



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1181 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

WICLIFFE OMONDI MANYALA.....CLAIMANT

VERSUS

ROTEX SUPPLIERS AND SERVICE LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant Wycliffe Omondi Manyala brought a memorandum of claim dated 9th June, 2017 and prays for a total compensation of Kshs.201,290/=.

CLAIMANT'S EVIDENCE

2. The Claimant states he was first employed by the Respondent on 5th August, 2013 in a position of a driver. Her salary was Kshs.12,000/= per month.

3. The Claimant states that on 5th October, 2014 the Respondent terminated his services.

It is the Claimant's evidence that he used to work even on public holidays and that he was not given annual leave.

4. He also claims his statutory dues inclusive NSSF and NHIF were never remitted to the necessary bodies.

5. He claims on 5th October, 2014 he reported to work and the Respondent Director informed him there was no work as he had assigned his truck which he was driving to someone else.

6. Basically the Claimant alleges his employment was unlawfully and maliciously terminated after working for the Respondent for one year without any blemish. He prays for a declaration that his dismissal was wrong, unfair and unlawful.

He prays for payment of his terminal dues totaling Kshs.201, 290/=.

RESPONDENT'S EVIDENCE

7. The Respondent admits the Claimant was employed as a driver. He says the Claimant would absent himself from work and so did not work for a whole year. He wrote an apology letter for being absent from work (dated 12th May, 2014).

He states that the Claimant was not a faithful employee as he claims to be.

8. The Respondent also claims the Claimant did not work on public holidays and as a whole the company had a policy that employees would not work on public holidays.

The Respondent further says the Claimant had worked for less than one year and so was not entitled to annual leave.

9. The Respondent says the Claimant absconded from duty on 30th August, 2014 and only appeared on 2nd September, 2014 where he re-

applied for a job application letter dated 2nd September, 2015 is produced as an exhibit.

10. The Respondent says the Claimant breached the terms of the contract by absconding from duty and being a habitual late comer to work and poor performance of his duties. The Respondent actually says he made losses as he would claim the vehicle needed to be repaired and would be sent money.

11. The Respondent avers he does not owe the Claimant for September, 2014 and Claimant himself said his services were terminated on 5th August, 2014.

He also says he never underpaid the Claimant and furthermore that he observed the statutory minimum wage bracket.

He says that the Claimant is also put to strict proof on allegations that he worked on public holidays and he also says the Claimant was a member of NSSF and so was not entitled to gratuity.

12. The Respondent states the suit is frivolous therefore and bad in law. He says the same is an afterthought because summons were served on 24th August, 2018 which is one year and two months after filing the suit. He says the suit is a non-starter and should be dismissed suo moto.

ISSUES FOR DETERMINATION

13. (1) Was Claimant dismissed from his employment or be absconded duty.

(2) is Claimant entitled to damages/reliefs sought.

(3) Who bears the costs.

DETERMINATION

14. The evidence by the Claimant was that he went to work on 5th October, 2014 and found the car he used to drive had been assigned to another driver. He says he tried to talk to Robinson his boss but was not willing to talk to him.

He says that is how his employment was terminated.

15. The Respondent on the other hand claims the Claimant simply absconded from employment. The Black Law dictionary defines desertion as:-

The willful and unjustified abandonment of a person duties or obligations.

16. The authorities that deal with desertion require that employer show the effect made to try to get employee back to work.

The other requirement is that the conduct of the employee must be clear he is no longer interested in the employment.

In **NAIROBI ELRC NO.1324 OF 2014 ESTATE TRADERS (K) LIMITED CAUSE NO.743 OF 2017** it was held that an employer who alleges desertion must demonstrate efforts to establish the whereabouts of the expected to give notice to the deserting employee that termination of employment on grounds of desertion is being considered.

17. It is also held on the various authorities on desertion that an employer who terminates an employee on grounds of desertion had to demonstrate and/or prove that the employee had no intention of resuming work.

18. The present case lacks fundamental records from both the Claimant and the Respondent.

For one there is no contract of employment and there is no letter from the employer in reference to the desertion.

The Claimant could also have put his response in writing when he claims he was terminated orally.

19. Having said so the employer has a duty to put the employee's contract of service into writing Section 9 (2) of the Employment Act provide that an employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn stating particulars of employment and that the contract is consented to by the employee in accordance to subsection 3.

20. In the absence of any such records the court finds itself groping in a maize and it is not a nice picture.

The court having considered the evidence by the parties, the pleadings as well as the submissions by the respective and having considered what I have just observed about having no records, I find the evidence leans more on the fact that the Claimant was terminated from his employment unprocedurally rather than him having absconded from duty.

21. The Respondent does not give a valid reason as to the reason of termination of the Claimant's employment except to say that he did not

terminate his employment but that the Claimant absconded from his employment only to return 13 months re-employed.

22. The Respondent did not demonstrate the efforts he took to establish the whereabouts of the Claimant and any notice he gave him to the effect that he was considering terminating his employment on the grounds of desertion. These are the requirements as held in **ELRC NO.1324 OF 2014** and **MOMBASA E & L NO.743 OF 2017 JAVAN KISOI VS S.A.A INTER ESTATE TRADERS K. LIMITED**.

23. The law provides clearly that an employer before terminating the employment of an employee under Section 44(3) or 44(4) must hear and consider the representations which the employee may make on grounds of misconduct or poor performance and the person chosen by the employee within Section 1.

24. In the case of **WALTER ANURO VS TEACHERS SERVICE COMMISSION (2013) eKLR** the court observed that for a termination of employment to pass the fairness test there must be substantive justification and procedural fairness. Substantive justification has to do with a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting termination.

25. Section 45 (2) of the said Employment Act provides that termination of employment of a contract is unfair if employer fails to prove it was grounded on a valid and fair reason and it was done after following a fair procedure.

26. Regrettably the evidence by the Respondent has failed the tests on both fronts that is on establishing a valid reason and following fair procedure.

27. The Respondent did allude in his defence and submissions that the summons were served one year and two months after filing the suit.

The court found that contention was as a by the way and there was no affidavit of service produced before court to show exactly when summons were served.

The court was also not presented with evidence that there was no leave granted by the court.

It is not for the court to presume such weighty issues and so will give the Claimant the benefit of doubt as far as service of summons is concerned.

28. In conclusion I find the Respondent was expected to keep records of employees and should an issue arise whether an employee deserted employment or not the employer should make reasonable attempts to reach to the employee and furthermore he should inform him that desertion is a ground they are considering for termination of employment.

The Respondent therefore failed the mandatory requirement to give a valid reason of terminating the Claimant's employment and did also not follow the requisite procedure in the process of termination as provided in Section 41 of the Employment Act.

I have no choice but to find the Claimant was unlawfully terminated from his employment and I enter Judgment in his favour.

RELIEFS

1. Notice to pay –

There is no evidence that Claimant was paid salary in lieu of notice. He is entitled to one month salary Kshs.12,000/= in lieu of notice.

2. The Respondent's failure to keep records prejudices him as there is no evidence whether Claimant left employment in July or October. I will award his September, 2014 salary Kshs.12,000/= as well.

3. The underpayment of wages is not proved as no evidence has been placed in court or legal instruments to establish the underpayment. Same is declined.

4. Payment of untaken/unpaid public holidays – just as 3 above no evidence to support this prayer. I decline the prayer.

5. Service gratuity: - There was no evidence to support gratuity and the Claimant did not prove that his NSSF dues were not remitted. Same is declined.

6. The court will award the Claimant one month Kshs.12,000/= worthy as damages considering he only worked for the Respondent for one year.

CONCLUSION

The import of my award is a total of Kshs.36,000/=.

Costs follow the events and so I award the Claimant's costs of the suit.

I also award him interest till full payment at court rates.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE