



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 670 OF 2015

FRANCIS MUSOMA MUSEMBI.....CLAIMANT

v

RAA LIMITED.....RESPONDENT

### JUDGMENT

1. The Court is called upon to determine the questions, *whether Francis Musoma Musembi (Claimant) was unfairly terminated from employment or deserted, whether Claimant had pending leave by time of separation, whether Claimant was paid earned wages for February 2015, whether the Claimant had outstanding loan with Raa Ltd (Respondent) at time of separation and appropriate remedies.*

2. The Cause was heard on 14 March 2018.

3. An attempt by the Respondent to secure an adjournment after the close of the Claimant's case was declined by the Court because it had failed to comply with Court orders issued on 24 May 2017 to file and serve witness statements within 7 days.

4. The Court also notes from the record that it is the Respondent who caused the adjournment on 24 May 2017 when the Cause had first come up for hearing.

5. The parties did not file submissions as ordered. The Court has given due consideration to the pleadings and evidence on record.

#### **Desertion or unfair termination of employment**

##### *Desertion*

6. The Respondent had pleaded that the Claimant had absconded from work when confronted to account for change after purchase of spare parts.

7. The Respondent however did not avail itself of the opportunity to demonstrate to the required threshold during the hearing that indeed the Claimant absconded from work with no intention of resuming.

8. The desertion allegation therefore remains just that and the Court concludes that this was not a case of desertion.

9. Even assuming that the Claimant deserted, which is a *misconduct*, the Respondent did not remotely suggest in its pleadings that it took (or attempted to take) the Claimant through a hearing for *misconduct* as contemplated by section 41 of the Employment Act, 2007.

10. For case law on desertion, the Court refers the parties to the cases of *James Okeyo v Maskant Flowers Ltd* (2015) eKLR and *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).

##### *Procedural fairness*

11. In terms of section 35(1)(c) of the Employment Act, 2007, the Respondent should have given the Claimant notice of termination of employment.

12. The Claimant's testimony was that his boss a Mr. Paras Chandaria verbally informed him that his services were no longer required. The testimony was not rebutted.

13. Further, by dint of section 41 of the Act, the Respondent was under an obligation to hear out the Claimant if the determination of the

contract was on account of *misconduct, poor performance or physical incapacity*.

14. The Respondent did provide or lead any evidence to show that a hearing was conducted or that attempts were made to contact the Claimant to show cause or representations as to failure to report to work.

15. In the view of the Court, the Claimant discharged the burden placed upon him by section 47(5) of the Employment Act, 2007 to show that there was unfair termination of employment and the Court so finds.

#### *Substantive fairness*

16. Pursuant to sections 43 and 45 of the Employment Act, 2007, the Respondent had the task of proving the reasons for terminating the contract of the Claimant.

17. It did not discharge that task and the Court finds the termination of contract was not for valid and fair reasons.

18. On account of the findings on separation, the Claimant would be entitled to pay in lieu of notice.

#### **Leave**

19. The Claimant sought pay in lieu of leave for the year 2015 which he computed as Kshs 30,000/- (equivalent of his monthly salary).

20. The Respondent, as the employer did not expressly traverse the pleadings on leave or file leave records (see section 10(3) & (7) of the Employment Act, 2007).

21. The Claimant was not cross examined on the issue of leave.

22. The Court will find for the Claimant.

#### **Wages for February 2015**

23. Under this head of claim, the Claimant's testimony that he was not paid earned wages up to date of separation was not challenged or rebutted by the filing of pay records by the Respondent.

24. The Claimant would be entitled as of right to the earned wages which he computed as Kshs 15,000/-.

#### **Service pay**

25. The contract issued to the Claimant provided for service pay at the rate of 15 days' pay for each completed year of service.

26. The Respondent did not interrogate the computation by the Claimant, and the Court will allow the claim as computed.

#### **Loan and advances**

27. The Respondent counterclaimed against the Claimant for Kshs 55,000/- being loan and advances and Kshs 1,795/- being refund of change which was not surrendered.

28. Because the Respondent did not produce any evidence/witness to prove the allegations, they remain mere allegations.

29. It is not lost to the Court that the Claimant's testimony that he took a loan of Kshs 50,000/- which was deducted from the November and December 2014 payroll was not questioned by the Respondent during cross examination.

30. The counterclaim on account of refund of Kshs 1,795/- was also not proved.

31. The Court finds that the counterclaim was not proved.

#### **Compensation**

32. Considering that the Claimant served the Respondent for about 11 years, the Court is of the view that maximum compensation (equivalent to 12 months gross wages would be appropriate).

33. Before concluding, the Court wishes to observe that both parties did not execute their respective cases with the diligence expected of them.

#### **Conclusion and Orders**

34. The Court finds and holds that the contract of the Claimant was unfairly terminated and that there was breach of contract and awards him and orders the Respondent to pay him

(i) Pay in lieu of notice	Kshs 30,000/-.
(ii) Pay in lieu of leave	Kshs 30,000/-.
(iii) February 2015 wages	Kshs 15,000/-.
(iv) Service pay	Kshs 150,000/-.
(v) Compensansation	Kshs 360,000/-
<b>TOTAL</b>	<b>Kshs 585,000/-</b>

35. Claimant is denied costs for having failed to file submissions as ordered.

**Delivered, dated and signed in Nairobi on this 4<sup>th</sup> day of May 2018.**

**RADIDO STEPHEN**

**JUDGE**

**Appearances**

For Claimant      Mr. Ndungu instructed by Njogu & Associates

For Respondent    Mr. Okoth & Mr. Aketch instructed by Gitonga Kinyanjui & Co. Advocates

Court Assistant    Lindsey