



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE. NO. 49 OF 2015

GEORGE OTIENO ORACHA.....CLAIMANT

-VERSUS-

GOGNI RAJOPE CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a driver from August 2007 till September 2013. His salary was Kshs.32,000 per month. He brought this suit on 19.1.2015 alleging that the respondent had unfairly terminated his employment and prayed for the following reliefs:-

- (a) Payment of Kshs.720,000/= as particularized in paragraph 6 of the Memorandum of Claim.
- (b) Costs of this suit
- (c) Interest on prayer (a) above at court rates from the date of filing this suit till payment in full.
- (d) Any other relief that this honourable court may deem fit to grant in the circumstances.

2. The respondent denied the alleged unfair termination and averred that it is the claimant who terminated the contract by deserting work from 12.9.2013 without any prior notice. She therefore prayed for the suit to be dismissed and prayed for one month salary in lieu of notice by way of a counterclaim.

3. The main issue for determination arising from the pleadings is whether the claimant was unfairly dismissed by the respondent or he deserted employment without prior notice. The parties agreed to dispense with the oral hearing and opted to rely on their pleadings, written witness statements and the documents filed, and proceeded to dispose of the suit by written submissions.

Claimant's Case

4. In his statement dated 19.1.2015, the claimant stated that he was employed by the respondent on 27.8.2007 as a Truck Driver and worked in various places in Kenya and South Sudan. In September 2013, he was working in Muhoroni where the respondent was constructing a road. On 12.9.2013, he sought 3 days off to attend hospital at Kisumu because he had previously been diagnosed with stomach ulcers and admitted to Kisumu District Hospital. He sought the permission from his Site Foreman Mr. Bob Kizamba and his immediate boss Engineer Moses Otieno.

5. The claimant further stated that on 14.9.2013, Engineer Moses Otieno called him and informed him to report to the office at Kisumu on Monday 16.9.2013 before resuming work at the site. He reported to Kisumu Office on 16.9.2013 at 8.00 a.m. as directed but found that Engineer Otieno had left for the site at Muhoroni and followed him.

6. On the way he met the truck he was assigned being driven by another driver. While talking to the driver, Engineer Otieno came and told him not to step into the truck until the management called him back. He therefore went back home at Muhoroni until 23.9.2013 when he was called by Engineer Otieno to Kisumu office on 25.9.2013. When he arrived, he found Engineer Otieno and the Project Engineer Mr. Fred Adumbo who asked him about the sale of murrum using truck Registration KBS 701K by driver Peter Ochieng. He however denied knowledge of the said sale and explained that he was on sick off when the alleged sale occurred. Thereafter, Engineer Adumbo told him to stay away until the management called him after further investigations.

7. The claimant further stated that he was never called back until 23.12.2013 when he decided to go back to the office and met the Administrator Mr. Wilbur Omondi who told him that he had received the investigations report. He further stated, since September 2013, the

respondent stopped paying his salary and as such he interpreted that to mean that his employment had been terminated. He therefore asked the Administrator for a recommendation letter.

8. In view of the foregoing, he prayed for the reliefs set out in the claim including terminal dues, salary arrears, and compensation. He concluded by stating that since September 2013, he has not secured another employment.

9. Mr. Peter Ochieng Ombedo, filed a written statement witness dated 16.3.2015 to support the claimant's case. He stated that on 13.9.2013, the truck allocated to him, KBS 703K got a puncture. He therefore decided to use KBS 701K because the claimant was away attending hospital for medical check up. While going to deliver murrum at the site, the road became impassable due to heavy rain and he off loaded it not from the designated point.

10. Mr. Ochieng further stated that he was later summoned to the respondent's office at Kisumu and after explaining what happened to Engineer Moses Otieno and Engineer Fred Adumbo, he was told to stay away until he was called back after further investigations. Thereafter, he was never called back to work. He contended that the employer did the same to the claimant, Mr. Michael Mugwe Mwangi, Ezra Gumbo and Bob Kizamba but later only Bob Kizamba was called back to work.

11. Mr. Michael Mugwe Mwangi, also wrote a statement dated 16.3.2015 to support the claimant's case. He stated that on 13.9.2013, he was operating an excavate and loading murrum to trucks. That on that day Mr. Ombedo was driving truck KBS 701K which was normally driven by the claimant.

12. He further stated that on 16.9.2013, he was summoned to Kisumu Office and interrogated by Engineer Moses Otieno, Engineer Adumbo and a subcontractor Mr. Lawrence about murrum that was diverted. He however denied knowledge of the alleged diversion of the murrum and maintained that his duty was only to load the trucks at the quarry. After the explanation he was told to stay away until he was called back, after investigations. He however was never called back and he learned that the same was done to the claimant, Peter Ochieng, Ezra Gumbo and the foreman Mr. Bob Kizamba.

Defence Case

13. Mr. Moses Oteino filed a written statement dated 6.3.2015 in which he stated that in he was the respondent's site Engineer in September 2013 for the constructions of Sugar Board Road Project in Muhoroni. His duties included direct supervision of tripper drivers including the claimant herein.

14. On 12.9.2013, the claimant failed to report to work without any explanation or leave. He denied the allegation by the claimant that he gave him leave or directed him to report on any other date. He contended any leave request by an employee must be approved by the Supervisor, Project Engineer and the Head of Finance and Administration.

15. He further stated that as the site Engineer, he is required to report to the Project Engineer and the Finance and Administration Department if an employee absents himself from work for a period of 7 days. Accordingly, after the claimant absented himself from work for 7 days from 12.9.2013, he reported the matter to the Project Engineer and the Finance and Administration department. He concluded by stating that since 12.9.2013, the claimant never explained his absence and has not cleared with the Finance and Administration Department as required. He therefore prayed for the suit to be dismissed with costs.

16. Mr. Fredrick Otieno Adumbo also filed a written statement dated 6.3.2015 in which he stated that in September 2013 he was the Project Engineer during the construction of the Sugar Board Road Project. He further stated that the claimant was Tipper driver working under Moses Otieno who was the site Engineer.

17. He stated that on 12.9.2013, Mr. Moses Otieno informed him that the claimant had absented himself from work without any word. Thereafter, he reported the matter to the Head of Finance and Administration Mr. Wilber Omondi to take appropriate action after the claimant absented himself continuously for days.

18. He further stated that there was never any investigation being done at the time and contended that the allegation that the claimant was told to go home pending investigations is not true. He therefore maintained that he claimant absconded duty from 12.9.2013 without any permission or direction from the respondent which led to termination of his employment contract without prior notice.

19. Mr. Wilber Omondi also filed a written statement dated 6.3.2015. He stated that he is the Head of Finance and Administration Department at the respondent. He confirmed that the claimant was employed by the respondent from August 2007 as a Tipper Driver earning a gross pay of Kshs.25,000 per month.

20. He further stated that in September 2013 the claimant was assigned to work as a Tipper Driver in Muhoroni under the Supervision of Engineer Moses Otieno. On 19.9.2013, he received a report from Engineer Moses Otieno that the claimant had absconded duty for 7 consecutive days period from 12.9.2013. The said report was also confirmed by the Project Engineer.

21. He further stated that the claimant absconded duty for 4 months until 23.12.2013 when he went to the Kisumu Office to inform him that he had secured another job and he was in need of a recommendation letter. He confirmed that he gave the claimant the recommendation letter but thereafter the respondent was served with demand letter by the claimant's counsel demanding Kshs.448,000 as terminal dues.

22. He denied the claimant's claim for terminal dues and contended that it is the claimant who should be ordered to pay one month salary for terminating the contract of service without notice.

Claimant's Submissions

23. The claimant submitted that the allegation that he deserted work in wild, malicious and unsupported by any evidence. He maintained that he was called to the Kisumu Office on 16.9.2013 and interrogated about murrum that was diverted while he was away attending hospital. That after denying knowledge of the matter, he was directed to go home to await further investigations. That from that time he was not paid his salary.

24. He relied on *Michael Mwangi Mugwe Vs Ceabud Engineering Services Ltd*, respondent's subsidiary company where Onyango J., found that the employer had unfairly terminated the employee in similar circumstances without subjecting him to disciplinary hearing. In the said case, the employer removed the employee from the payroll alleging that the employee had absconded work for 7 days without permission. He therefore prayed for reliefs sought in the suit based on gross pay of Ksh.32,000.

Respondent's Submissions

25. The respondent maintained that the claimant is the one who terminated his employment contract without prior notice by absconding duties from 12.9.2013. She therefore denied the claim for salary in lieu of notice, compensation for unfair termination and severance pay. She contended that the claimant has not proved by evidence that he was earning Kshs.32,000 and maintained that his salary was Kshs.20,833 basic pay plus Kshs.4,167 house allowance.

26. In conclusion, she dismissed the precedent cited by the claimant as irrelevant because the facts and the circumstances of that case are distinguishable from the instant case. She therefore prayed for the suit to be dismissed with costs and that her counterclaim be allowed with costs.

Analysis and determination

27. There is no dispute that the claimant was employed by the respondent until September 2013. The issues for determination are:-

- (a) Whether the claimant deserted his employment or he was unfairly dismissed by the respondent.
- (b) Whether the claimant is entitled to reliefs sought.
- (c) Whether the counterclaim should be allowed.

Unfair termination or desertion

28. The claimant testified that he obtained 3 days leave from his Supervisor Engineer Moses Otieno on 12.9.2013 who later called him over the phone to tell him not to report back to work at the site before reporting to the office at Kisumu on 16.9.2013. That he complied with the direction. That on that day, Engineer Moses Otieno told him not to resume duty until the management called him back. That on 23.9.2013 he was summoned to Kisumu office and questioned about murrum which was diverted but he denied knowledge of the same since he was away attending hospital. Thereafter, he was told to go back home to await further investigation.

29. The respondent has steered clear from the issue of diverted murrum issue and maintained that the claimant absented himself from work from 13.9.2013 without permission or any explanation. His supervisor Engineer Moses Otieno denied the allegation that he gave permission to the claimant to be away for 3 days and contended that apart from him any leave requires prior approval by the Project Engineer and the Head of Finance and Administration.

30. The claimant has not produced any written evidence or eye witness to support the allegation that he was granted leave by Engineer Moses Otieno. I therefore agree with the defence that the claimant absented himself from duty from 13th-15th September 2013.

31. However, the court does not agree with the defence that from that period the claimant never reported back to work. The court believes the evidence by the claimant and his two witnesses that the respondent summoned them to Kisumu Office for questioning about diverted murrum and thereafter they were told to go away to await further investigations. The respondent denied that any investigations were being undertaken by her as alleged.

32. The respondent never paid claimant his salary for the days worked in September 2013 and the court agrees with the claimant that he was entitled to treat the contract of service as having been terminated by the respondent and his name removed from the pay roll. On that ground the court returns that the claimant did not desert his employment from 12.9.2013 but he was constructively dismissed by the respondent.

33. The question that arises is whether the said termination met the legal threshold for a fair termination within the meaning of section 45(2) of the Employment Act. Under the said provision termination is unfair if it is not grounded on a valid and fair reason and that fair procedure is followed.

Reason for the termination herein

34. The reason for the termination according to the respondent is absence from work contrary to section 44(4)(a) of the Act. The Court agrees with the defence that the claimant absented himself from work without leave or good course. He did not produce any written evidence or other form of evidence to prove that Engineer Otieno gave him permission to attend hospital for 3 days starting 13.9.2013. He further did not produce any medical certificate from a medical practitioner to prove that he was incapacitated during the said 3 days of his absence, I

therefore return that the respondent had a valid a fair reason under section 44(4)(a) of the Act to dismiss the claimant summarily.

The Procedure followed

35. In this case, there is no evidence whatsoever from the respondent to show that she subjected the claimant to any disciplinary hearing on the misconduct of absence from work without leave or good cause. All what is on record is the claimant’s evidence that he and other colleagues were interrogated on diverted murrum and not his absence from work. I therefore find that the facts of this case to be on all fours with those in *Michael Mugwe v Ceabud Engineering Services Limited* cited by the claimant where Onyango J held that:

“These facts were not rebutted by Rw1 who only testified that the claimant failed to report for duty and after 7 days his name was removed from the pay roll according to the policy of the respondent.

From the foregoing it is evident that the respondent terminated the claimant’s employment without subjecting him to a disciplinary hearing in terms of section 41 of the Employment Act and without giving him a termination letter or even informing him that his employment had been terminated.”

36. In addition to the foregoing, I must observe that the respondent did not prove by evidence that she was prevented from according the claimant a hearing because he was not reachable after reasonable effort to get in touch with him before removing him from the payroll. Consequently, the court returns that the termination of the claimant’s services was unfair within the meaning of section 45 of the Employment Act because it was done without following a fair procedure.

Reliefs sought

37. In view of the foregoing, I award the claimant one month salary in lieu of notice plus 4 months’ salary compensation for unfair termination by dint of section 35(1)(c) and section 49(1) of the Employment Act. In granting the said damages, I have considered the fact that the claimant served the respondent for over 6 years and he contributed to his dismissal through misconduct. The award is based on the gross salary of Kshs.25,000 made up of Kshs.20,833 basic pay plus Kshs.4,167 House Allowance.

38. In addition, I award the claimant salary for 12 days worked in September 2013 being Kshs.12,000 as admitted in the defence and counterclaim. I however dismiss the claim for severance pay because the termination was not through redundancy under section 40 of the Employment Act.

Counterclaim

39. In view of the funding herein above that the claimant never deserted work but rather dismissed by the employer, I dismiss the counterclaim for lack of merits.

40. I have found that the claimant did not desert his employment but he was dismissed by the respondent. I have further found that despite the respondent having a fair reason for dismissing the claimant, the termination was unfair because fair procedure was not followed. Consequently, I enter judgment for the claimant against the respondent in the following terms:-

Notice.....	Kshs. 25,000
Compensation	Kshs.100,000
Salary for September 2013.....	<u>Kshs. 12,000</u>
	Kshs.137,000 =====

The award is subject to statutory deductions but inclusive of costs and interest at court rates from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 18th day of October, 2019

ONESMUS N. MAKAU

JUDGE