



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO. 350 OF 2014**

P O O .....CLAIMANT

**-VERSUS-**

NAIROBI CITY COUNTY .....RESPONDENT

**JUDGMENT**

P O O the claimant was an employee of the Nairobi City Commission from 14th September 1988 until 2nd August 2011 when he was summarily dismissed from employment by letter dated 1st August 2011. In his Memorandum of Claim filed on 7th March 2014 through Wangira Okoba & Company Advocates he alleges that around June 2010 he fell ill and by the end of July he started having mental illness. His family took him to his rural home to seek treatment when conventional medicine seemed not to work. In September 2010 he was diagnosed with HIV-AIDS, and Tuberculosis and was put on treatment. In September 2010 he reported back to work at his work station at Machakos bus stage but was directed to go and report at City Hall. At City Hall he explained what had happened to him to the administrator and was told to go back home and wait to be advised on the next cause of action. On 1st August 2011 his dismissal letter was sent to him by registered post to an address he did not know. He obtained a copy of the letter from the registry.

The claimant appealed against the dismissal by his letter of 2nd September 2011 but the appeal was dismissed on 26th March 2012. He filed a second appeal on 16th April 2012 for review of the appeal decision but that too was dismissed on 9th January 2013.

The claimant alleged that he was never given a hearing and his union was not informed about his dismissal, that the dismissal was unfair, illegal and was on grounds of his health status, especially his HIV-AIDS illness contrary to Article 41 of the Constitution. He was 50 years old at the time of dismissal and his salary was Ksh 28,970/=.

He seeks the following orders against the respondent:-

- a. The dismissal of the claimant by the respondent was unlawful, unfair and unprocedural.
- b. The respondent failed to give the claimant an opportunity to defend himself against the allegations which were made against him.
- c. The procedure used by the respondent to dismiss the claimant was unlawful and unfair.
- d. The claimant was discriminated against due to his illness and dismissed from employment contrary to the Employment Act 2007 and the Constitution 2010.

He seeks the following remedies:-

- a. General damages for unfair discrimination Kshs 3,000,000/=
- b. Damages for unfair, unlawful and unprocedural dismissal at 1 years gross @Kshs 28,970 X 12 = Kshs 347,640/=
- c. Salary unfairly retained from date of the wrongful dismissal to date (from August 2011 to November 2013) @28,970 X 27 months = Kshs 782,190/=
- d. Retained salary from the date of illness upto the time of dismissal (July 2010 to July 2011) @28,970 X 12 months = Kshs 347,640/=
- e. Leave pay for the year 2010 @ one month's salary Kshs 28,970/=
- f. Pay for untaken leave days @ 28 days/30 days X 28,970 = Kshs 27,038.60
- g. An order of reinstatement and/or payment for the remaining years of service being 10 years @ 10 X 12 X 28,970 = Kshs 3,476,400/=
- h. Aggravated damages for discrimination on the basis of health and sacking from employment.

The respondent did not respond to the memorandum of claim and did not attend court for hearing although there was evidence of service of both the summons to enter appearance together with Memorandum of Claim and a hearing notice.

The case was heard *ex parte* on 9th October 2014 where the claimant reiterated the averments in the Memorandum of Claim.

The claimant filed written submissions through his advocates on 6th November 2014 and served a copy on the respondent as directed by the court. The respondent appointed the firm of Musyoki Mogaka & Co. Advocate who on 11th November 2014 sought leave to file the respondent's written submissions. The leave was granted and the respondent filed its submissions on 21st November 2014.

In the submissions the respondent averred that the claimant was dismissed for gross misconduct after absconding duty for more than one year and only reported back to work after the dismissal. That no notice was given to the respondent of the claimant's illness in contravention of Section 30 of Employment Act and that Section 34(3) affords the employer a defence in such circumstances.

I have considered the evidence adduced by the claimant and averments both in the Memorandum of Claim and in his testimony. I have also considered the submissions of both the claimant and the respondent.

The issues I have to decide are whether the dismissal of the claimant was unlawful and whether he is entitled to the prayers sought.

Summary dismissal is provided for under Section 44 of the Employment Act. Under Section 44(4) (a) an employer may dismiss an employee if "without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work".

The claimant does not deny that he absented himself from work without permission. In his appeal against dismissal which was submitted a month after his dismissal he state as follows:-

1. In August 2010, I fell sick seriously and got a mental devastation. My family sought for traditional medication back at my village home.

2. On 2nd March 2011 I attended Eastern Deanery AIDS Relief Program on advice of friend. There, I was diagnosed with HIV. I have been taking drugs and my health was coming back on track.
3. On 8th August 2011, at Huruma Care Centre (my health started deteriorating again) and I was diagnosed with TB."

After his appeal was dismissed the claimant made an application for review of the decision in which he state as follows:-

1. In August 2010, I fell seriously ill and got mentally devastated. My family sought for traditional medication back at home in the village.
2. On 2nd March 2011, I attended Eastern Deanery AIDS Relief Program (on advice of friend) which is a medical facility in Huruma Care Centre. There I got diagnosed with HIV. Since then I have been undergoing medical treatment to date.
3. On 1st August 2011, at the above facility, my health started deteriorating again I was diagnosed with TB. I started taking drugs on 8th August 2011 and completed the treatment on 18th January, 2012."

In his testimony in court he stated that the reasons for his dismissal was because he was sick and that he was discriminated. He further stated that nobody looked for him when he was sick. He further testified that he was confused.

In his letter of appeal and review, the claimant did not explain why he did not inform the respondent that he was sick. He only apologized for the inconvenience caused by his absence.

The treatment records annexed to his memorandum of claim cover the period 9th November 2011 to 19th December 2013. The card for treatment gives the date when anti-retroviral treatment commenced as 12th September 2011. The certificate from Eastern Deanery Aids Relief Program dated 29th August 2011 states that the claimant was on treatment from 2nd March 2011.

Absence on grounds of illness is excusable where there are medical records to confirm illness. Section 30 of the Employment Act provides at Subsections (1) and (2) that an employee is entitled to sick leave "**subject to production of a medical certificate of incapacity, and that the employee shall notify or cause the employer to be notified of his incapacity as soon as is reasonably practical.**" In this case the claimant never at any time notified or caused the respondent to be notified of his medical incapacity. Indeed he testified that he reported back to work and was then directed to go to the head office. He was not specific on when he reported back to work. The claimant did not even state when he stopped going to work only stating that he was taken ill about June 2010. Obviously the employer was not aware about his illness at the time of his dismissal. By the time of dismissal the claimant had been away from work for about 14 months. The first time he notified the respondent about his illness was in his appeal against dismissal. This cannot be reasonable time as envisage in Section 30(2) of the Act.

Section 44(3) provides that "an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service". It is my opinion that by absenting himself from work without permission and without notification of reasons thereof to his employer the claimant fundamentally breached his contract of employment and the employer was entitled to dismiss him. The absence would have been excusable only if he submitted a medical report justifying the period of absence which he did not do. There is no evidence that the claimant's mental faculties were compromised to such a state that he was incapable of informing the respondent or sending someone to inform the respondent about his illness for the entire period of his absence.

The claimant's allegation that he was dismissed due to his medical condition and that he was discriminated for the same reason is to say the least absurd. The employer was not aware of his illness.

His allegation that the respondent did not sent anybody to check on him in spite of knowing where he lived is misplaced as the employer was under no obligation to look for him and was not aware of his illness.

For the foregoing reasons I find that the respondent was justified in dismissing the claimant for absconding duty.

Having found that the dismissal of the claimant was justified he is not entitled to prayers (a) (b) (c) (d) (g) and (h). On prayers (e) and (f) which relate to leave pay for 2010 and pay for untaken leave, no evidence was adduced by the claimant in respect thereof. I therefore find that the said prayers have not been proved and dismiss the same.

The upshot is that the claimant's entire claim is dismissed. There will be no orders for costs.

Orders accordingly.

**Dated and signed at Kisumu this 16<sup>th</sup> day of June, 2015**

**MAUREEN ONYANGO**

**JUDGE**

**Delivered in Nairobi this 7<sup>th</sup> day of July, 2015**

**HELLEN WASILWA**

**JUDGE**

*In the presence of:*

Wetangula h/b for Wangila..... for claimant(s)

N/A..... for respondent(s)