



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 427 OF 2013

AYAKO ONGAKI THOMAS

CLAIMANT

v

ELGON VIEW HOSPITAL

RESPONDENT

JUDGMENT

1. Ayako Ongaki Thomas (Claimant) sued Elgon View Hospital (Respondent) on 9 December 2013 alleging unlawful dismissal (section 40 of the Employment Act, 2007 was cited, but it relates to termination on account of redundancy). The Respondent filed a Response on 15 January 2014 and the Cause was heard on 2 June 2015 and 30 July 2015.
2. The Claimant filed his submissions on 18 August 2015, while the Respondent's submissions were not on file by this morning.
3. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of Claimant was unfair, whether Claimant has accrued leave and overtime and appropriate remedies/orders.*

Whether dismissal was unfair

Procedural fairness

4. Pursuant to section 41 of the Employment Act, 2007, an employer is under a statutory obligation to inform an employee of the allegations for contemplated dismissal and to grant the employee an opportunity to make representations before dismissal, if the dismissal is on account of *misconduct, poor performance or physical incapacity.*
5. The Claimant was dismissed through a letter dated 16 November 2012 and the reason given was misconduct.
6. His case is that on 14 November 2012 a colleague (Cheres) called him and told him that the Respondent (Dr. Samuel Ombeyi) had instructed that he should not report to work and that the next day he went and saw Dr. Ombeyi.
7. Dr. Ombeyi then told him to return the next day, but he only went back after about 1 week (27 October 2012) and was given a dismissal letter. He denied receiving any notice of termination, attending a disciplinary hearing or warning letters prior to the dismissal.
8. The Respondent called 3 witnesses. The first witness stated that the Claimant threatened to kill him and that a conciliatory meeting was held. He did not know whether minutes were kept.
9. The second witness stated that he was the chairperson of the Respondent's Disciplinary Committee. He narrated how he dealt with cases involving the Claimant in February 2011 (minutes for 27 February 2011 were produced). The Committee recommended that the Claimant

- be served with a warning letter.
10. Another hearing was held on 14 November 2012 (minutes produced). The hearing related to allegations that the Claimant was reporting to work drunk and not putting on his guard's uniform.
 11. The minutes of the meeting held on 14 November 2012 indicate that the Claimant was present and made representations. The minutes also capture his arrogance during the proceedings.
 12. The Claimant's testimony that he did not attend a disciplinary proceeding is inconsistent with the testimony of the chair of the Disciplinary Committee and the minutes kept and produced by the Respondent.
 13. The Claimant did not suggest the minutes did not reflect what transpired on 14 November 2012.
 14. The minutes were corroborated by the Respondent's second witness. Considering the minutes and the testimony, the Court is satisfied that the Respondent was in substantial compliance with the requirements of procedural fairness.

Substantive fairness

15. Reporting to work drunk and not putting on uniform were the principal reasons for the dismissal of the Claimant.
16. The Claimant made no mention of these reasons in his evidence in chief. He denied receiving any warning letters despite being shown 2 warning letters.
17. He even denied being issued with an appointment letter despite one with his acknowledgment being produced in Court.
18. The Claimant's testimony went against the documentation produced in Court. He did not appear truthful and was content with making minimal disclosures.
19. The Respondent's second witness testimony that the Claimant was not reporting to work in uniform was not challenged at all. No questions were posed thereto in cross examination.
20. There was also evidence that the Claimant was a difficult employee. But nothing turns on it.
21. The Court is satisfied that the Respondent had and has proved valid and fair reasons to dismiss the Claimant.

Leave

22. The Claimant pleaded that he did not go on leave for 2006/2007. He testified that however that it is in 2005 and 2006 that he did not go on leave.
23. Respondent produced a leave form for 2007 to show Claimant took his 21 days annual leave.
24. The Respondent was not put on notice that the Claim for leave related to 2005/2006, and hence no records were produced.
25. In the view of the Court, the Claimant did not lay a proper evidential basis for leave for 2005/2006 as opposed to 2006/2007, and the Court declines his invitation due to the inconsistency in the pleadings and testimony.

Overtime

26. The Memorandum of Claim was not clear as to the period of overtime sought. But the total hours and sum were disclosed.
27. In testimony, the Claimant stated that he worked from 6.00pm to 8.00am without overtime.
28. It is a notorious fact which the Court ought and the Court takes judicial notice that guards work 12 hour shifts in this country.
29. In the view of the Court, failure to pay overtime would constitute a continuing injury and pursuant to section 90 of the Employment Act, 2007, such a claim should have been commenced within 12 months of cessation.
30. Assuming the failure to pay overtime ceased with the dismissal of the Claimant around 16 November 2012, the claim in respect of the same should have been initiated by 15 November 2013.
31. The claims herein were commenced on 9 December 2013 outside the 12 month window. This would be true even assuming that the dismissal was on 27 November 2012 when the dismissal letter was handed to the Claimant.

32.The overtime claim is therefore incompetent by operation of the law.

Appropriate remedies/Orders

1 month pay in lieu of notice/Compensation

33.These 2 heads of claim can only be tenable where the Court reaches a conclusion of unfairness of dismissal. The conclusion on the question is to the contrary here.

Leave

34.This head of claim is rejected because of the inconsistency between the pleadings and the evidence.

Service benefits

35.The Claimant was a contributor to the National Social Security Fund and by virtue of section 35(5) and (6) of the Employment Act, 2007 is ineligible for service pay.

Overtime

36.This relief is declined for the reasons stated in paragraphs 31 and 32 hereinabove.

37.Before concluding, the Court also notes that there were other inconsistencies between the pleaded case and the evidence of the Claimant.

38.The cause of action was anchored on section 40 of the Employment Act, 2007 which deals with redundancy while the evidence did not point at redundancy at all.

Conclusion and Orders

39.The Court finds and holds that the claim herein ought to be dismissed and orders it be dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 5th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant
& Co. Advocates

Messrs Onyancha & Morara instructed by Chepkwony

For Respondent
Associates

Mr. Ombongi instructed by Marende & Nyaundi

Court Assistant

Nixon