



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA,

CAUSE NUMBER 751 OF 2015

BETWEEN

SAMSON CHEMBE VUKO CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KILIFI RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Gicharu Kimani & Associates, Advocates for the Claimant

Oduor Siminyu & Company Advocates for the Respondent

ISSUE IN DISPUTE; UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Mr. Samson Chembe Vuko was employment by then Local Authority, the County Council of Kilifi, as a Revenue Clerk, on 4th December 2000. He transited to the County Government of Kilifi, the constitutional successor of the County Council of Kilifi. In December 2013, he was assigned to the Department of Information Communication and e-Government. He held the position of Computer Programmer.

2. He asserts in November of 2013, he took his annual leave of 60 days, as granted under his contract of employment. Before the lapse of his leave, he sought from the Respondent, extension of the annual leave days. There was no response from the Respondent. However, the Claimant received a letter dated 3rd June 2014 from the Respondent asking him to show cause why disciplinary action should not be taken against the Claimant for having extended his leave without the authorization of the Respondent. The Claimant states he replied to this letter twice, the last on 20th August 2014. He was summoned before the Department of Human Resource [Disciplinary] Committee on 11th September 2015. In the end he was advised the Respondent would communicate to him, its decision. There was no communication, and on 6th October 2015, the Claimant filed this Claim. He seeks against the Respondent the following orders:-

- a. The Respondent is compelled to advise the Claimant on his employment status, or the Respondent is ordered to reinstate the Claimant.
- b. Monthly salaries from 1st May 2014 to 1st October 2015 at Kshs. 936,000.
- c. 2 months' salary in lieu of leave at Kshs. 104,000.
- d. Terminal dues in event of unemployment [?]
- e. Costs, interest and any other suitable reliefs.

3. The Respondent filed its Statement of Response on the 18th November 2015. It does not deny to have employed the Claimant as stated in his Claim. He however deserted work effective from 18th March 2014. He was to return from his annual leave. He did not return. He was summoned before the Disciplinary Committee to explain desertion, on 17th September 2015. He informed the Committee he was no longer interested in working for the Respondent. The Respondent did not terminate the Claimant's contract; he left employment of his own volition. He extended his annual leave by 30 days. The Respondent prays the Claim is dismissed with costs to the Respondent.

4. The Parties registered a Consent Order on the 5th February 2016, to have the dispute considered and determined on the strength of the record. They confirmed the filing of their Closing Submissions to the Court at the last mention on the 21st March 2016.

Claimant's Submissions

5. He submits that he took his normal 60 days of annual leave with the approval of the Respondent. The 60 days lapsed on the 18th March 2014. He added 30 days of his accumulated leave days to the authorized 60 days. He wrote to the Respondent seeking authorization for the extension. There was no response. It is not true as alleged by the Respondent that the Claimant deserted. The Respondent knew the Claimant was on annual leave. Section 28 [5] of the Employment Act, and Clause 22 of the CBA concluded between the Respondent and the relevant Trade Union, allow an Employee to utilize accumulated annual leave days. The Claimant had in excess of 90 days of accumulated annual leave days. The Claimant attended a disciplinary session convened by the Respondent on the 11th September 2015. He was heard, explained the circumstances of his extended annual leave, and was told the Respondent would communicate its decision. None was communicated. He has been kept in suspense for a prolonged period, which he urges the Court to find to amount to unfair labour practice as was concluded in the ***Industrial Court Cause Number 95 of 2013 between Donald Mumo Moses v. Mid- Wave Freighters Limited.***

Respondent's Submissions

6. The Respondent submits that from the Leave Application Form, there was no approval of the Claimant's application at any time. The Form was never signed by the County Secretary, or the Section Officer. The Claimant just left and disappeared. He was summoned to a disciplinary hearing on 17th September 2015. He was given the opportunity to be heard. He boldly told the Respondent he was no longer interested in working for the Respondent. He resigned by word of mouth. He concedes in his Submissions that he unilaterally 'increased his annual leave days on account of accumulated days...' Relying on this Court's decision in ***Cause Number 199 of 2014 between Daniel Sirengo Wakhunga v. Sawa Sawa Academy [2015] e-KLR***, the Respondent urges the Court to find the Claimant fundamentally breached the law and his contract, by absenting himself from work without the authorization of the Employer.

The Court Finds:-

7. It is not disputed that the Claimant was employed by the Respondent as a Computer Programmer. He applied for 60 days of annual leave, through a Request Form dated 19th November 2013. The days would end, according to the Form, on 12th February 2014. This Form appears to have the signature of the Claimant and that of his Head of Department. It is not a correct submission that he took the 60 days of

annual leave without the authorization of the Respondent.

8. It is not clear when the end of the 60 days, was altered from 12th February 2014, to 18th March 2014. Nonetheless the Respondent authorized the 60 days of annual leave, as shown in the Request Form, and in subsequent correspondence to the Claimant. On 3rd June 2014, the Respondent wrote to the Claimant alleging he had been away from work without the permission of the Respondent, from 18th March 2014. He is not said to have been absent from work without the leave of the Respondent, in the period preceding this date.

9. The question at the centre of this dispute is whether the extended leave of 30 days, after 18th March 2014, was authorized leave. The Claimant states he wrote to the Respondent seeking extension, because he had accumulated days. There was no response. He just stayed away and assumed extension had been approved.

10. He was wrong. He should have returned to work at the end of the approved period, and notwithstanding his written request for extension, asked the Respondent formally, through a Request Form, for another 30 days. He had no reason to take the Respondent's silence, as approval of the desired extension.

11. Section 28 [1] [a] of the Employment Act, grants Employees who have worked for 12 consecutive months, fully paid annual leave of at least 21 days. Section 28 [5] requires where an Employee is entitled to annual leave days in excess of the 21 days, the Employer and the Employee may agree how to utilize the leave days. This agreement allows Employers to plan for Relievers to hold forte in the absence of the substantive job-holders. It may also be agreed that such days are sold to the Employer. Production must continue even as the Employees utilize their annual leave entitlement.

12. The Claimant was entitled to 60 days of annual leave, which in any labour market appears overabundant annual leave entitlement. How does a nascent County Government manage its business with such overabundance of annual leave days granted to its Employees? It was not surprising that the Claimant states even after utilizing his 60 days, he was still owed over 90 days. He agreed with the Respondent how the 60 days would be utilized. He did not agree how the excess 30 days would be utilized. For the period after 18th March 2014, he was away from duty without the leave of the Respondent. He gave the Respondent no chance to plan for continuity in its work, during the Claimant's extended annual leave.

13. The Employment and Labour Relations Court has established in several decisions, that even in cases where an Employee is considered to have abandoned his job, the Employer has an obligation to try and reach the Employee and apply the disciplinary procedure contained in the Employment Act.

14. The Claimant was called upon to show cause why disciplinary action should not issue. He replied and was called to a disciplinary hearing on 17th September 2015. He states the Respondent advised him it would communicate its decision at a later date. No decision has been communicated to-date.

15. The Respondent states the Claimant resigned orally. He told the disciplinary forum he did not wish to continue working for the Respondent. The Court is of the view that once there was a disciplinary process, it was incumbent upon the Respondent to communicate the outcome of the process to the Claimant. It was insufficient to allege he resigned orally. Resignation was not a form of punishment at the end of the disciplinary process. The initiative remained with the Respondent. If the Claimant had expressed his wish not to continue working, this ought to have been one of the reasons cited in the Respondent's decision to terminate, alongside the ground of desertion.

Remedies

16. The Claimant prays for reinstatement, with back pay to the date his salary was stopped. The Court does not think his prayer for back pay is justified, granted that the Claimant absented himself after 18th

March 2014 without the leave of the Respondent or other lawful cause. He is not entitled to receive salary for days he did not render any service to the Respondent. The Claim for salary of 52 months is rejected.

17. He did not persuade the Court that he merits 2 months' salary in lieu of leave. Which 2 months did he not take annual leave? This is not adequately explained in the Pleadings and Submissions filed by the Claimant. It is rejected.

18. There was no decision made by the Respondent at the end of the disciplinary process. It was not demonstrated that the Claimant resigned. There is no letter of resignation on record. It was alleged the Claimant told the Respondent he is no longer interested in working for the Respondent. This is not what the Claimant has told the Court; he states categorically he wished, and wishes to continue service. It was only when the Claimant demanded from the Respondent, through his Advocates, to know his employment status that the Respondent asked the Claimant to appear before the Disciplinary Committee. Why would he be asking for his employment status, if he was no longer interested in serving? He has expressed his wish to return to work.

19. The record suggests the Claimant took the extended annual leave due to his misunderstanding of the law, and assumption that, as he had a considerable arrears of annual leave days, all he needed was to inform the Respondent he had extended his annual leave. This was excusable. There was miscommunication at various stages, between the Parties, which adversely affected the employment relationship. The Court has also taken into account the Claimant served for 13 creditable years. His employment record, prior to 18th March 2014, was untarnished. He should not have left employment under a cloud of uncertainty after all these years of service. The Respondent states it did not terminate the Claimant's contract of employment. The Court is satisfied this is a matter where the primary remedy of reinstatement is merited.

IT IS ORDERED:-

- a. ***The Respondent shall reinstate the Claimant to the position of Computer Programmer with effect from 1st August 2016.***
- b. ***The prayers for back salary and 2 months' annual leave pay are rejected.***
- c. ***The period the Claimant has been out of employment, beginning from the date of his salary stoppage, shall be treated as a period of unpaid leave.***
- d. ***No order on the cost.***

Dated and delivered at Mombasa this 1st day of July 2016

James Rika

Judge