



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1835 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WILLIAM GITUMA GATEERE.....CLAIMANT

VERSUS

RAA LIMITED.....RESPONDENT

JUDGMENT

Vide his Memorandum of Claim dated 9th October 2014, the claimant avers that he was employed by the respondent on or about 1st November 2012 as a driver at a salary of Kshs.17,421. He avers that on or about 8th September 2014 his employment was terminated verbally.

He alleges that the termination was triggered by work related injuries the claimant had sustained. He avers that the termination was high handed, reprehensible and malicious and as such he is entitled to punitive and exemplary or aggravated damages.

The claimant prays for the following remedies

- a...A declaration that he was wrongfully and unfairly dismissed from his employment.
- b...Notice period for one month Kshs.17,421.00
- c...Unpaid salary for the month of September Kshs.17,421
- d...12 months' salary as compensation for wrongful and unfair termination Kshs.209,052
- e...Certificate of service
- f...Costs and incidental to this suit.

Claimant's case

At the hearing the claimant testified that he was injured in February 2014 after being attacked by thugs while at work. He was hospitalised and given sick off. While on sick off the respondent paid his salary.

The claimant testified when he reported back to work he was accused of syphoning fuel from the vehicle he was driving. He was told to go back home and report back after two days. When he reported back he was not allowed into the premises by the security. He reported the matter to the Ministry of Labour.

Under Cross examination the claimant denied that the vehicle he was driving broke down frequently. He stated he had no letter of termination and could not ask for it because he was not allowed into the work premises. He stated he had filed another suit against the respondent for compensation for the injury he sustained while at work. The same was determined in his favour and he was paid.

In the submissions filed for the claimant he submits that he did not desert duty as alleged by the respondent. That if he deserted duty the respondent ought to have proved it before dismissing him.

That the respondent did not try to contact the claimant after the alleged desertion.

It is further submitted that the respondent did not comply with the procedure under Section 41 of Employment Act.

Respondent's Case.

The respondent filed a memorandum of reply dated 19th November 2014 but filed on 17th April 2015 where it states that the claimant's salary was Kshs.16,150 and not 17,421 as alleged by the claimant. The respondent further pleads that the claimant's services were not terminated but he walked away after the respondent demanded an explanation why the fuel tank of the vehicle he was driving was tampered with. That after waiting for the claimant to report back, the respondent reported his desertion to the Ministry of Labour.

At the hearing, RW1 SYDNEY JAMES MBUTHIA, the Respondent's Accountant, testified that when the claimant reported back to work after the accident, he was asked what happened in Nyeri where he was injured and why the seal of the fuel tank he was driving was broken. That the claimant was not the only driver asked to explain about the broken seal. That the claimant walked away. That the claimant was not dismissed and that is why he has no letter of termination.

Under cross examination RW1 stated that the claimant reported back to work on 2nd September 2014 and was asked to explain what had transpired on the date he was injured. He stated that the claimant's last salary was paid in August 2014.

In the written submissions, the respondent submits that the claimant deserted duty when asked to explain what happened. That other drivers explained and are still at work.

It is submitted that by deserting duty the claimant breached his contract and the respondent was entitled to dismiss him from service under Section 44(4)(a) of the Employment Act. The respondent submits that it did not opt to repudiate the contract after the fundamental breach by the claimant. That instead it opted to write to the Ministry of Labour seeking advice on how to proceed. That by so doing the respondent discharged its burden under Section 43 of the Act.

It further submits that the claimant was not entitled to a hearing, as he was not available. That the claimant exhibited hostility towards the respondent and thus it was unable to ensure due process was complied with.

The respondent relied on the decision in the South African case of **Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** where the court sought the distinguish desertion from unauthorised absence from duty as follows –

"... desertion as 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 nor to return."

The respondent further submitted that that claimant knowingly and wilfully declined to offer an explanation to his supervisor. It relied on the case of **Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR**. In the case it was held that the respondent had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the respondent and its property. That in the case the employer was not required to prove but only rely on reasonable and sufficient grounds. That Section 44(4)(e) of the Act provides –

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

The respondent further relied on the case of **Standard Group Limited v Jenny Leusby (2018) eKLR** where the claimant abandoned the place of work and declined a hearing.

Determination

I have considered the pleadings, evidence on record and submissions. There is no contention that in February 2014, the claimant was involved in a road accident at work which led to his hospitalisation for three weeks following which he was on sick off until September 2014 when he reported back to work. Both parties also agree that upon reporting back to work the claimant was asked to explain about the broken fuel tank seal.

The claimant contends that he was chased away after being accused of breaking the fuel tank seal while the respondent contends that claimant declined to give an explanation and walked away, never to return.

The issues for determination are therefore whether the claimant was dismissed or deserted duty.

Section 74 of the Employment Act requires the employer to keep records of among other employment records, a record of warning letters or other evidence of misconduct of an employee. Section 10(7) provides that –

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

In this case, it is the word of the employee against the word of the employer. I take note of the testimony of RW1 to the effect that the claimant was asked to explain about the broken fuel tank seal by a supervisor who was no longer in the respondent's employment when he walked away. It means that RW1 was not present when the incident occurred and between him and the claimant, the claimant's evidence has a higher probative value.

Further, as provided in Section 10(7), the respondent was supposed to keep records of all disciplinary issues regarding employees. The only record the respondent produced was a letter to the Ministry of Labour dated 12th September 2014. The letter of is reproduced below –

“12th September 2014

Labour Officer

Ministry of Labour, Social Security and Services

Sub-County Labour Office

Industrial Area

P.O. Box 18183 – 00500

NAIROBI

Ref: Mr. William Gituma Gateere

This is to notify you that Mr. William Gituma Gateere an employee with Raa Limited as a driver was send for goods delivery to Mwea Chuka Meru route.

While there at Mwea, according to the report given back to the Company, he was dragged out of his lodging room by thugs beaten up to near death and left there.

The company took up the matter and did everything possible for his medical treatment paying all the medical bills and his monthly salary from that time to date.

There was a case where all the delivery vehicles which were fitted with fuel tank locks had all the fuel tanks seals broken for the purpose of siphoning the fuel.

When asked to explain why the vehicle assigned to him had fuel tank tampered with he became angry and walked out of the premises.

Kindly advise on the way forward.

Yours truly

SIGNED

David Malindu

Accountant

For RAA Limited”

This is not a record of evidence of misconduct as envisaged under Section 74(1) of the Employment Act. The respondent should have addressed a letter to the claimant and upon his failure to respond, invited him for a disciplinary hearing. It is only after failing to attend the disciplinary hearing that the respondent would be justified to dismiss him for refusing to subject himself to the disciplinary process or to explain about the tampering with the fuel tank seal.

As was held in the case of **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR** that –

8. The Claimant states that he was verbally terminated on 17th December 2010 after making a request to go on leave. The Respondent on the other hand states that the Claimant deserted duty after being summoned to a meeting to discuss under performance of his duties. Desertion amounts to gross misconduct and renders an employee liable to summary dismissal. However, like all cases of misconduct, it must be proved. It is not enough for an employer to simply state that an employee has deserted duty.

9. On 18th January 2011, the Respondent wrote to the Labour Office in Nairobi as follows:

“Dear Sir/Madam

RE: DESERTION (SIC) FROM WORK-EVANS OCHIENG I.D NO 13681728

The above refers:-

We wish to inform your good office that the above person has been our employee since Nov. 2008. He

absconded duty from 17th Dec 2010 to date.

Attempt to reach him through the cell phone and word

of mouth from his manager hasn't yielded much.

We therefore wish to inform your office that he's no longer in our payroll.

Yours faithfully,

For Njimia Pharmaceuticals

(signed)

BEATRICE WAIGANJOH

HUMAN RESOURCE MANAGER”

10. According to this letter, some effort was made to reach the Claimant. However, the Claimant's Manager who is said to have made these efforts was not called as a witness and the Court was therefore unable to assess the efficacy of these efforts. An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserting employee. At the very least, the employer must issue reasonable notice to the employee that termination of employment is being considered.”

Further in the case of **Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR**, the court held that –

17. For the benefit of litigants, the Court wishes to observe that an employer who advances desertion as a ground must be alert to the legal prerequisites to prove desertion. And desertion is not the same as absence without permission or leave, which occurs when the employee has an intention to return to work.

18. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.

19. The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary.

But that is enough observation for now.

20. The Court has perused the appointment letter dated 10 January 2012. It did not provide for a fixed term contract which would be renewed on expiry. It was in the nature of what is loosely referred to as permanent employment.

21. The Respondent could not purport not renew the contract which was not a fixed term contract. To bring it to an end, it was duty bound to give one month written notice or pay in lieu of notice. No notice was given and no pay in lieu was offered.”

In the case of **Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR**, the court held that –

“Desertion of Duty or Unlawful Termination

9. In its Reply to the Claimant's claim, the Respondent states that the Claimant himself deserted duty after being involved in several instances of gross misconduct.

10. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR**).

11. In his testimony before the Court, the Respondent's Workshop Supervisor, John Omenda Oloo accused the Claimant of careless performance of duty and reporting for duty while intoxicated. When put under cross examination, Oloo stated that the Claimant was terminated on account of poor performance.

12. With these conflicting accounts by the Respondent, the Court was unable to identify a specific reason for the termination of the Claimant's employment. At any rate, none of the grounds were established at the shop floor and the ensuing termination was therefore substantively and procedurally unfair and the Claimant is entitled to compensation."

Further in the case of **Chiguba Zuma Chiguba v Njucu Consolidated Company Limited [2018] eKLR**, the court held that –

“Desertion of Duty or Unlawful Termination

8. The Claimant told the Court that his employment was terminated after he reported an attempted theft at his assignment site. In its Reply, the Respondent admits that there had been incidents of theft at the site but states that the Claimant deserted duty on the heels of reassignment of duty.

9. Desertion of duty is a serious offence which may attract summary dismissal. It must however be proved. The Court was referred to the decision in **James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR** where my brother, Radido J. held that an employer relying on desertion as a ground for termination of employment, must demonstrate attempts made to reach out to the employee, to establish their whereabouts. This is the legal position as I understand it. It is therefore not enough for an employer to simply state that an employee has deserted duty.

10. In the instant case, the Respondent did not show any attempts made to reach out to the Claimant with a view to establishing why he had not reported to work. In light of this, the Court rejects the Respondent's line of defence and thereby adopts the Claimant's testimony that his employment was unlawfully and unfairly terminated.

It is not enough for an employer to say an employee has deserted duty and do nothing about it as was the testimony of RW1 who in re-examination stated “we cannot force someone to come back if he walks away.” The employer cannot be an observer or sit on the fence where an employee commits any act of misconduct. The law permits, and requires, an employer to take action and bring the matter to a close.

I find that the respondent failed to accord the claimant a hearing in the manner provided under Section 41 of the Employment Act. Further, the respondent failed to prove that it actually asked the claimant to explain about the broken seal of the fuel tank as no evidence was produced of the same. This is an explanation that should have been sought in writing and the claimant required to respond to in writing for record purposes.

For the foregoing reasons I find the termination of the claimant's employment unfair both substantively for want of proof of reason for termination, as well as procedurally, for failure of fair procedure.

Remedies

The claimant's prayer for notice of one month's salary succeeds and I award him **Kshs.16,150** being one month's salary in lieu of notice based on his contract and payslips produced by the respondent.

The claimant's prayer for salary for September succeeds only in respect of days worked as he is not entitled to salary for days he did not work. According to the pleadings, the claimant left work on 8th September 2014. I thus award him salary for 8 days worked in September 2014, in the sum of **Kshs.4,970**.

I do not think the claimant has made a case for award of compensation equivalent to twelve months as prayed. Taking into account all the circumstances of this case I will award him compensation equivalent to three month's salary in the sum of **Kshs.48,450**.

The total award is Kshs.69,570.

The respondent will pay the claimant's costs for the suit. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

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, the 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 the 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.

MAUREEN ONYANGO

JUDGE