



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1542 OF 2010

JAMES WAMBUA MUKOSICLAIMANT

-VERSUS-

POSTAL CORPORATION OF KENYARESPONDENT

M/s. Kilemi for the Claimant.

Mr. Kiprono for the Respondent.

JUDGMENT

The Claimant filed this suit vide a Memorandum of claim dated 7th December, 2010 seeking a declaration that the termination of his employment was unlawful and unfair and therefore seeks reinstatement to his job with payment of all arrear salary till date of reinstatement in the alternative payment of maximum compensation for the unlawful termination.

A further Memorandum of claim filed on 3rd October, 2011 did not add anything new to the claim before court.

The Respondent filed a response to the claim on 23rd December, 2010 denying that it dismissed the Claimant unlawfully and unfairly and avers that the Claimant went on leave for forty (40) days from 1st July, 2004 which was to end on 25th August, 2004, but did not return to work as expected and was subsequently lawfully terminated for absconding from work.

Claimant's case.

The Claimant's case is that he had worked for the Respondent for a period of seventeen (17) years from 1st July, 1987 as a Postal Officer until 27th August, 2004 when his employment was terminated.

That he went on leave for forty (40) days from 1st July, 2004 and was due to return on 25th August, 2004.

That he was attending to his sick mother and therefore whilst still at home applied for an extension of the leave for a further forty five (45) days as per exhibit JWM – 4(a) attached to the Memorandum of claim.

The initial leave form was submitted on 7th July, 2004 when the leave itself commenced on 1st July, 2004. The claimant states that the approval in arrears was with the authority of the Postmaster Machakos.

That the forty five (45) days extension was agreed upon by Postmaster Machakos Mr. Kioko Nyaamai on a phone call and he requested the Claimant to formalise. That he was shocked to be charged with vacating office and wrote a letter attached as JWM '6' wherein he asked the Postmaster Machakos to "Please let me enjoy my leave" as it had been sanctioned by him.

He justified the extension by stating his mother was sick and his wife was hospitalised at Mater Hospital. No hospital records were however produced.

Sometime in October, 2004, he was asked to attend a seminar by the Postmaster Machakos but was not allowed by him to enter the conference hall before he could be cleared by the Head Office at Embu.

He was charged for desertion and wrote an explanation marked JWM '6' but was found guilty and his employment was terminated. That he appealed the decision six (6) times in vain.

He claims that the penalty of dismissal was severe and he should be reinstated to his job with all benefits. He says he is still fit to work and is ICT literate and so he is ready and willing to perform his duties.

At the time of termination the gross salary of the Claimant was Kshs.23,768/35.

He owed the Respondent Kshs.59,892/80 in respect of a car loan. The car is in his possession but the logbook is with the Respondent.

That he was advised to pursue Kshs.91,700/= which was his contribution to the Tele Posta Sacco and was not paid his pension dues in the sum of Kshs.59,507/15 which he was informed would be used to clear the car loan.

He is presently a farmer and is able to feed his family.

Under cross-examination, the claimant denied that he had no authority to go on leave and stated that both initial leave and the extension were approved.

That he had made arrangements for a standby officer by the name of **Scholastica Mweni** who was still there for the entire period he was away.

Respondent's case.

The Respondent called one **Joseph Nyamai** the Postmaster Kitui in support of its case. He was the Postmaster Machakos at the material time and therefore was the supervisor of the Claimant whilst he was at Kibwezi.

He approved the initial forty (40) days leave on 8th July, 2004 because the leave form was submitted by the Claimant after he had taken the leave on 1st July, 2004. He said this was irregular though he sanctioned it.

However, upon expiry of the forty (40) days, the Claimant did not return to work and on 14th September, 2004 he reported the matter to the Head Office at Embu. He was due to return on 30th August, 2004.

Later on the witness received a letter seeking to extend the leave for forty five (45) days. The letter was posted on 30th August, 2004, the date the Claimant was due to return to work. He received the letter on 14th September, 2004 and he decided to report the matter as he viewed this as gross indiscipline.

The Claimant had not filled a leave form for extension. He told the court that, the Claimant should have filled leave forms at the nearest post office but he did not do so.

The officer said he was not happy with the extension as the Claimant was due to attend a training on 13th September, 2004.

He denied that the Claimant came for the training as he alleged but he had confirmed he would attend by telephone.

The witness was closely cross-examined by M/s. Kilemi for the Claimant, in which the witness admitted he had approved the initial leave but denied having approved the extension. The witness noted the explanation by the Claimant dated 23rd September, 2004 which was received at the Head Office in Embu but he said it was not sent through his office.

He did not deny that the Claimant had ninety six (96) leave days to his credit. The officer did not recall the Claimant from the extended leave stating that the Claimant was aware of the procedure. He instead chose to report him to the head office leading to the dismissal. He denied having barred the claimant from entering the training until he was cleared by the head office, but his denial appeared not candid.

Under re-examination the witness tried to revise his earlier position that he did not recall the Claimant from the extended leave. No letter was however shown recalling the Claimant. The fact that the Claimant had many outstanding leave days was not placed in dispute.

The Respondent called DW2 **Nancy Mathenge** who is the Human Resource Manager of the Respondent. She told the court that she is familiar with this case.

She stated that the Respondent has regulations that guide application for leave and a leave form to be filled which is referred to as "*PD 37 Form*".

The employee fills Part I whereas the employer fills Part II.

The leave form for the Claimant was produced in which forty (40) days leave was approved from 1st July, 2004 on 8th July, 2004. The form shows that the Claimant as at that date was entitled to sixty six (66) days leave. She also produced a letter dated 24th August, 2004, in which the Claimant applied for an extension of forty five (45) days leave with effect from 30th August, 2004.

The letter shows that the Claimant would still have outstanding eleven (11) days leave upon completion of the extended leave.

She told the court that the Claimant should have come back to the office to extend his leave but not to do it through sending a letter. He was therefore charged with vacating office. She admitted that no letter was written to the Claimant to recall him from the extended leave.

She explained that the Claimant had no reasonable explanation as to why he extended his leave days unprocedurally. That he did not allude to the sickness of his mother and wife in his letter of extension.

She confirmed that all the appeals by the Claimant were rejected and he was dismissed from the service of the Respondent. He had deserted work. She explained that for the offence of desertion one is dismissed after expiry of twenty one (21) days if one does not give a reasonable explanation for being absent from office.

She said that at the time, the Claimant owed the Postal Sacco Kshs.59,892/= hence the counterclaim to recover the amount.

Under cross-examination the witness was evasive as to why they did not recall the Claimant from the extended leave and why they did not wait for twenty one (21) days before declaring him a deserter in terms of the Postal regulations.

She was also evasive on the number of leave days outstanding in favour of the Claimant at the time of the termination. She insisted that desertion was punishable after 48 hours contrary to what she had said in-chief.

She also confirmed that the supervisor had recommended a caution for unprocedural extension of leave but stated that the Human Resource department had the final say on the matter.

She confirmed that the Claimant had served the Respondent for seventeen (17) years and had a good record of work. She was unable to produce any adverse record against the Claimant in his long service.

She also told the court that the Human Resource department did not consider a lesser punishment for the Claimant inspite of his long service and a clean record.

She also admitted that the Claimant waited for a whole six (6) months to get a verdict of the disciplinary hearing.

Analysis.

From the totality of the evidence before court, it is clear that the Claimant was lawfully on leave for forty (40) days. Uncontroverted evidence indicates that he was attending to his sick mother and during the period, his wife was admitted at Mater hospital.

That whilst at home he applied for extension of leave for a further forty five (45) days because he and a total of ninety six (96) days to his credit.

That the only error the Claimant did was not to fill a leave form for the extension though the application for the extension was received by the Respondent.

The Respondent had the option to recall the Claimant from the extended leave but it did not respond by either refusing the Claimant the extension and/or recalling him from leave.

His supervisor recommended a reprimand and caution for the deviation but the Human Resource department decided to dismiss the claimant.

The Claimant was in the position of Postmaster Kibwezi. He had arranged for a standby before he took leave and had duly handed over.

He had a clean record serving the Respondent for seventeen (17) years. No record of any disciplinary action against him for the entire period was produced.

This service to a public entity was curtailed to his loss and detriment only for failure to fill a leave form though he was lawfully entitled to take his outstanding leave to take care of his sick mother and wife.

The Claimant has told the court that he was dismissed for a reason that is not valid and has discharged the onus placed on him in terms of **Section 47 (5)** of the Employment Act.

The Respondent has the onus of rebutting the claim by the Claimant that the reason for termination was not for a valid reason by justifying it in terms of the onus placed on it in terms of **Section 47 (5)**.

The court's considered view is that the Respondent has failed to discharge its burden of rebuttal. It has failed to rebut the evidence by the Claimant that he had leave days to his credit which he had not

exceeded. That he had applied for extension of his leave within the days he had but no response was forthcoming from the Respondent. That it did not write to deny him the leave nor to recall him back to office.

It is the court's view that the circumstances of the Claimant as narrated by him to court justified the manner in which he had applied for extension of his leave days and the Respondent dismissed him from his employment unlawfully taking all the circumstances of the case into account.

Remedy

The Claimant sought reinstatement to his previous job. This is not practicable having been dismissed more than eight (8) years ago.

The Claimant lost prospects of completing his career with an employer he had served for seventeen (17) years.

The Claimant should now be treated as if his service was normally terminated and terminal dues be processed with effect from the date of such termination. He is therefore entitled to one month's salary in lieu of notice in the sum of Kshs.23,768/35.

The Claimant has suffered immense loss by fact of unlawful termination and the court awards him twelve (12) months gross salary as compensation for the unlawful termination in the sum of Kshs.308,988/35.

The Respondent is to pay the costs of the suit.

Dated and delivered at Nairobi this 29th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE