



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 157 OF 2014

ALFRED C NGENO

CLAIMANT

v

KENYA INDUSTRIAL ESTATE LTD

RESPONDENT

JUDGMENT

1. Alfred Cheruiyot Ngeno (Claimant) was employed by Kenya Industrial Estates Ltd (Respondent) through a letter dated 19 December 2008 as a Credit Assistant.
2. Through a letter dated 7 October 2011, the Respondent notified the Claimant that he was being transferred from Kabarnet to Taveta and that he was expected to report to the new station not later than 17 October 2011.
3. The Claimant, through a letter dated 10 October 2011 sought to have the transfer to Taveta annulled on health grounds, or that he be posted to a station near Nakuru because of the need for constant medical attention. The Claimant's Manager endorsed the request.
4. The Respondent however through a letter dated 25 October 2011 maintained that the Claimant should report to his new station as earlier instructed.
5. It appears the Claimant reported to the new station but all was not well for the Respondent issued him with a show cause letter dated 6 August 2012 seeking his explanations allegedly because he had been absent from duty from 31 July 2012 to the date of the letter. The Claimant had prior to the letter been granted sick off which expired around 30 July 2012. The Claimant was given up to 17 August 2012 to make the explanations.
6. On 19 September 2012, the Respondent again informed the Claimant that he was being transferred from Taveta to Head Office, Risk Department and that he should report by 24 September 2012.
7. The Claimant in a response to the new transfer wrote to the Respondent on 24 October 2012 seeking a reconsideration and transfer to Nakuru due to his health condition. The decision to transfer the Claimant was effected while he was in hospital.
8. On 18 December 2012, the Respondent suspended the Claimant from duty on the grounds of misconduct. The particulars of gross misconduct were given in the suspension letter and they included *absenteeism from 3 December 2012 to 11 December 2012, failing to report to new duty station, insulting behavior/failing to obey lawful command on 14 December 2012 and failing to perform work from July 2012 to the date of suspension.*
9. The Respondent informed the Claimant that the suspension was anchored on section 2.4(i) of the Human Resources Policy, and it was to pave way for investigations.
10. The Claimant responded to the suspension letter on 10 January 2013. The Respondent then invited him to a disciplinary hearing through a letter dated 20 February 2013.
11. On 15 March 2013, a disciplinary hearing was held and the Disciplinary Committee recommended that the Claimant should be dismissed immediately. The minutes show that the Claimant had

- reported to work for only one day after the transfer from Taveta to head office and had also spurned a request to go for a medical check up on his health status.
12. The Respondent acted on the recommendation of the Disciplinary Committee and on 19 March 2013, it wrote to the Claimant informing him of his summary dismissal.
 13. The dismissal prompted the Claimant to commence action on 21 May 2014 alleging unfair dismissal. He sought various reliefs.
 14. The Respondent filed its Response to the Cause and documents and a hearing was conducted on 27 April 2015 and 21 October 2015.
 15. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies/orders.*

Whether summary dismissal was unfair

Procedural fairness

16. The Claimant was issued with a show cause notice dated 6 August 2012. The notice detailed the allegations and particulars thereof against the Claimant and invited him to make written representations before 17 August 2012.
17. On 18 December 2012, the Claimant was issued with a suspension letter which also detailed the allegations against him.
18. It is not clear from the documentation produced and the Claimant's testimony whether he responded to the show cause notice of 6 August 2012.
19. Section 41 of the Employment Act, 2007 has outlined the basic ingredients/requirements of procedural fairness before an employer takes the decision to terminate the employment of an employee.
20. In the present case, the Claimant was notified of the allegations to confront. He was given time to make written representations.
21. Considering the documentation and evidence, the Court is satisfied that the Respondent was in substantial compliance with the statutory requirements of procedural fairness before it took the decision to dismiss the Claimant.
22. Because only an extract of the Human Resource & Administration Policy Manual was presented before Court, the Court is unable to determine whether the Respondent complied with its own internal disciplinary procedures.

Substantive fairness

23. The burden on an employer in a complaint of unfair termination of employment is an onerous one and does not relate only to the procedural requirements. The employer is expected to prove the reasons (section 43 of the Employment Act, 2007) and that those reasons are valid and fair (section 45 of the Act). But that is not all. The employer's action will also have to pass the test of justice and equity (section 45(4)(b) of the Act).
24. The reasons under the spotlight and which the Respondent gave for dismissing the Claimant were *absence from duty without permission, refusing to obey lawful command to go for medical check up and behaving in an insulting manner.*
25. There is no dispute that the Claimant was absent from work as alleged.
26. The question is whether he had permission or lawful cause.
27. The Claimant produced in Court several medical notes/records. These included medical reports dated 1 August 2012, 13 October 2011, 21 September 2012, off duty slips dated 6 August 2012 and prescriptions for drugs.
28. In his letter dated 10 January 2013, the Claimant also made reference to his health.
29. The Respondent also produced documents in which the Claimant sought time off to seek medical attention/sought funds. These included the letters dated 28 August 2009, 18 December 2012 and a Memo dated 14 December 2012 seeking approval for Claimant to undergo a medical check-up.
30. After considering the documentation and testimony of the witnesses, the Court finds that the Respondent was aware that the Claimant had serious health concerns which affected his ability

Judge

Appearances

For Claimant Ms. Muthoni instructed by Karanja Mbugua & Co. Advocates

For Respondent Mr. Mogaka instructed by Musyoki Mogaka & Co. Advocates

Court Assistant Nixon