



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2095 OF 2014

SILAS SHIKANGA SHIVANDA.....CLAIMANT

v

EPCO BUILDERS LIMITEDRESPONDENT

JUDGMENT

1. Silas Shikanga Shivanda (Claimant) instituted legal proceedings against EpcO Builders Ltd (Respondent) alleging unlawful and unfair termination of employment and non-payment of terminal dues.
2. In its Statement of Defence, the Respondent contended that the Claimant absconded from work thus fundamentally breaching a contractual obligation.
3. The Cause was heard on 12 April 2018 when the Claimant testified and closed his case and on 20 June 2018 when the Respondent's Human Resources Manager testified and its case was closed.
4. The Claimant filed his submissions on 20 July 2018 while the Respondent filed its submissions on 9 August 2018.
5. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as
 - (i) *whether the Claimant absconded and if not, whether there was unfair termination of employment*
 - (ii) *whether Claimant had pending leave days by time of separation*
 - (iii) *whether Claimant was entitled to service pay/gratuity and*
 - (iv) *appropriate remedies.*

Abscondment

6. The case advanced by the Respondent was that the Claimant failed to report back to work after getting injured in the course of work and securing sick leave.
7. The Respondent's witness however did not disclose in both his witness statement and/or during testimony exactly when the Claimant was expected to resume duty and on what date he was presumed to have absconded.
8. When challenged on cross examination whether any action was taken in light of the Claimant's alleged failure to resume work, the witness stated that no dismissal letter was issued.
9. The witness also stated that the local labour office was not notified.
10. Failure to report to work is a breach of a fundamental contractual obligation warranting disciplinary action.
11. In the employment relationship, the employer is under an obligation to keep certain records. Even if records are not kept, an employer with a human resource department such as the Respondent ought to know when an employee has not reported to work.
12. The Respondent was not able to produce any records to establish exactly when the Claimant breached the obligation to report to work.

13. Sections 76 and 78 of the Employment Act contemplate the employer notifying the Labour Office of a vacancy or termination of employment. No such notification was made.

14. The Court in consideration of the above can therefore conclude that the assertion by the Respondent that the Claimant absconded lacks factual basis. The Claimant did not abscond.

Unfair termination

15. The Claimant testified that upon discharge from hospital, an employee of the Respondent called Catherine phoned him and instructed him not to resume work until he got a letter from the hospital.

16. Upon getting the letter and reporting on 19 April 2014, the said Catherine informed him that his services were no longer required.

17. Although the Respondent's witness denied that there was an employee by the name of Catherine, the Court is of the view that the narration by the Claimant was more probable and worthy of belief as he even gave a date.

18. And because there was no evidence that notice of termination of employment was issued or a hearing conducted as contemplated by sections 35 and 41 of the Employment Act, 2007, the Court finds that there was unfair termination of employment, and that the Claimant is entitled to compensation.

19. The Claimant served the Respondent for about 2 years and in consideration of the length of service, the Court would assess compensation as equivalent to 2 months gross wages (Claimant's testimony was that his monthly gross wage was Kshs 27,000/-).

Leave

20. The Claimant testified that he did not go on leave from 2012 to time of separation in 2014. He quantified the leave days as equivalent to Kshs 54,000/-.

21. The Respondent's witness did not advert to the claim for leave during testimony. The witness statement was equally silent on the issue of leave.

22. In consideration of sections 10(3),(7) and 74(1)(f) of the Employment Act, 2007, the Court finds that the Claimant had pending leave from 2012 to 2014.

23. Because the computations by the Claimant were not interrogated or challenged, the Court finds the Claimant is entitled to the same.

Service pay

24. Under the head of service pay/gratuity, the Claimant sought Kshs 27,000/-.

25. There was no evidence that the Claimant was making contributions towards the National Social Security Fund and/or was a member of a pension scheme, and by dint of section 35(5) and (6) of the Employment Act, 2007, the Court will allow the head of claim.

Conclusion and Orders

26. The Court finds and holds that the Claimant did not abscond but had his employment unfairly terminated, and awards him

(a) Pay in lieu of notice	Kshs 27,000/-
(b) Leave	Kshs 54,000/-
(c) Service pay	Kshs 27,000/-
(d) Compensation	Kshs 54,000/-
TOTAL	Kshs 162,000/-

27. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 22nd day of October 2018.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Mulaku instructed by Namada & Co. Advocates

For Respondent

Mr. Ngolima instructed by Okwach & Co. Advocates

Court Assistant

Lindsey