



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 205 OF 2017

MOSES GICHUHI GATERU.....CLAIMANT

VERSUS

NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was an employee of the Respondent working as a driver. He has sued the Respondent for dismissing him summarily without terminal benefits. He averred that he was employed as a driver in 2011 earning Kshs. 21,000/- a month. He avers that he worked diligently until September 2016 when he was summarily dismissed. He avers that he was on his normal duties as a driver to one of the directors when he was verbally informed by the director to go to Thika head office and clear with the company and that his services as a driver had been terminated. After the Claimant's persistent demands to know the reason for termination and after reporting the matter to the labour office in Thika, he was issued with a dismissal letter alleging that he had deserted employment. The Claimant averred that he was summarily dismissed without due process and that the termination was illegal, unfair, wrongful and inhumane, contrary to the basic tenets of labour law and natural justice. The Claimant therefore seeks his terminal benefits, to wit, accrued leave pay of Kshs. 105,000/-, overtime pay amounting to Kshs. 1,417,500/-, service pay amounting to Kshs. 52,500/- as well as compensation for the unlawful termination to the maximum of 12 months' gross salary – Kshs. 252,000/-, costs of the suit plus interest on the sums claimed.

2. The Respondent in its response denied the Claimant's allegations and asserted that the Claimant had been instructed on the 16th September 2016 to report to the head office for further duty allocation but he failed to report. The Respondent averred that the Claimant deserted his employment by failing to obey those instructions. The Respondent confirmed that the Claimant took up the matter with the Labour offices and that the two parties were invited for a conciliatory meeting which took place on 1st February 2017 and the Respondent averred that the Claimant failed to give any explanation for desertion. The Respondent denies that the Claimant was dismissed without notice and maintained that it paid him all his dues. The Respondent further averred that the Claimant's NSSF deductions were remitted in time and a claim for service pay cannot lie. It averred that the Claimant had approached the court with unclean hands by failing to disclose that he is the one who deserted duty and therefore cannot claim and benefit from the same. It prayed that the court dismisses the suit with costs to the Respondent.

3. The Claimant testified on his own behalf and the Respondent called Mike Murimi a former HR manager of the Respondent as witness. The Claimant adopted his statement as evidence and testified that he was a driver earning a salary of Kshs. 21,000/- per month and that he used to drive heavy and light vehicles. He stated that on 16th September 2016, he had prepared to drive his director but before they could drive off he went to attend to a short call and when he came back he saw his boss Samwel Wachira on the wheel and that the director left thereafter. The director told him to follow him to Chiromo and when he got there the boss told him to go to the head office, clear and leave. He identified the clearance form that he signed on that day of 16th September 2016 in court. He stated that he went home and waited to be called and later sought the intervention of the Labour office in Thika which convened a meeting with the employer. The Claimant stated that at the meeting it was ordered that he be paid. He testified that after that, he was called to collect his dues but he stated that the dues were not properly calculated. He stated that he was issued with a dismissal letter after the meeting. He denied having deserted the job and stated that he was told to clear and go home and he followed the instructions. He testified that he never used to go on leave and he used to work overtime, including holidays and he sought for compensation. In cross-examination he confirmed that his dues were paid and that he signed the letter tabulating the dues. On re-exam he said that he signed the letter so the he would have evidence of the dues but they were not enough according to him. He also testified and confirmed that he was employed in 2008 and not 2009 as indicated in the statement of claim.

4. The Respondent's witness Mike Murimi adopted his statement and testified that the Claimant was employed as a driver and he was instructed by the director to report to the head office on 16th September 2016 but he refused. He stated the Claimant was unreachable and that the next thing they received was a letter from the labour office calling for a conciliation meeting. He confirmed that he attended the meeting and they discussed the Claimant's payment. He further asserted that the Claimant refused to take an alternative employment in the Respondent. He testified that the Claimant was paid three years leave and for days worked. He also asserted that the company used to pay statutory deductions - NSSF and NHIF on behalf of the Claimant. In cross-examination he confirmed that he did not know the circumstances that led to the transfer of the Claimant. He averred that the Claimant may have been unwilling to report to the head office for deployment and

that his failure to report was desertion. He confirmed that the Respondent did not issue the Claimant with a notice of dismissal and averred that it was a summary dismissal. He stated there was no internal hearing accorded to the Claimant apart from the meeting they had with the labour offices. On the issue of tabulation of dues, the witness for Respondent confirmed that there was a miscalculation on their part. On re-exam he stated that they gave the Claimant an opportunity to go back to work but he refused. He stated that the Claimant had deserted employment and that is why they could not issue him with a notice.

5. The Claimant filed submissions but the defendant did not file its submissions. In his submissions, the Claimant stated that he was sent to the main office in Thika by the director on 16th September 2016 and upon reaching there, he was informed by the manager that his services had been terminated with immediate effect without any plausible reason. He submitted that the Respondent failed to accord him any hearing and he thus was condemned unheard and was not given an opportunity to appeal the decision to dismiss him. He submitted that the Respondent failed to prove that the reasons for dismissal were valid or that the process was fair. He submitted that due process was breached. He cited the case of **Donald Odeke v Fidelity Security Ltd [2012] eKLR**. He submitted that he was not heard and that it was only after the conciliation meeting that the Respondent issued him with a letter some 6 months after the impugned summary dismissal. He submitted that he was not accorded due process and the manner in which he was dismissed was *ipso facto* unfair/unlawful warranting the suit. He submitted that the dismissal was not only unfair but that there was no valid reason and that it was therefore wrongful termination. The Claimant rebutted the Respondent's averments that he received all his dues and signed a discharge voucher and submitted that he signed it due to threats from the Respondent that he would lose all his dues if he failed to sign. He placed reliance on the case of **Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013] eKLR**.

6. From the foregoing, the following issues fall for determination:-

- i) Whether the Claimant deserted duty or he was unlawfully terminated.
- ii) Whether the Claimant discharged the Respondent.
- iii) Whether the reliefs sought should be granted.

7. As to whether the Claimant deserted duty or he was unlawfully terminated, desertion is provided for in Section 44(4)(a) as follows:-

44.(4)(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

Desertion is also defined in **Black's Law Dictionary, Ninth Edition** as **the wilful and unjustified abandonment of a person's duties or obligations, especially to military service or to a spouse or family**. In the case before me, the Claimant stated that he had prepared to carry out his normal duties of the day, but first he went to attend to a short call and on returning he found that his boss had taken control of the vehicle. Thereafter he was informed to go to the main office in Thika where he was verbally terminated and was told to clear. He followed instructions from his manager and cleared as instructed. His actions were therefore not wilful he acted as per his boss's instructions. The Respondent on the other hand alleges that the Claimant deserted duty after being told to go to the head office for further duty allocation but he refused. 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. The Respondent's witness testified that they tried to follow up with the Claimant, however there is no such evidence to show that indeed they tried communicating with the Claimant to find out why he had absconded what efforts the Respondent undertook to see if the Claimant could come back to work. After the verbal dismissal of the Claimant the Respondent did nothing until it received a letter from the labour offices requiring it to attend to a conciliation meeting. They ought to have at least attempted to contact the Claimant if at all he had deserted duty as alleged. On the issue that the Claimant refused to adhere to instructions of being allocated further duties at the head office, there is no clear details of what the new duties were. Similarly, there is no evidence of such new duties as the Claimant did not receive any letter detailing such duties and or any communication prior to his dismissal.

As to whether fair procedure was followed before the dismissal, it is imperative to recall that prior to dismissal, an employer has to give an employee the safeguards of Section 41 of the Employment Act. The Claimant in the instant suit testified and stated that he was verbally instructed to go to the head office and upon reaching there he was informed that his services were terminated and he was requested to clear and sign a clearance form which instructions he obeyed. The Respondent confirmed that it did not issue the Claimant with a notice of dismissal nor did they accord him a hearing. The Respondent only confirmed having a meeting with the Claimant before the labour officers but there was no internal hearing before arriving at a decision to terminate the Claimant. This therefore shows that the decision to dismiss was so abrupt and in violation of Section 41 of the Employment Act.

8. However, the Claimant signed a discharge voucher on 17th March 2017. In his pleadings he did not state that he had signed a discharge voucher. It was the Respondent who brought the existence of the same to the court. In his submissions, the Claimant asserts that he signed the discharge voucher on accounts of threats. The discharge he signed is in the nature of a contract. As stated by the Court of Appeal in the case of **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR**

In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties.

9. A contract can only be vitiated on the grounds of coercion, mistake or fraud, duress, misrepresentation, undue influence and illegality. The attempt by the Claimant to disparage the contract he executed is therefore to be reflected against this. He states that he was forced to sign it yet there were no particulars of the coercion. No evidence was led on the alleged coercion (threats) and therefore it is not sufficient to vitiate

his contract. As held by the Court of Appeal, I do not discern any intention for the Claimant not to be bound by the discharge he executed. He could comfortably had indicated the signing was without prejudice or declined to discharge the Respondent. In the premises the claim as filed despite showing merit on the issue of dismissal, the Claimant opted to release the Respondent from any liability by signing the discharge by stating *I have received my full and final settlement of my dues and that I have no further claims whatsoever at all against Njuca Consolidated Company Limited, its affiliates, successors and assignors*. The suit is therefore dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar