



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 229 OF 2016

JOYCE KAMAIROH.....CLAIMANT

v

THE PROPERTY SHOW a.k.a.

THE PROPERTY SHOW WITH NANCY a.k.a.

THE PROPERTY SHOW WITH MUTHONI.....RESPONDENT

JUDGMENT

1. Joyce Kamairoh (Claimant) sued the Property Show (Respondent) on 18 February 2016 and she stated the Issue in Dispute as Unfair dismissal of the Claimant's services by the Respondent and failure by the Respondent to adequately compensate the Claimant.
2. In a Response and Counterclaim, the Respondent contended that the Claimant absconded from work when it was established she was working for/promoting a competitor.
3. The Respondent counterclaimed for 1 month pay in lieu of notice from the Claimant for breach of contract.
4. The Cause was heard on 6 December 2017 when Nzioki wa Makau J took the Claimant's and her witness (Georgette Adrienne Wambui) testimonies, and on 28 February 2018 when I took the testimony of the Respondent's 2 witnesses (Nzioki wa Makau J could not conclude the hearing due to his transfer to another station).
5. The Claimant filed her submissions on 15 March 2018 while the Respondent filed submissions on 5 April 2018.
6. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as

Whether the Claimant absconded and if the abscondment terminated the employment contract,

Whether there was unfair termination of employment,

Whether the Claimant worked overtime,

Whether the Claimant's salary included house allowance and

Appropriate remedies.

Abscondment

7. Absconding from work or desertion would amount not only amount to a *misconduct* warranting disciplinary hearing in terms of section 41 as read with section 44(4)(a) of the Employment Act, 2007 but a repudiation of contract.
8. Due to the nature of desertion, and considering the requirements of the law, an employer faced with desertion should make attempts to reach the employee in order for the employee to explain the absence.
9. Assuming that the Respondent's first witness testimony that the Claimant did not resume duty after attending an official engagement with Aberdare Hill Golf Resort on 5 October 2014 was true, the Respondent was expected to ask the Claimant to show cause why she should not

be summarily dismissed for being absent from work without permission or lawful authority.

10. In the view of the Court, the attempts to get an explanation through a show cause even if not successful, would pass statutory muster.

11. That is so because in terms of section 41(2) of the Employment Act, 2007 a hearing was required.

12. In the instant case, the Respondent's first witness who served as the General Manager at the time, stated that an attempt was made to call the Claimant.

13. However, the identity of the person who made the attempt was not disclosed. Even the telephone number used to call the Claimant was not disclosed.

14. On the basis of the evidence on record, the Court finds that no attempts were made to reach the Claimant to *show cause* or explain the desertion.

15. The Court has already observed above that apart from being a *misconduct* warranting summary dismissal, desertion or abscondment amounts to repudiation of contract.

16. Repudiation of contract, as a general rule in common law, does not terminate an employment contract.

17. The innocent party should accept the repudiation (see my decision in *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).

18. The common law position that a repudiated employment contract does not end until the repudiation is accepted by the innocent party was confirmed by the Supreme Court of the United Kingdom in *Geys v Societe Generale, London Branch* (2012) UKSC 63.

19. In the case at hand, the Respondent did not disclose whether it accepted the repudiation, for example, by writing to the Claimant to inform her that her contract had been brought to an end because of her failing to report at the designated locus for the due performance of the contract.

Unfair termination of employment

20. The Claimant filed a witness statement and the same was adopted as part of her testimony. The statement formed the basis of cross-examination.

21. In the statement, the Claimant asserted that it is the Respondent's Chief Executive Officer, Nancy Muthoni who called her and asked her to leave as her contract had been terminated, and that thereafter a security officer was sent to ensure she left. By that time, the General Manager had not arrived in the office.

22. The Claimant's colleague who testified in support of her case corroborated the testimony that the Chief Executive fired the Claimant in the presence of other staff and asked her to leave.

23. The Chief Executive Officer was not called to testify. The failure to call her was also not explained. The Respondent's witnesses who testified appeared to not have been privy to the incidents as stated by the Claimant and her witness.

24. There being no suggestion that the process contemplated by section 41(1) & (2) of the Employment Act, 2007 were complied with, the Court concludes that there was unfair termination of employment (the counterclaim in effect fails).

Overtime

25. The Claimant did not lead sufficient evidence as to the hours she worked beyond the contractually agreed hours and the Court finds that she did not prove this head of claim.

House allowance

26. The employment letter provided that the Claimant was entitled to a net salary.

27. That was a curious provision as it was not expressly declared whether the Respondent was to shoulder statutory deductions including tax.

28. Nevertheless, in terms of section 31 of the Employment Act, 2007, the Respondent was under an obligation to provide the Claimant with housing or pay an allowance to recover rent.

29. The other option was for the contract to provide that the remuneration was consolidated, which was not the case.

30. The Court therefore finds that the salary did not include house allowance, which the Claimant was entitled to (practice is to pay 15% of basic salary as house allowance).

Appropriate remedies

Pay in lieu of notice

31. With the conclusion that the termination of employment was unfair and by dint of section 35(1)(c) of the Employment Act, 2007 and the termination clause in the employment contract, the Court finds that the Claimant is entitled to this head of relief.

Overtime

32. This head of claim was not proved and the relief is declined.

House allowance

33. The Court finds that the Claimant is entitled to Kshs 60,000/- on account of house allowance as pleaded.

Lost income

34. No legal or contractual basis for the Kshs 120,000/- the Claimant would have earned had she served the contract to expiry was laid and the relief is found untenable.

Compensation

35. The Claimant served the Respondent for less than a year. She was on a 1 year fixed contract.

36. In the view of the Court, the equivalent of 1 month salary would be an appropriate compensation.

Certificate of Service

37. A certificate of service is a statutory right and the Respondent should issue one to the Claimant forthwith.

Conclusion and Orders

38. The Court finds and holds that the Claimant did not desert but had her contract unfairly terminated.

39. The Court awards the Claimant and orders the Respondent to pay her

(a) Pay in lieu of notice Kshs 40,000/-

(b) House allowance Kshs 60,000/-

(c) Compensation Kshs 40,000/-

TOTAL Kshs 140,000/-

40. Respondent to issue a certificate of service forthwith.

41. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 20th day of April 2018.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Ms. Muhanda instructed by Mudeshi Muhanda & Co. Advocates

For Respondent Mr. Wilson instructed by Muriu, Mungai & Co. Advocates

Court Assistant Lindsey