



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.270 OF 2015**

***(Before D. K. N. Marete)***

**EMILY MUHONJA.....CLAIMANT**

**VERSUS**

**KEN-KNIT (K) LIMITED.....RESPONDENT**

**JUDGMENT**

This matter was brought to court vide a Memorandum of Claim dated 4th December, 2015. It does not disclose the issue in dispute on its face.

The respondent in Respondent's Defence dated 11th February, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, she was an employee of the respondent. This was with effect from the year 2000. She served with loyalty, diligence and competently discharged her duties to the best of her ability until 2013 when she was unfairly and unprocedurally dismissed by the respondent. This was on allegations of desertion of duty which she denies. She avers that this is contrary to the provisions of S.41, 44 and 45 of the Employment Act, 2007.

She enlists the following as grounds for unfair, illegal and an unlawful termination;

- a) *The respondent terminated claimant's employment without following the laid down procedures in the Employment Act.*
- b) *The respondent did not give the claimant termination notice as required under section 35 (1) (b) (c) of the Employment Act.*
- c) *The respondent terminated claimant's employment without proving that the reason for the termination was valid as provided under Section 43 & 45 of the Employment Act.*
- d) *The respondent did not give the claimant lawful leave days contrary to section 28 (1) of the Employment Act.*
- e) *The respondent failed to pay the claimant his severance pay as the law requires.*
- f) *The respondent failed to give the claimant certificate of service as required under section 51 of*

*the Employment Act.*

*g) The Respondent failed to pay the claimant her 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act and section 49 (c) of the Employment Act.*

The termination of employment was therefore unfair. She claims as follows;

- i) Three month pay in lieu notice Kshs.23,748.00*
  - ii) Severance pay*  
*15 days x years worked x basic divide by 30 days Kshs.55,412.00*
  - iii) Leave dues*  
*21 days x years worked x basic + house allowance*  
*21 days x 1 x 9103*  
*Kshs.9,103.00*
  - iv) Compensation for unfair termination*  
*Gross pay x 12*  
*9,103 x 12* *Kshs.109,236.00*
- TOTAL CLAIM Kshs.197,499.00***

In the penultimate she prays for;

- a) Declaration that the claimant's services were unprocedurally and unfairly terminated.*
- b) Kshs. 197,499/- as per paragraphs 14 (1) to (v) of the Memorandum of Claim.*
- c) Costs of this cause and interests at court rates from time of filing the memorandum of claim until payment in full and;*
- d) Costs and interest of this cause.*

The respondent in defence denies that the claimant was a diligent worker. It is the respondent's case that the claimant was a habitual deserter from work and absconded from 19th November, 2012 to 3rd December, 2012 without notice of absenteeism.

It is further the respondent's case that a hearing notice of disciplinary proceedings was made to the claimant but she ignored and failed to attend. It is also the respondent's case that the claimant engaged in forgery of medical documents to support the medical case but this was disapproved on scrutiny. She also denies receipt of notice to sue. She therefore prays that this cause be dismissed with costs to herself.

The matter variously came to court until the 15th February, 2016 when the parties agreed on a disposal of the issues in dispute by way of written submissions.

The issues for determination therefore are;

1. Whether 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 cause?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in her written submissions reiterates her case. It is her submission that she served the respondent with diligence until the 18th November, 2012 when she was involved in the accident and this and other ailments led to her search for medical attention. She was awarded sick leave which she took and on resumption of duty, she was confronted with a notice to show cause which she answered appropriately. The claimant subsequently presented herself for duty but she was turned away at the gate without being accorded an opportunity of being heard.

The claimant seeks to rely on the authority of **Walter Ogal Anuro Vs. Teachers Service Commission (2013/EKLR)** it was held as hereunder;

*“ ... that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”*

This is coupled with Section 45 (4) (b) of the Employment Act 2007 which provides as follows;

*“... that termination of employment shall be unfair where in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”*

The respondent in her written submissions reiterates her denial for the claim. She recites a case for abscondment for duty. She submits that the claimant was unreliable and was severally warned and responded through various apology letters. Through the intervention of the claimant's union, case was given a last warning. Further, the Claimant produced a forged document to justify her absence from 19th November 2012 to 13th December 2012. This is as follows;

*That on 19/11/2012 to 13/12/ 2012 the Claimant was absent at work and when asked to explain where she had been, she presented a document from Moi Teaching and Referral Hospital which was later found out that the document was a forgery.*

*The Claimant had photocopied a letter head from Moi Teaching and Referral Hospital and put in the details of her fake treatment. The stamp used was from Moi National and Referral Hospital and not from Moi Teaching and Referral Hospital. This is to add that the stamp that was used also forged.*

*The Respondent proceeded to Moi Teaching and Referral Hospital to verify whether the document was a false document. The Respondent found out that the out patient number belonged to someone else and not the Claimant and that the document is a photocopy prescription of Moi Teaching and Referral Hospital but the format of prescription of prescription medicines was incorrect together with the three drugs prescribed.*

The respondent submits that the claimant was served with a show cause letter but declined to attend disciplinary proceedings in her case.

The respondent further relies on the Case of **Dulle vs the Ministers of Pension [1947] 2 ALL ER 372**, where Lord Denning said the following about the standard of in civil cases.

*“ the (Standard of proof) is well settled. It must carry a reasonable degree of probability. If the evidence is such that the tribunal can say: “we think it more probable that not” then burden is discharged, but if the probabilities are equal it is not.”*

And truly, this matter, in a balance of probability tilts in favour of the respondent. The claimant has not demonstrated a concretised case of unlawful termination of employment. She has not in any way controverted the case of, *inter alia*, absconding duty as presented by the respondent. She has also not rebutted the serious allegations of forgery of medical document(s) and report. I therefore find a case of lawful termination of employment and hold as such.

On the above finding of the 1st issue for determination, the 2nd issue dissipates into nothingness. The claimant would not be entitled to the relief sought having lost on a case of unlawful termination of employment.

I am therefore inclined to dismiss the claim with orders that each party bears their own cost of the claim. This clears all the issues for determination.

Dated, delivered and signed this 25<sup>th</sup> day of May 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Nyamberega instructed by Nyamberega & Company Advocates for the claimant.
2. M/s Sawe instructed by Kitiwa & Company Advocates for the respondent.