



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 201 OF 2018

GIBSON OMARI NYAMBANE.....CLAIMANT

v

ESGRAY COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. Gibson Omari Nyambane (Claimant) was offered employment by Esgray Company Ltd (Respondent) as a Gym Instructor on 2 November 2016.
2. On 21 February 2018, the Claimant instituted legal proceedings against the Respondent alleging unfair termination of employment, breach of contract and refusal by the Respondent to pay him terminal benefits.
3. In its *Response*, the Respondent countered that the Claimant absconded from work, and that there was no unfair termination of employment.
4. The Cause was heard on 4 March 2019 when the Claimant testified, and on 10 June 2019 when the Respondent's General Manager and a Labour Officer testified.
5. The Claimant filed his submissions on 25 June 2019 while the Respondent filed its submissions on 13 August 2019.
6. The Court has considered the pleadings, evidence and submissions.
7. The parties filed separate Issues for determination, but the Court has identified and condensed the Issues as
 - (i) Was there unfair termination of employment
 - (ii) Did the Respondent breach the contract of employment and
 - (iii) Appropriate remedies/Orders.

Unfair termination of employment

8. The Respondent's General Manager testified that the Claimant absconded from work with effect from 18 November 2017 after calling in sick and seeking 21 days leave (he was granted 14 days), and that he only reported back on 11 January 2018 when he was suspended pending a disciplinary process.
9. According to the witness, the Respondent received a demand letter from the Claimant's advocate around 24 January 2018. He also stated that the Claimant failed to appear for a disciplinary hearing at which a Labour Officer was present.
10. The Claimant on the other hand asserted that his employment was terminated on 11 January 2018 without notice or being afforded an opportunity to be heard.
11. The Claimant caused a demand letter to be sent to the Respondent on 24 January 2018 alleging unfair termination of employment.
12. The Respondent sought legal advice and its advocate replied to the demand letter on 7 February 2018 indicating that the Claimant was

under suspension, had absconded after going on leave, but was yet to be dismissed.

13. As a demonstration that there was no dismissal, the letter stated that the Claimant had been paid salary for January 2018 and that he would be informed of disciplinary proceedings in due course.

14. On 15 February 2018, the Respondent sent an email to the Claimant inviting him to attend a disciplinary hearing on 16 February 2018.

15. In a reply dated 16 February 2018, the Claimant's advocate maintained that the Claimant had been dismissed with effect from 11 January 2018, and that he would be moving to Court.

16. The Claimant did not attend the disciplinary hearing.

17. The Claimant did not report to work after 11 January 2018 because he believed his contract had been terminated. The Respondent, in a formal response to a demand alleging unfair termination informed the Claimant's advocate that a dismissal had not been effected and that a disciplinary hearing would be held.

18. The Claimant maintained that he was no longer an employee and therefore could not be susceptible to disciplinary action.

19. The Court is satisfied on the material on record that the Respondent had not made up its mind to dismiss the Claimant by 11 January 2018. The question of unfair termination of employment in the circumstances does not arise.

20. The contract herein was frustrated by the Claimant's mistaken belief that his services had been terminated despite the Respondent indicating otherwise.

21. The contract became physically impossible to be performed. If the Claimant had cooperated and participated in the disciplinary hearing scheduled for 16 February 2018, the finding could have been *different*.

22. *Pay in lieu of notice and compensation* are therefore not available remedies.

Breach of contract

Wages for December 2017 and January 2018

23. The Claimant sought Kshs 32,800/- being wages for December 2017 and Kshs 13,876/- being earned wages up to date he contended his contract was determined on 11 January 2018.

24. The Respondent filed salary vouchers up to November 2017, and urged that the Claimant was not entitled to wages for December 2017 because he did not report on duty.

25. Section 19(1)(c) of the Employment Act, 2007 authorises an employer to deduct wages for periods when an employee is absent without permission or lawful cause.

26. The Claimant did produce a sick-sheet to demonstrate that he had lawful cause to be away from work in December 2017. He is entitled to wages for the month.

27. In respect of January 2018 wages, the Respondent filed records to show the same was paid to the Claimant around 5 February 2018.

Leave

28. On account of leave, the Claimant sought Kshs 32,800/- being accrued leave for 1 year.

29. The Respondent produced a copy of the Claimant's leave records up to 24 November 2017.

30. The Claimant would therefore be eligible for *pro-rata* leave from November 2017 to 11 January 2018. But considering that the Claimant did not as a matter of fact work after November 2017, the Court would decline to make any award under this head of claim.

Certificate of Service

31. A *certificate of service* is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

32. The Court finds that the contract between the parties was frustrated by the conduct of the Claimant and therefore unfair termination of employment does not arise.

33. The Court however finds breach of contract and enters judgment for the Claimant for

(a) Wages December 2017 Kshs 27,800/-

34. Respondent to issue certificate of service within 21 days.

35. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 16th day of September 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Onenga instructed by Omongo Onenga & Co. Advocates

For Respondent Mr. Njoroge instructed by Njoroge Njeri Advocate

Court Assistant Lindsey