

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 324 OF 2017

ALEXANDER MAINA MACHARIA.....CLAIMANT

VERSUS

PETER WANJAU MAINA t/a RIPPLE CAFE.....RESPONDENT

JUDGMENT

1. The Claimant sued his former employer seeking to recover for his alleged unlawful dismissal. He averred that the Respondent dismissed him via SMS on 21st May 2017 and that before the dismissal there was no show cause or any misconduct proved. He sought a declaration that the dismissal was unlawful and unfair and the payment of damages for the unlawful dismissal, unpaid leave for two years, unpaid salary arrears for 20 days worked in the month of May 2017, one month's salary in lieu of notice, overtime @8hours per day for 2 years and costs of the suit and interest at court rates.

2. The Respondent filed a defence and counterclaim in which the Respondent averred that the Claimant deserted work after he was asked to have a meeting with the Respondent to explain why he was reporting late for work as well as other misconduct at the workplace. The Respondent counterclaimed a sum of Kshs. 91,380/- comprising of salary advance and salaries for other employees given to the Claimant to pay out but which the Claimant failed to pay as well as money for the supply of tea to AA driving school that he failed to ensure was done. The Respondent thus sought the said sum plus interest thereon at court rates. No defence to the counterclaim was filed.

3. The Claimant testified as did the Respondent's witness Peter Wanjau Maina. The Claimant testified that he was a manager at the Respondent's restaurant and he earned Kshs. 17,000/- before his dismissal. He said that he was in a matatu from Karatina on the way to the office when he received a call notifying him the restaurant was not opened. He received an SMS advising him to wait for communication which was not forthcoming. He thus sought payment of his dues as per his claim. In cross-examination he stated that the text was a dismissal as he was told *Naona usiende. Hiyo sio saa ya kazi. Tuongee nikitoka Church*. He did not get a call and he waited the whole of May and June and then in July he went to check what had happened. He testified that the Respondent gave him Kshs. 40,000/- to pay salaries and the sales were 15,600/- which he added to the sum but the entire lot was stolen and he reported to the Police. He stated that AA used to pay Kshs. 4,800/- a month and the sum was not lost. He testified that the staffs were paid and that the CID were to investigate. He said that the Respondent declined to have Police involvement in the matter and thus the investigation was stalled. He reiterated he was dismissed through SMS. In re-examination he stated that he was asked to report the matter to Police which he did and that he was not arrested for the theft of the funds and that it was only when he sought his dues that the issue of the funds lost in 2016 came up.

4. The Respondent's witness stated that the Claimant was initially repaying a debt and the salary was at first some 12,000/- a month then 15,000/- at the time he left. He stated that the Claimant was opening and closing the hotel, paying the suppliers and paying the staff. He stated that the Claimant was not heeding his requests and because he had not hired him, he requested the Claimant not to go to the hotel. He testified that on the material day he called the Claimant 5 times with no answer and when the Claimant called, he told him not to go to work as it was rather late to be opening the premises. Regarding the lost money, he stated that he left the Claimant with 40,000/- to pay plus some 40,980/- from the weekend sales and instead of paying the salaries he called to say the cash was lost. He testified that the Claimant reported the matter to the Police after 10 days because he kept asking about the cash. He said that o the AA tea, the Claimant could not account for tea payments for 2 months which was 10,400/-. He stated that for the 1st year the Claimant reported to work properly and never went or sought to go on leave. He testified that the Claimant had gone to vote for nomination of a candidate and that was why he was coming late on 21st May a Sunday. He stated that the Claimant did not need to stay there the whole day as his role was to open and close the business. In cross examination he stated that the Claimant became truant in the 2nd year. He testified that he did not dismiss the Claimant who was to work to clear the debt he owed the Respondent. He stated the Claimant was to open and close the restaurant and that he received a call from a customer telling him the Claimant had not opened and that is why he called the Claimant and told him not to bother opening as it was late. He stated that the Claimant went on off days and never sought to go on leave. In re-examination he testified that the Claimant did not report to work and did not return after that day upon receipt of the SMS asking him not to open the café. That marked the end of oral testimony.

5. Parties filed submissions in which the Claimant submitted that he was unlawfully dismissed. He asserts that the Respondent did not prove the counterclaim. He submitted that the Respondent was duty bound to connect him to the alleged theft which the Respondent failed to do. He submitted that was not in any event, the reason for the separation. The Claimant asserts he reported the alleged theft. The Claimant submitted that Section 43 of the Employment Act placed a burden on the Respondent to prove the reason for the termination. The Claimant submitted that the issue of the theft was an incident that had occurred a year prior and was thus not a valid reason for termination. The Claimant submitted that the Respondent was liable to pay the relief sought by the Claimant.

6. On his part, the Respondent submitted that the Claimant had terminated the contract by not reporting to work from 22nd May 2017 after the meeting aborted. It was submitted that the communication between the parties was intended to deliberate how the parties would improve their performance of the contract of employment but the Claimant had failed to go to work from the date of the communication. The Respondent cited the case of **Price v Guest, Keen & Nettle-Folds Ltd [1918] Scottish Law Reporter Vol. LVI. 361** where the House of Lords held that the onus of proving the discontinuance of employment is on the employee and where there is no such evidence to establish

the discontinuance by the employer, the claim in respect thereof should be dismissed. The Respondent also cited the case of **SAS Service Partners v Whalley (1983) ICR 511** a decision of the Employment Appeals Tribunal (EAT) which was to the effect that the determination of the question on who between the employer and the employee terminated the contract of employment is a question of fact taking into consideration all the circumstances of the case. The Respondent submitted that the Claimant repudiated the contract of employment by not reporting to work from 22nd May 2017 to date. The Respondent also relied on the case of **Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd [1962] 1 ALL ER 474** and submitted that it was the non-defaulting party who was entitled to claim any damages or compensation arising from repudiatory breach of contract. The Respondent thus urged the dismissal of the Claimant's suit.

7. The Claimant was engaged by the Respondent to man the Respondent's business. From their accounts, the Claimant was a manager of sorts. He was hired and was repaying a debt owed to the Respondent and thereafter was earning a sum of Kshs. 15,000/- a month which was later increased to Kshs. 17,000/-. The Claimant was accused of pilferage or loss of various sums which the Respondent counterclaimed. The Claimant was ostensibly dismissed by SMS. The SMS sent was to the following effect - *Naona usiende. Hiyo sio saa ya kazi. Tuongee nikitoka Church* which translates to 'I do not think you should report. That is not the time to go to work. Let us talk after Church'. There is no other conversation that the two had even after the Respondent left church on the material day. The Claimant had been running late and was therefore not able to open the restaurant on time as expected prompting the message. Taken as a whole, the text was not as the Respondent argues an invitation to have a discussion on performance but a bar to report to work. It was what would amount to dismissal as the Claimant was thereby asked not to go to work. He however stretched things a bit far by not checking on the Respondent that month or the next and only went to work in July. The Respondent on his part did not bother with the Claimant until the suit was filed. The Claimant asserts there was unlawful dismissal while the Respondent asserts that the Claimant failed to report to work. In my finding, the Claimant failed to report to work on account of the SMS he received. Whereas there was an issue that seemed unresolved relating to loss of money, that had occurred a year previously and was not the main reason for the falling out. It seems the Claimant had failed to report to work on time prompting the response by the Respondent. The Claimant did not avail any requests for leave that were denied by the Respondent. By his own admission, on the date he was fired he was travelling from Karatina after some off days. The Claimant failed to report to work after the day he was told not to show up late. That is not in keeping with the expected conduct of an employee. He did not indicate that the SMS sent was an express dismissal but only a telling off. If he had gone the following week he perhaps may have had issues clarified. In my view there was no termination and the suit is therefore only fit for dismissal as the Claimant failed to report to work. I dismiss it but make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 12th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar