



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.599 OF 2014

RICHARD CHERUIYOT SIGEL.....CLAIMANT

VERSUS

BLISS FLORA FIRM LIMITED.....RESPONDENT

JUDGEMENT

In September, 2011 the claimant was employed by the respondent as a General Worker at a wage of Kshs.180.00 per day and which position and wage the claimant had until his employment was terminated on 6th April, 2013. Despite the claimant serving for over a year he was not allowed to take annual leave or paid in lieu thereof.

On 5th April, 2014 the claimant was directed to report at work which was his off day and at the time he received this message he was in church and could not make it to work. The claimant reported to work on Monday, 6th April, 2014 when he was dismissed on the spot. This was without warning, reasons and contrary to section 35, 41 and 43 of the Employment Act, 2007.

The claims are for;

- a) Notice pay of one month;*
- b) Leave for 1 year and 6 months;*
- c) Compensation*
- d) Costs.*

The claimant testified in support of his claims. Upon employment, the claimant served the respondent diligently and earned his off day on each Sunday. For each day at work, the claimant would sign on a book, a record kept by the respondent.

The claimant also testified that contrary to what the respondent has stated in defence, he did not abscond duty. When he was called back to work during his off day, he was already in church and was not able to report to work in good time. When he returned to work the next day, he was sent away by Mr Nicholas. He was not allowed to defend himself and was directed to return all respondent's property.

The claimant also testified that he reported the matter to the County Labour Officer and in communication to the respondent made an error stating that the last date at work was on 6th April, 2013. This error was not by the claimant but by the County Labour Officer.

Defence

In response the respondent's case is that the claims by the claimant are false and without basis and should be dismissed. The claimant had a tendency of absenting himself from work without permission and especially in October, 2012 when he was away for a week. In April, 2013 the claimant was absent from work for two days without permission and when asked by his supervisor to give reasons he failed to respond and opted to leave work and has never gone back until this claim was filed. There was no termination of employment as the claimant absconded duty. The claims made are without justification.

In evidence, the respondent called Stephen Onyango the Head Administrative Assistant and in charge of pay roll clerk who check daily attendance and physical count of employees. The claimant was working for the respondent for the period of 2011 to 2013 and on 6th April, 2013 he failed to report on duty and has never reported back. On 5th April, 2013 the claimant absconded duty and when called upon to report to work he failed to do so he did not give an explanation for such absence.

Mr Onyango also testified that The 5th of April, 2013 was on a Friday when the claimant was required to be at work as this was not his rest day.

6th April, 2013 was a Saturday when the claimant was required to be at work and failed to do so. When called upon to explain his whereabouts, the claimant failed to do so and rudely said he did not need the job. This was not the first time the claimant had absconded duty. He has not signed severally on the register meaning he was absent. The respondent kept all the work records.

From 14th October, 2012 the claimant was absent for a week;

On 1st April, 2013 the claimant was absent on a Monday;

5th April, 2013 a Friday the claimant was absent;

6th April, 2013 a Saturday the claimant was absent.

Noting the records and the option by the claimant to remain out of work, effectively he had terminated his employment with the respondent.

At the close of the hearing, both parties filed written submissions.

The respondent in submissions states that the claimant has pleaded that he was terminated from employment on Monday, 6th April, 2014 for failure to report to work on 5th April, 2014 as it was a Sunday, his rest day and he was therefore in church. From the master roll, the claimant was not at work on 6th April, 2014 which was on a Monday. The claimant also submitted a complaint with the labour officer that he had been dismissed on 6th April, 2014.

The respondent also submits that the claimant absconded from work when he failed to report on duty on 5th April, 2014. When he reported to work on 6th April, 2014 he did not explain why he had been absent on the previous day. By his conduct, the claimant terminated his employment.

The employment of the claimant by respondent is not challenged. Equally the evidence by the claimant that he enjoyed a rest day while at work with the respondent is not challenged in any material way. Such rest day was each Sunday of every week.

The respondent has attached work records to the Response and therein, it confirms that indeed the claimant from 2012 he was not present at work each Sunday.

The record for 8th to 14th October, 2012 shows that the claimant was at work for the week until Sunday when it is noted that *'he left employment'*. However, subsequent records show that the claimant reported to work on the following week. Until Sunday when he was *'off'*.

With regard to the week of 1st April, 2013 to 7th April, 2013 the claimant was at work until the Sunday where the record show that he was *'off'*.

The following week, 8th to 14th April, 2013 it is recorded that the claimant *'left employment'*.

The claim herein relates to the year 2014. The claimant avers and testified that on 5th April, 2014 he was on his usual off day when he was called back to work. He was in church at the time and could not make it to work. On the next day he was not allowed at work and was chased away by Mr Nicholas. He was not

allowed back at work.

There are no records for 2014 submitted by the respondent. The last records relates to April, 2013. Indeed, 5th and 6th April, 2013 were on a Friday and Saturday respectively.

However, the claim relates to 5th April, 2014. Such day falls on a Sunday and the 6th April, 2013 falls on a Monday.

The claimant made a complaint to the county labour officer immediately upon his employment was terminated. The claimant testified that the labour officer made an error when he noted that termination of employment had been on 6th April, 2014. However my reading of the complaint and notice sent to the respondent upon the claimant's report to the County Labour Officer is that this was not a mistake or an error. The county Labour Officer Letter is dated 29th April, 2013. It relates to a complaint by the claimant on the grounds that he was dismissed by the respondent on 6th April, 2013.

The claimant testified that he was in the employment of the respondent for one year and 6 months (1.6 years). Effectively where employment commenced in September, 2011 for the 1.6 years this rationally takes the claimant to April, 2013 and not April 2014. These findings are supported by the claims made by the claimant that he is entitled to leave due for the period of 1.6 years only.

I take as correct the evidence by the respondent that the employment record is only available up and until April, 2013 when the claimant left its employment. The record of the County Labour Officer is also taken as corroborating the defence to the extent that the events leading to the claimant's exit at the respondent was his report to this office on matters relating to the 5th of April, 2013 and not 2014.

Where indeed the record ought to have related to 5th April, 2014, the claimant having noted the great challenge which this posed to his claim, nothing stopped him from amending his pleadings to reflect the correct and true position. The County Labour Officer is also an officer available to the court as a witness and would have clarified the claimant's case had the report and complaint been made in error to note 2013 instead of 2014.

From the records, employment ceased on 6th April, 2016. Where the claimant was absent from work on 5th April, 2014 such was not a Sunday, his rest day. Absence from work on a day not a rest day as scheduled by the employer is sufficient reason for summary dismissal under the provisions of section 44(3) read together with section 44(4). The explanation given and insistence by the claimant that he was absent from work on 5th April, 2014 a Sunday is not support by the record.

From the allegations made by the claimant he therefore stands out as a person who cannot be believed even on the records he has filed to urge his case. Such conduct deals a major blow to his claims as he does not stand out as a honest person even when faced with a defence that he was not at work on a day or days he was required to, the 5th and 6th of April, 2013. The insistence by the claimant that his employment terminated on 5th and 6th April, 2014 is therefore without basis. At such a time, the claimant has long since been out of the respondent establishment for a complete year.

The claimant, well represented by Counsel and aware of the veracity of his claims ought to have conceded and saved the court valuable time.

Accordingly, the claim is hereby dismissed as it has no iota of merit. Costs awarded to the respondent.

Dated and delivered at Nakuru this 3rd day of October, 2018.

M. MBARU JUDGE

In the presence of:.....