

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.41 OF 2016

PHILIP RUBUCHA.....CLAIMANT

VERSUS

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS, HOSPITAL AND ALLIED WORKERS.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 23rd September, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 28.02.2016 in person. The claimant prayed for judgment against the respondent for:

- a) The dismissal letter to be declared null.
- b) The order for reinstatement without any condition.
- c) Order for payment of transfer allowance.
- d) The order for costs of the suit.

The respondent did not file a response to the memorandum of claim but appointed H.K. Ndirangu to appear in the suit. The final submissions were filed for the respondent.

The claimant was employed by the respondent trade union on 1.07.1997 as the organising secretary for Meru Branch. It was an oral employment. On 14.04.2003 he was transferred to Chuka Sub- Branch but there was no office because the same had been closed for none payment of rent. Thus the claimant reported back to Meru Branch. On 12.02.2004 the claimant was transferred to Nanyuki Branch but he reported without transfer allowance. He requested the branch secretary general to give him time to liaise with the National Office for the relevant transfer allowance. In the meantime the claimant continued working at the Meru Branch. On 22.12.2011 the claimant was transferred to Isiolo Sub-Branch. There was no registered office for Isiolo Sub-Branch, the claimant informed the Secretary General as much and he had not been provided the relevant transfer allowance. The claimant continued working at the Meru Branch and on 31.12.2013 he was transferred to the Isiolo Sub-Branch again. Isiolo Sub-branch was under the Meru Branch and he requested the Meru Branch Secretary General to secure necessary office at Isiolo and further requested for transfer allowance from the National Office. There was no provision in view of the two requests and the claimant continued to work at the Meru Branch.

On 10.03.2014 the claimant was again transferred to Isiolo Sub-Branch. He was given cash for rent and the transfer allowance. He secured the office and started to work. On 08.03.2015 he was transferred to Nyeri Branch. He reported and he had accumulated leave days so that he applied for 3 months' leave. The Branch Secretary at Nyeri approved the leave. However the National Secretary General instructed that since the claimant was serving in Isiolo Sub-branch of Meru Branch when the leave days accumulated, he had to apply for the leave through the Secretary, Meru Branch. The claimant complied with that procedure and his leave was approved by the National Secretary General. While on leave the claimant wrote on 30.07.2015 to the Secretary General explaining that due to personal reasons relating to pressing

family responsibilities, the claimant wished not to serve in Nyeri Branch. The grievances were not considered positively and the claimant wrote an appeal before his leave lapsed but he received no reply. On 27.01.2016 the claimant received a letter of summary dismissal. The claimant's leave was ending on 27.11.2015 so that the claimant had been absent from duty from 28.11.2015 to 27.01.2016. The claimant's explanation was that he had not been on duty in Nyeri Branch because he was waiting for a reply to his appeal against deployment to Nyeri.

The claimant testified that at the time of the dismissal he had absconded duty for 2 months and in the 2 months he had not served another employer.

The claimant has established that there was no notice and hearing before the summary dismissal as envisaged in section 41 of the Employment Act, 2007. However the claimant further admitted in court and testified that the reason for dismissal was valid because as at time of dismissal, he had indeed been absent from duty for two months. The court finds that nothing stopped the claimant from reporting on duty soon after the lapsing of his leave. That the claimant was awaiting decision on his appeal against deployment to Nyeri was unreasonable ground to fail to report back on duty at the end of the leave period. In so far as the reason for termination was valid as testified by the claimant before the court, the court returns that the dismissal was not unfair as envisaged in section 43 of the Employment Act, 2007. The respondent did not file a defence and the court considers that each party shall bear own costs of the suit.

In conclusion the claimant's memorandum of claim is hereby dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 23rd September, 2016.

BYRAM ONGAYA

JUDGE