



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 207/2013

(Before Hon. Justice Hellen Wasilwa on 14th March, 2014)

SYMON ODHIAMBO ORITA CLAIMANT

-VERSUS-

RIFT VALLEY RAILWAYS KENYA LTD RESPONDENT

JUDGMENT

The claimant herein Symon Odhiambo Orita filed his memorandum of claim on 18.7.2013 through the firm of Olel, Onyango, Ingutiah & Co. Advocates. He contends that he was wrongfully dismissed from employment by the respondents.

The claimant's case is that he was employed by the respondents with effect from 26.10.2006 as a train control officer Muhoroni having been absorbed from Kenya Railways where he worked for years. The claimant avers that he worked diligently and faithfully for the respondent until January 2013 when he proceeded for annual leave which was to end on 4.2.2013 but on the afore-stated date he couldn't report back as his wife one Lona Nakholo Odhiambo fell seriously ill and required his personal attention to get her admitted to hospital and attended to. He called the yard master his immediate supervisor and informed him of what was happening and requested for a day to resolve the issue. The supervisor however sent a text message stating that he had already put the claimant on duty on Friday and he was expected to report back to work from 8am to 6pm. On 4.2.2013, he took his wife to hospital Clinix and she was referred to Amani hospital in Kisumu on the same day. He exhibited the referral letter as **Exh App 2c**. She was then referred to Nairobi West Hospital where he proceeded to take her.

In the meantime he went to their Nairobi Headquarters office and informed the Human Resource Manager one Caroline Okach about his situation. The Human Resource Manager informed him to put a request through DHL to his yard master Eldoret so he could accept his request. App 2a is the letter he sent through DHL as per **App (iii)** sent on 7.2.2013. He told court that his wife was found to have brain hemorrhage and was referred to Tenwek hospital and operated upon.

He produced documents from Tenwek hospital as **App 2**. She was admitted in hospital upto 14.2.2013. He eventually went back to work and was told not to work as he had refused to report back to work after leave. He got a letter dated 14.2.2013 informing him that he had deserted duty. It was show cause letter **App 3b** which he replied to on 18.2.2013 as per **App 3b** explaining that his wife had been sick and he had to attend to her. He was later called to Nairobi for a disciplinary meeting. In the meeting he explained why he had not reported on duty. In May 2013 he received a dismissal letter **App 4**. His contention is that he was unfairly terminated because of the sickness which his wife suffered and he couldn't wait for leave approval as it was an emergency.

He now seeks court's intervention and prays he be paid his terminal dues – overtime, gratuity, 1 month salary in lieu of notice, damages for unfair termination and issuance of a certificate of service.

He further avers that the respondents contention that he absconded duty is not true and that he never incited any worker. He denies reporting to work under the influence of alcohol. In a letter dated 10.10.2010, the respondents had written him a letter of misconduct but he says he explained at the time that he has a disease which makes him collapse and become unconscious and he presented a letter from the doctor to that effect.

In cross examination claimant admitted that he had previously been served with a warning letter on 10.10.2012 and a final warning letter on 14.12.2012 which was valid for 12 months. He also told court that he took care of his wife in hospital until she was discharged on 14.2.2013 and he reported to work on 14.2.2013 at noon, the same day the letter of desertion was written. He told court that he does not want a reinstatement but only payment of his terminal dues. He says he was not a member of a Pension Scheme. He denies receiving Ksh 28,000/= as his terminal dues. In re-examination he told court that he was dismissed on 29.4.2013 and his certificate of service is dated 5.3.2013 and so it appears that a decision was made to dismiss him in March and he attended the disciplinary hearing on 3.4.2013. He denies his wife's sickness was a case of domestic violence.

The respondents on the other hand filed their defence on 13.9.2013 through the firm of Nyachiro Nyagaka & Co. Advocates. They also called 2 witnesses whose contention is that they never received any information of the claimant's predicament through one Mr. Yongo and further deny even receiving any letter, leave application form, and treatment notes and they contend that they are forged. They also contend that the claimant was booked for disciplinary action and subsequently dismissed and that the same was justifiable, procedural and lawful owing to the unbecoming behaviour and/or gross misconduct on the part of the claimant that could not be condoned. It is the respondent's further contention that the claimant as guilty of gross misconduct. Particulars being absconding duty regularly without any valid cause, reporting to work late and leaving work early contrary to the employment contract, unlawfully inciting other workers against the respondents reporting to work while under the influence of alcohol.

It is their position that the process of dismissing the claimant was procedural and legal based on sound provisions of law. They asked court to dismiss the claimant's case with costs to the respondents.

RW1 who was claimant's immediate supervisor informed court that the claimant was given a warning letter in October 2012 for absconding duty. He apologized for this misconduct and on 14.2.2012 he was issued with a final written warning following RW1's recommendation on the same issue. He told court that on 4.2.2013 the complainant sent him a text message saying that his wife was unwell and was forcing him to take her to hospital. He didn't grant claimant permission to be away from duty on this occasion. That the claimant should have applied for leave which he didn't. He admits that the claimant kept texting him but this was not an official way. On 7.2.2013, the RW1 decided to report to the management officers of claimant's absence and on 8.2.2013 is when he received a letter delivered through DHL from claimant asking for leave. Subsequently Nairobi headquarter took the matter to conclusion. RW1 told court he tried severally to counsel claimant about work but he didn't change.

In cross – examination he admitted that before the letter of 10.10.2012, there was no other letter of warning and that the letter of 14.12.2012 was his last warning in respect of the incident of 10.10.2012. He also admitted that if one's wife is sick, a person can be given an emergency leave.

RW2 told court that the claimant was taken through disciplinary proceedings and considering his service record, he was terminated from service. That he was paid his terminal dues and the pension provider was asked to pay him. He picked 100% of his contribution and 50% of the employer's contribution from the pension contributor and the balance will be collected after he attains 50 years. Further that the company paid him Ksh 28,762/= as overtime of 80 hours and time off of 16 days which was paid directly to his account at KCB. The respondents further contend that the dismissal was lawful and he is not entitled to any other payments.

In cross-examination RW2 told court that Mr. Yongo was notified by the claimant that he could not resume duty on 4.2.2013. that there was also an email from respondents on 7.2.2013 showing that the claimant's wife needed to go for brain surgery which was a serious issue. The claimant was also called for a disciplinary hearing on 3.4.2013 but the certificate of service is dated 5.3.2013 which RW2 says could have been a systems error.

Upon hearing all the evidence of the parties and upon analyzing their submissions, the issues for determination are as follows:-

- 1. Whether the claimant committed acts of misconduct to warrant dismissal.**
- 2. Whether the respondent followed the laid down disciplinary procedures before dismissing the claimant**
- 3. Whether the claimant is entitled to prayers he has sought.**

On the 1st issue, evidence from claimant shows that his wife was taken ill and he had to attend to her as an emergency. He sent a text message to his immediate boss one Mr. Yongo informing him of this fact which text Yongo admits getting. However, this text message was not taken into account. According to the respondents, the claimant should have applied for an emergency leave before taking his wife to hospital. The respondents seem to rely on their code of conduct which provides for sick leave. Since the claimant didn't take this leave and proceeded to take his wife for treatment, he was considered a deserter. The question then is what was reasonable in the premise. Evidence from claimant shows that his wife was seriously ill. In fact she was taken to hospital the same day 4.3.2013 when claimant was to resume duty and a head scan ordered the same day. The scan showed a brain damage which required urgent surgery. Surgery was carried out on 7.3.2013. The medical documents to this effect were produced as exhibits. It is true that the code of conduct provides for sick leave, but in the case of a matter of life and death as in the case of claimant's wife, it is prudent to save a life than pursue leave application's first. The insistence by the respondents that claimant should have applied for leave first is inhumane and unreasonable given the circumstances of this case. The absence following claimant's desire to save his wife's life cannot be termed as desertion.

The respondents further insist that the claimant had committed previous acts of gross misconduct and issued with warning letters and a final warning letter.

The code of conduct of the respondents clause 70 (b) states as follows:-

“An employee who commits misconduct will be given a first written warning. If he/she commits another misconduct, he or she will be given a second written warning. If such an employee is warned three times in a period of twelve (12) months, the third warning will be final. The final warning shall state clearly that termination may follow failure to improve. Copies of the warning letters must be sent to the Head of Human Resources.”

The respondents have averred that they issued claimant with the warning in a letter of 10.10.2012. This was the 1st of such warning letters which explained his absence from work on 2nd, 3rd and 4th of October, 2012 at different times. He was asked to reply to it and he responded the same day of 10.10.2012 explaining he had been unwell and attending to a doctor. The respondent seems not to have accepted his explanation as per the comments of claimant's boss – Yard Master Eldoret. He ordered that he should be warned. On 14.12.2012 he was given a final warning letter issued in relation to the same events of 10.10.2012. In effect the warning emanate from the same events and can at best be considered as the first written warning. There is therefore no second nor final warning as the respondents expected this court to believe. Their termination of claimant following one incident and without a final warning as per their code of conduct is therefore unfair and I make a finding that the claimant had not committed acts of misconduct warranting his dismissal at the time.

On second issue on disciplinary procedure, the issue of the warning letters expounded above was not

adhered to. He was given a hearing as expected under S. 41 of the Employment Act 2007, however, the disciplinary procedures failed to take into account the fact that the claimant had only been issued with one written warning. His dismissal letter indicates that he had been given a final warning on 14.12.2012 which is not true. The bias of respondents in the disciplinary proceedings is also exemplified by their issuance of a certificate of service to claimant in March 2013 before his dismissal and disciplinary proceedings in April, 2013. I therefore find that the respondents had already predetermined to dismiss claimant before the disciplinary hearing and therefore flouted their own disciplinary procedures before dismissing the claimant.

On the 3rd issue, the claimant has sought for various prayers including payment of his terminal dues set out in his statement of claim being one month salary in lieu of notice, overtime, gratuity and compensation for unlawful termination.

Since I have already made a finding that his termination was unfair as unfair procedures and considerations were followed before his termination, I make a declaration that his dismissal was unfair and unlawful and I convert it to a normal termination.

In regard to payment of gratuity, I find that he is not entitled to it as he was a member of the respondents pension scheme and under S. 35 (6) of the Employment Act, an employee who is a member of a registered pension or provident fund scheme under the Retirement Benefits Act is not entitled to payment of gratuity.

The respondents have also told court that they paid the claimant some moneys for his overtime which claimant didn't dispute. In any case, the claimant has not proved the overtime claim before this court I therefore cannot award anything in that limb. The end result is that I find for claimant and order as follows:-

1. The dismissal of claimant by the respondents was unlawful and unfair and I convert it to a normal termination.

2. The respondents to pay claimant 1 month salary in lieu of notice - = Ksh 46,000/=

3. The respondents to pay claimant 12 months salary as compensation for unlawful termination = Ksh 46,000 X 12 - = Ksh 552,000/=

TOTAL = Ksh 598,000

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less statutory deductions.

4. The respondents to issue the claimant with a correct certificate of service.

5. Respondents to pay costs of this case.

HELLEN WASILWA

JUDGE

14/3/2014

Appearances:-

Olel for claimant

Nyachiro for respondents

CC. Wamache