawfully dismissed for desertion of duties.

DW 2 - Maureen Roseline Arwa testified that she is the Human Resource Manager of the respondent. She also adopted her witness statement filed on 25th October, 2016 and prayed that this be adopted as evidence in court. She thereon went on to reiterate the defence case as presented in her witness statement.

DW 3 – Jotham Njeru Ileri testified that he is the nursing officer in charge of Accidents and Emergency. He also adopted his witness statement and relied on it as evidence in court.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant's written submissions dated 5th December, 2017 are a restatement of his case as presented.

The respondent in her written submissions dated 6th December, 2017 represents and reviews the evidence of the respective parties and comes up with a conclusion of lawful termination of employment. This is as follows;

- The claimant absented himself from duty from 4th May, 2016 to 25th May, 2016 when he was summarily dismissed.
- During his state of absence from work the claimant made it impossible for his employer to reach out to him by refusal to pick his calls or respond/reply email communication on his address.
- The claimant emailed his employer on 2nd May, 2016 indicating that he was unable to continue working in the month of may and june 2016. The request for unpaid leave had been disallowed via an email reply on 3rd May, 2016.
- Vide a letter dated 9th May, 2016, the respondent informed the claimant of his absence from work without permission and awarded him four days to get in touch of his disciplinary action.
- Vide an email dated 18th May, 2016, the claimant was invited to attend a disciplinary meeting to held on 23rd May, 2016.
- Vide a letter dated 25th May, 2016 (emailed to the claimant) the claimant was dismissed in circumstances where the respondent had not received any response from him or attendance to the disciplinary meeting. He was deemed to have absconded duty and dismissed in terms of section 44 4 (a) of the Employment Act, 2007. This is as follows;

44 (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 of 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;

(b) ...

The respondent further seeks to rely on the authority of **Ann Njoroge vs Topez Petroleum Ltd, (2013)eKLR**, where the court observed as follows;

“When an employee claim is based on unfair termination that is countered with a defence of absconding, this court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is tantamount to gross misconduct and the sanction is summary dismissal without notice.”

A scrutiny of the respective cases of the parties brings out a case for the respondent. This is because the respondent’s case overwhelms that of the claimant in evidence and veracity. The respondent with ease has established a case of lawful termination which the claimant unsuccessfully struggles to rebut in evidence. It is clear that the claimant was dismissed for absconding duty after his failure to respond to disciplinary proceedings of which he had been warned about and invited through the only means available – his email address. It is also clear that the claimant had taken unauthorized leave and held himself incommunicado thereby frustrating all efforts by the respondent to get in touch.

The finding here would be obvious. This is a case of lawful termination of employment and I find as such. And 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. On a finding of a lawful termination of the employment of the claimant, he becomes disentitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with an order that each party bears its own cost of the claim. And this clears all the issues for determination.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Bii Instructed by Bii V.K. & Company Advocates for the claimant.
2. Mr. Makanga Instructed L.G. Menezes & Company Advocates for the respondent.