



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1533 OF 2014

PAUL NDUNGU KIARIE CLAIMANT

v

EPCO BUILDERS LIMITED RESPONDENT

JUDGMENT

1. Paul Ndungu Kiarie (Claimant) was employed by Epcu Builders Ltd (Respondent) in 1994 as a Storekeeper and was later promoted to Batching Plant Operator.
2. On 25 July 2012, the Respondent *summarily dismissed* the Claimant and the reason given was the *failure to report to work from 10 July 2012* to the date of the dismissal.
3. The Claimant was aggrieved and on 2 September 2014, he sued the Respondent alleging unfair termination of employment and breach of contract.
4. The Respondent filed a *Response* on 1 October 2014 and the Cause was heard on 1 July 2019. The Claimant and the Respondent's Human Resources Manager testified.
5. The Claimant's submissions were not on file by this morning while the Respondent filed its submissions on 14 August 2019.
6. The Court has considered the pleadings, evidence and submissions and has identified the Issues arising for determination as examined hereunder.

Unfair termination of employment

7. The Claimant in contending that the termination of his employment was unfair testified that he got injured in the work place on 21 January 2012 and was treated at Kenyatta National Hospital and returned to work until 9 July 2012 when the Respondent's Transport Manager, Mr Kasan called him to the office and directed him not to report to work the next day.
8. He stated that he was not issued with a *show cause* notice or the reasons for the directive. He also stated that he was not called to a disciplinary hearing.
9. The Respondent's witness on his part testified that the Respondent was not aware of the Claimant's injury in the work place. According to the witness, the Claimant just disappeared from work and only resumed in March 2012 to claim he had been injured without providing any medical evidence of the alleged injuries.
10. The witness further testified that the Claimant failed to report to work from 10 July 2012 and was issued with a *summary dismissal* letter on 25 July 2012 for absconding from work. The letter was posted to the Claimant.
11. The witness further testified that the Transport Manager was not the Claimant's immediate supervisor, and therefore could not have had a role in his dismissal.
12. It is not disputed that the Claimant was away from the work place from January to March 2012.
13. The Claimant alleged he was injured in the work place on 21 January 2012 and was attended at Kenyatta National Hospital. However, he did not produce any sort of evidence to support the contention.

14. Such medical documentation, in the view of the Court, could have given *bona fides* to the Claimant's narration of events as to how the separation occurred.

15. The Respondent's witness testimony that the Transport Manager was not the immediate supervisor of the Claimant and therefore could not have played any direct role in his dismissal was not interrogated in any meaningful way.

16. The Court finds that the narration by the Respondent's witness was probably the truth.

17. Further, the Court keenly observed the Claimant. He did not appear an honest person or one given to telling the truth. The Court does not believe his version as to how the separation occurred. He was in a fundamental breach of his contractual obligations by failing to report to work without any lawful cause.

18. The Court finds this was not a case of unfair termination of a contract, but rather a repudiation of contract by the Claimant.

Breach of contract

19. The Claimant sought Kshs 4,875/- being unpaid salary for 9 days worked in July 2012, and Kshs 16,250/- on account of accrued leave.

20. The Respondent's witness admitted that the Claimant was not paid the earned wages and that he was due for annual leave starting August 2012.

21. In the circumstances, the Respondent should pay to the Claimant the earned wages and *pro-rata* leave up to date of separation.

Conclusion and Orders

22. The Court finds and declares that the Claimant's employment was not unfairly terminated but rather he repudiated the contract.

23. Nevertheless, the Claimant is awarded

(a) Wages up to 9 July 2012 Kshs 4,875/-

(b) *Pro-rata* accrued leave Kshs 16,250/-

TOTAL **Kshs 21,125/-**

24. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Mukeli instructed by Namada & Co. Advocates

For Respondent Ms Awuor instructed by Okwatch & Co. Advocates

Court Assistant Lindsey