



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 279 OF 2017

NYANGAU OMOA EDZARDCLAIMANT

v

FRESH AN JUICI LIMITEDRESPONDENT

JUDGMENT

1. Nyangau Omosa Edzard (the Claimant) testified and closed his case on 31 October 2018. The Court then scheduled the Respondent's case for 28 May 2019.
2. The Court did not sit on that date.
3. When the Court sat on 30 July 2019, the Claimant was absent. The record shows a hearing notice had been sent to the wrong address. The hearing was rescheduled to 11 March 2020.
4. On 11 March 2020, both parties were ready to proceed, but the Court adjourned the hearing to 27 April 2020. Due to COVID19, the Court did not sit on this latter date.
5. When the Cause was next placed before the Court on 14 December 2020, the Claimant was absent. The Respondent indicated that it was ready to proceed.
6. Because there was evidence on record that the Court had sent an email to both the Claimant and the Respondent, the Court allowed the Respondent's case to proceed.
7. Despite Court directions, the parties did not file submissions.
8. The Court has considered the pleadings and the evidence and identified the Issues for determination as:
 - (i) Unfair termination of employment.
 - (ii) Breach of contract.

Unfair termination of employment

Procedural fairness

9. The Claimant asserted that he was dismissed without being given reasons on 11 January 2017. He also contended that he was not allowed an opportunity to be heard.
10. Narrating the events before the alleged dismissal, the Claimant stated that he fell ill on 3 January 2017 and attended Lumumba sub-district hospital and that on reporting to work, his immediate supervisor, Raymond Kimetto allowed him to go home to recover and that when he reported back on 7 January 2017, one of the Managers called John Wanyonyi told him not to proceed with work because he had a case pending at the head office in Nairobi.
11. The Claimant stated that he went to Nairobi and met the Human Resource Officer, the General Manager and another person called Adiv (?) and was told his services were no longer required.
12. The Respondent's witness, the Human Resources Manager, gave a different narrative. She testified that the Claimant was absent without

permission from work on 3 January 2017 and only returned on 7 January 2017. Upon being asked by his supervisor to explain the absence, the Claimant became uncooperative but stated that he had been ill.

13. Challenged to provide evidence of the illness, the Claimant did not produce any. He was then instructed to see the Human Resource Officer, and upon being served with a warning letter, the Claimant defiantly walked away.

14. The Claimant had verbal engagements with his superiors culminating in his travelling to Nairobi to meet the human resource team. The Claimant admitted meeting a team in Nairobi.

15. The engagements must have been to allow the Claimant an opportunity to explain why he had been absent for 4-days.

16. The evidence being mostly oral, the Court is ready to find that the Claimant was afforded an opportunity to explain his absence.

17. The Court finds that the Respondent was in substantial compliance with the procedural fairness requirements of section 41 of the Employment Act, 2007.

Substantive fairness

18. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent was expected to prove and not only prove but prove as valid and fair the reasons for dismissing the Claimant.

19. The Claimant disclosed the names of the present persons when he was told that his services were no longer required. The Respondent did not present these persons to rebut the Claimant's oral testimony.

20. The failure to call them to testify was not explained. The Claimant produced a copy of a medical sheet from Lumumba sub-district hospital.

21. The Respondent's case was that it did not dismiss the Claimant but rather that upon being given a warning letter on 11 January 2017, he walked out on the Human Resources Manager not to return. A copy of the warning letter was filed.

22. When the Claimant's advocate made a formal demand asserting unfair termination of employment, the Respondent, in a reply dated 30 March 2017, maintained that the Claimant's contract had not been terminated.

23. If indeed the Claimant failed to report to work after the Nairobi meeting, he was guilty of misconduct (absence without permission).

24. Absence without permission with no intention to return to work is a repudiation of the contract.

25. The Respondent should have given an ultimatum to the Claimant to return to work and/or show cause why he should not be treated as being in repudiation of contract (see *Societe Generale, London Branch v Geys* (2012) UKSC 63). No evidence of such a show-cause was exhibited.

26. Being the innocent party, the Respondent appears not to have accepted the repudiation by the Claimant.

27. The Court, therefore, finds that technically, there was unfair termination of employment.

Compensation and salary in lieu of notice

28. In the view of the Court, this is not a suitable case to award compensation or salary in lieu of notice.

Breach of contract

Gratuity/service benefits

29. The Claimant sought Kshs 5,171/- on account of gratuity/service pay.

30. Copies of the Claimant's payslips filed in Court show he was a contributor to the National Social Security Fund. By dint of section 35(5) & (6) of the Employment Act, 2007, he is not entitled to service pay.

31. If there was a contractual agreement on payment of gratuity, the same was not proved.

Underpayments

32. On account of underpayments, the Claimant prayed for Kshs 99,250/-

33. Underpayment of wages occurs either where the employer pays below the prescribed minimum wages or below contractually agreed rates.

34. The Claimant anchored this head of the claim on prescribed minimum wages.

35. However, the Claimant did not disclose which particular Wages Order applied to the Respondent's sector, and relief is declined.

Annual leave

36. Every employee is entitled to at least 21 days annual leave with full pay. The Claimant sought Kshs 9,604/- being commuted leave pay during the period of employment.

37. The Respondent did not produce the Claimant's leave records, and pursuant to section 10(3) & (7) of the Employment Act, the Court will allow this head of the claim.

House allowance

38. The copies of payslips produced by the Claimant and the contract indicate that the Claimant was earning house allowance. Relief is declined.

Overtime pay

39. Despite alleging that he was not paid overtime for working on Sundays, the Claimant's payslips tell a different story. Overtime worked was compensated. Relief is declined.

Conclusion and Orders

40. From the foregoing, the Court finds that technically, the Claimant's services was unfairly terminated but declines to award any compensation or salary in lieu of notice.

41. The Court, however, finds that the Respondent was in breach of contract in respect to accrued leave, and the Claimant is awarded Kshs 9,604/-

42. The Claimant has only succeeded partially, and the Court makes no order on costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 31st day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant -T. O. Nyangosi & Co. Advocates

For Respondent - Ouma D, Federation of Kenya Employers

Court Assistant - Chrispo Aura