



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 888 OF 2015

LUKA MBUVI..... CLAIMANT

V

ECONOMIC INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. Luka Mbuvi (Claimant) was employed as a machine operator by Economic Industries Ltd (Respondent) until around 11 April 2015.
2. On 22 May 2015, the Claimant instituted these proceedings against the Respondent alleging unfair termination of employment and breach of contract.
3. In its *Response* filed on 2 March 2018, the Respondent denied unfair termination of employment and contended that it was the Claimant who was in breach of contract by absconding from work.
4. The Cause was heard on 12 February 2020. The Claimant and the Respondent's Human Resources Manager testified.
5. The Claimant filed his submissions on 27 February 2020 while the Respondent filed its submissions on 21 April 2020.
6. The Court has considered the pleadings, evidence and the submissions, and adopted the Issues as were proposed and set out by the Claimant.

Unfair termination of employment

7. By dint of section 47(5) of the Employment Act, 2007, the Claimant had the onus of demonstrating at the first instance that an unfair termination of employment occurred.
8. The Claimant's testimony was that around 11 April 2015 an inspection was carried out in his absence (as he went to get his spare keys for the locker having lost the keys) and that he was informed on returning that some envelopes had been found in his locker.
9. According to the Claimant, he was instructed to leave and return on 18 April 2015 and that when he returned he was arrested by the Police but was released without being charged whereupon he did not go back to work fearing that he could be arrested afresh.
10. The Respondent's witness, testifying as to the circumstances of the separation stated that a random inspection was conducted on 11 April 2015 as the employees were leaving work and the Claimant was found with envelopes hidden inside his clothing.
11. Consequently, the witness stated, it was decided to search the Claimant's locker and more envelopes were found hidden therein and therefore a report was made to the Police whereupon the Claimant was arrested.
12. According to the witness, the Claimant did not resume work upon release by the Police after which his services were terminated. The Respondent was essentially contending that the Claimant *deserted* work.
13. The question of what constitutes *desertion* in employment law is not a straight forward one.
15. *Desertion* is not the same as being absent from the place appointed for work without permission or lawful cause as envisaged under section 44(4)(a) of the Employment Act, 2007.

16. *Desertion* in employment law is a repudiation of the contract of employment. The employee who *deserts* is in breach of contract and an employer is entitled to dismiss him on the ground of repudiation of contract. This is because he has no intention of turning up for work.

16. Repudiation of contract, as a general rule in common law, unless accepted by the innocent party, does not terminate an employment contract. The innocent party should accept the repudiation (see decision in *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).

17. The Court also wishes to observe that in *Geys v Societe Generale, London Branch* (2012) UKSC 63, the Supreme Court of the United Kingdom confirmed the principle that a repudiated employment contract does not end the contract until the repudiation is accepted.

18. In the *Geys* decision, the Supreme Court rejected the *automatic termination principle* that repudiated employment contracts are ended immediately upon repudiation in favour of the *election principle*.

19. In this sense, the employee who *deserts* employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.

20. Where an employer alleges *desertion*, it must prove the ingredients of desertion.

21. A primary ingredient of *desertion* to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract).

22. Establishing the intention not to return to work will depend on the facts of each case as presented in evidence.

23. The Claimant admitted that he did not report back to work upon being released by the Police because he feared rearrest.

24. Under the statutory framework in our jurisdiction, a *deserting* employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through colleagues or contact details in the employee's file (records).

25. An employer can also issue an ultimatum such as through a *show-cause* letter addressed to the employee's contact details on its records.

26. There was no suggestion here that the Respondent made any or any reasonable attempts to reach out to the Claimant to explain his absence or alleged *desertion*.

27. Since the Respondent did not also, as the *innocent party* show it had accepted the repudiation of the contract by the Claimant, the Court finds that this was technically, a case of unfair termination of the contract.

Compensation

28. Compensation is a discretionary remedy.

29. The factors the Court should consider before an award of compensation is made have been set out in section 49(4) of the Employment Act, 2007. One of the factors are the circumstances in which separation took place.

30. The Court declines to exercise its discretion to grant compensation on the ground that the Claimant admitted that he did not make any attempt to resume work after being released by the Police.

Breach of contract

Overtime (holidays and normal)

31. The Claimant asserted that he worked during holidays for 4 years without compensation and claimed Kshs 12,851/- and normal overtime spread over 4 years amounting to Kshs 404,832/-.

32. A copy of the Claimant's last contract provided for 45 hours of work spread over 6 days of the week and copies of the payslips for January to March 2015 produced indicated payment of overtime.

33. The Claimant, however, did not file copies of payslips over the 4 years.

34. On the basis of the sample copies of payslips produced in Court, the finds it probable that the Claimant was compensated for overtime work.

Gratuity

35. The Claimant made a plea for Kshs 40,162/- being gratuity. If by gratuity, the Claimant meant *service pay* as contemplated by section 35(5) & (6) of the Employment Act, 2007, he is not eligible as he was contributing to the National Social Security Fund.

36. If there was a contractual or any other legal foundation for this head of the claim, it was not disclosed. Relief is declined.

Leave

37. Annual leave of at least 21 days with full pay is a statutory entitlement for every employee.

38. The Claimant sought Kshs 80,324/- being untaken leave for 4 years of employment.

39. Section 28(4) of the Employment Act, 2007 circumscribes how many leave days can be carried forward.

40. The Claimant did not disclose whether he carried forward the leave days over the 4 years of employment with the permission of the Respondent and therefore the Court will only allow *pro-rated* leave for 4 months worked in 2015.

Conclusion and Orders

41. From the foregoing, the Court finds and declares that there was unfair termination of employment.

42. Despite the finding, the Court declines to award compensation.

43. The Respondent to compute and pay the Claimant pro-rated leave for 2015.

44. For clarity, all other reliefs are declined.

45. No order on costs.

Dated, signed and delivered through video/email in Nairobi on this 8th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Ms. Jaoko instructed by Arati & Co. Advocates

For Respondent Mr. Njuguna instructed by Gathara Mahinda & Co. Advocates

Court Assistant Judy Maina