



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 301 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

JULIUS KYALO MALONZA.....CLAIMANT

VERSUS

RUTH OSOLO T/A

ERAEVA CATERING SERVICES.....RESPONDENT

JUDGMENT

1. The Claimant's memorandum of claim dated 1st March 2016 was filed on the same day. The Claimant alleges that he was engaged by the Respondent as a Hotelier on 28th April 2004 at a monthly salary of Kshs.11,500 and was not given an appointment letter. That he served the Respondent diligently and was a royal employee until 8th July 2016 when he was unlawfully dismissed without notice or benefits. He sued for.

(i) 3 months' salary in lieu of notice Kshs.34,000

(ii) Service pay for 12 years Kshs.138,000

(iii) Overtime for 12 years Kshs.138,000

(iv) General damages for unlawful termination equivalent to 12 months' pay Kshs.138,000

Total Kshs.448,500

2. The Claimant amended his memorandum of claim on 23rd March 2016 and filed the same on 29th March 2016.

3. The Respondent filed its reply to the amended memorandum of claim on 15th November 2016 denying the claim in totality and prayed for its dismissal with costs alleging that the Claimant deserted employment for more than 21 days without lawful cause and without communicating with the Respondent.

4. A Notice of Motion dated 16th January 2017 and filed in Court on 18th January 2017 seeking the striking out and/or dismissal of the Claimant's case for not disclosing any reasonable cause and an abuse of the Court process appears not to have been pursued. The Respondents amended its reply to the amended memorandum of claim on 1st March 2017 and filed the same on the same day.

5. The case was heard on 10th August 2021.

Evidence

6. CW1 in his written statement stated that on or about 28th April 2004, the Respondent employed him as a Hotelier at Kshs.11,500 per month. That the Respondent was the proprietor of Eraeva Catering Services and the Claimant served diligently until 8th July 2016 when he was unlawfully dismissed by the Respondent.

7. He told the Court that he had no problems with the employer and was terminated without a termination letter. He alleged that on 8th July 2016 while at this place of work, he was summoned by the Manager (Mr. Hawa) who informed him that he had been dismissed. That he did not abscond duty.

8. On cross examination he confirmed that he had no employment letter to prove his status as an employee of the Respondent. He further confirmed that his written statement did not mention about the Manager and he had no document to prove his monthly salary. He also denied absconding duty.

RW1 (RUTH OSOLO)

9. She testified that the Claimant worked as a Waiter in her hotel business from mid-2014 until June 2015. She first met the Claimant at Toi Market where he was selling vegetables, onions and tomatoes. Witness engaged him as a supplier of items to the hotel. She testified that subsequently, the Claimant requested for employment and he was engaged as a Waiter. That he deserted the workplace for over three weeks without lawful cause and without communicating with the proprietors. That efforts to trace him were futile as he could not be reached on his mobile phone. The phone was either off or when the call went through he did not pick the witness's call. That after 30 days, she reported the desertion to the Labour Commissioner on 2nd July 2015 and the letter was received by the District Labour Office in Nairobi. The letter states that the Claimant had absented himself from duty for 34 days and had thus ceased to be an employee of the Respondent. The Claimant had previously absconded duty in 2014 for over one month but welcomed back but with a verbal warning. RW1 denied having terminated the Claimant employment. He did not report for work thereafter. That she only came to learn of the suit when she received documents from the Claimant's advocate.

Claimant's Submissions

10. The Claimant's Counsel identified two issues for determination namely; whether the Claimant was wrongfully and unlawfully terminated and whether the Claimant was entitled to terminal benefits.

11. On termination, Counsel submitted that the Claimant's termination was wrongful, unfair and illegal because he was not given neither justifiable reasons for the termination nor a hearing before termination. That he only learnt of the reasons for termination from the Respondent's letter to the Labour Commissioner dated 2nd July 2015. Counsel relied on Section 35 of the Employment Act on the obligation of the employer to give notice of termination as well as Section 45 on the reasons for termination and fair procedure.

12. Reliance was made on the Court of Appeal decision in **Kenfreight (EA) Ltd v Benson K. Nguti (2016) eKLR** for the proposition that an employer is bound to give a reason(s) for termination of an employee. Further reliance was made on the decision in **Joseph Sitati Nato v Kenya Ports Authority [2010] eKLR** for the proposition that employers should ensure substantial and procedural fairness in the termination process.

13. Counsel submitted that the Claimant's termination offended Sections 43 and 45 of the Employment Act since the Respondent gave the Claimant neither a notice of termination nor an opportunity to defend himself.

14. Finally the Respondent availed no documentation to prove that she attempted to contact the Claimant.

15. On whether the Claimant is entitled to terminal benefits as prayed in the memorandum of claim, Counsel submitted that Section 49 of the Employment Act, 2007 sets out the reliefs available where an employee is terminated unfairly and relied on the decision in **Co-operative Bank of Kenya v Banking Insurance & Finance Union (2015) eKLR** where the Court held that the award of reliefs for unfair termination was discretionary and based on the circumstances of the case as catalogued in subsection (4).

Respondent's Submission

16. On whether the Claimant was an employee of the Respondent, Counsel submitted that since the Claimant availed no documentary evidence of a contract of service for instance bank or Mpesa payment statement, he did not prove that he was employed in 2004. Having been an employee for 11 years, the Claimant should have produced some document suggesting that he was an employee of the Respondent. He only alleged. Counsel relied on the holding in **Eastern Produce (K) Limited v John Lumumba Mukosero Civil Appeal No. 25 of 1998** that –

“The fact that one party has filed a suit or made a claim by itself is not proof that there is a “prima facie case” which the Defendant must rebut. It is for the Plaintiff to prove liability. This onus of proof does not shift whatsoever.”

17. He also relied on the decision in **Jawado Hamad Omar v East Africa Sea Food Ltd (2017) eKLR**.

18. On whether termination was unfair, it was submitted that the Claimant was aware of the letter to the Labour Commissioner dated 2nd July 2015 which accused him of absconding duty but did not respond to it or controvert it. Counsel submitted that the absence of supportive evidence renders the Claimant's allegation of unfair termination unsustainable.

19. On the allegation that the Claimant absconded duty, it is contended that the Respondent discharged its burden by taking reasonable steps to contact the Claimant through his mobile phone but on two occasions, he did not pick and at other times his phone had been switched off. With no other recourse, the Respondent wrote to the Labour Commissioner on 2nd July 2015 explaining the conduct of the Claimant. Counsel relied on Section 44(4) of the Employment Act which entitles the employer to summarily terminate an employee for absence from duty without leave or other lawful cause.

20. On reliefs, Counsel submitted that the Claimant does not qualify for any of the reliefs claimed because he was not dismissed by the Respondent but absconded duty. In addition, he did not lead evidence to prove that he was entitled to any of them.

21. The Respondent prayed for dismissal of the suit with costs.

Analysis and Determination

22. After careful consideration of the pleadings, evidence and submissions, the issues for determination are: -

- (i) When was the Claimant employed by the Respondent;
- (ii) Whether the Claimant was unlawfully terminated by the Respondent or he absconded duty;
- (iii) Whether the Claimant is entitled to the reliefs sought;

23. Whereas the Claimant testified that he was employed by the Respondent from 28th April 2004 to 8th July 2015, the Respondent confirmed that she employed the Claimant sometime in mid-2014 until June 2014 when he absconded duty for over three weeks.

24. Neither party produced documentary evidence to establish the actual date of engagement or other terms of the contract of employment. However the totality of the evidence before this Court establishes beyond peradventure that there was a contract of service between the Claimant and the Respondent. In her evidence in chief, the Respondent confirmed that she employed the Claimant as a Waiter in 2014.

25. On the date of employment, the Claimant alleges 28th April 2004 while the Respondent states that it was mid-2014. Regrettably neither party provided documentation on the date or pay. On re-examination, the Claimant told the Court that payment was in cash. The Respondent did not contradict this evidence. On the date of employment, the Court found the Respondent's evidence more credible since she *inter alia* confirmed that she had known the Claimant for some time and even engaged him as a Supplier. Based on her testimony, the Claimant was employed by the Respondent in mid-2014. It would appear that the Claimant had worked for Respondent for about one year only.

26. The Respondent did not contradict the Claimant on the monthly salary.

27. In view of the foregoing, this Court finds that there was a contract of service between the Claimant and the Respondent from mid-2014 to June 2015 and the Claimant's salary was Kshs.11,500 per month.

28. On termination, whereas the Claimant alleges that he was a loyal and diligent employee and was unlawfully terminated on 8th July 2015, the Respondent told the Court that the Claimant absconded duty in June 2015 and never returned. According to the Claimant, he was still in employment in June 2015 and was only dismissed on 8th July 2015 by one Hawa, who he alleged was the Manager at the restaurant and no reason was given. From the documents on record, the Claimant sought legal assistance in February 2016 and does not appear to have engaged the Respondent before then. The Respondent testified that the Claimant absconded duty and efforts to contact him through his mobile phone proved futile because he did not pick calls or the phone had been switched off. This evidence was not contradicted. The Respondent further testified that she wrote to the Labour Commissioner reporting the Claimant's desertion of duty for more than 30 days and consequent cessation of employment with the Respondent. Significantly the Respondent reported that attempts to contact the Claimant had been unsuccessful. A copy of the letter stamped by the Nairobi Labour Office is on record.

29. According to the Claimant, the letter to the Labour Commissioner was written when he was still in employment since he was allegedly dismissed on 8th July 2015. It is unconceivable why an employer would allege that its employee has absconded duty when the person is still in employment and to the extent of writing to the Labour Commissioner.

30. Instructively, the Respondent testified that the Claimant had absconded duty sometime in 2014 but was welcomed back albeit with a verbal warning.

31. More importantly, it is confounding that neither the original memorandum of claim nor the amended version articulates the crux of the Claimant's case against the Respondent. The averment that he was unlawfully dismissed on 8th July 2015 is obviously inadequate. It is not supported by any factual basis of what transpired. It is not clear who dismissed him and what step he took thereafter.

Whether the Claimant's termination is unlawful

32. Section 47(5) of the Employment Act, 2007 provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

33. This provisions allocates the burden of proof and each party is bound to establish its part.

34. In this case, the Claimant averred that he “*served the Respondent with royalty and diligence until 8th July 2015 when the 2nd Respondent unlawfully dismissed the Claimant from employment without giving him any notice and/or hi full terminal benefits*”.

35. The written statement on record restates the contents of the statement of claim and the cross examination did not alter the Claimant's case.

36. The Claimant provided no evidence on where and how the termination took place and does not attribute any wrongdoing to the Respondent. The claim suffers the deficit of the essential factual background to support the termination as alleged.

37. Significantly, the Respondent alleged that the Claimant absconded duty which is typically a conscience decision by the employee. In **Judith Atieno Owuor v Sameer Agriculture and Livestock Limited [2020] eKLR**, Onyango J. cited the decision in **Seabolo v Belgravia Hotel [1997] 6 BLLR 829 (CCMA)** for the difference between desertion and absence without leave where the Court stated that –

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”

38. The Court has been consistent on the duty of an employer who relies on desertion or absconding duty as a defence to the Claimant's case.

39. In the words of Nzioki Wa Makau J. in **Boniface Francis Mwangi v B.O.M. Iyego Secondary School [2019] eKLR**

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

40. According to Abuodha J. in **Simon Mbithi Mbane v Inter Security Services Ltd [2018] eKLR**

“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”

41. In **Joseph Nzioka v Smart Coatings Limited [2017] eKLR** Nduma J. observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

42. Applying the foregoing propositions to the present case, the Court is satisfied that the Respondent has on a balance of probabilities discharged its onus of establishing that the Claimant absconded duty. The Respondent testified that after the Claimant absconded duty, she made several attempts to reach him through his mobile number but his phone was off and when on two occasions she got through, the Claimant did not pick the calls. The witness further testified that after 30 days, she wrote to the Labour Commissioner on 2nd July 2015 to report the desertion by the Claimant. She testified that she gave the Claimant a job when he requested for one and previously a supplier to the Respondent's business.

43. On cross examination she confirmed that she did not write a show cause letter because the Claimant could not be reached even on phone. This explains why she opted to write to the Labour Commissioner.

44. Similarly, she confirmed on re-examination that she thought the Claimant would report to work as he had done in 2014 when he absconded duty for over one month and was allowed back with a warning not to repeat such conduct.

45. In light of the above, this Court finds that the Respondent took reasonable steps to contact the Claimant and when its attempt hit a dead end, the Respondent wrote to the Labour Commissioner notifying the office of the cessation of employment of the Claimant by reason of absconding duty.

46. In the final analysis the Claimant has failed to prove on a balance of probabilities that he was unfairly terminated by the Respondent.

47. The Claimant's suit lacks merit and is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF OCTOBER 2021

DR. JACOB GAKERI

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 Civil 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.

DR. JACOB GAKERI

JUDGE