



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1042 OF 2015

GIBSON NAMASAKE **CLAIMANT**

v

LINKSOFT GROUP LTD **RESPONDENT**

JUDGMENT

1. Gibson Namasake (Claimant) was offered employment by Linksoft Group Ltd (Respondent) as Technical Services Manager-Uganda through a letter dated 1 August 2013.
2. On 10 April 2014, the Respondent issued a *redundancy notice* to its staff. The notice excluded some 7 named employees including the Claimant.
3. On 5 June 2015, the Claimant instituted legal proceedings against the Respondent and he stated the Issues in Dispute as
 - a) Unfair termination of employment contrary to section 45 of the Employment Act, 2007.
 - b) Failure to act in accordance with the procedure for termination as clearly set out in the Employment Act, 2007.
 - c) Refusal by the Respondent to pay outstanding benefits due to the Claimant.
4. In a Statement of Response filed on 31 August 2015, the Respondent contended that the Claimant *deserted* duty and was not entitled to any of the duties sought in the Memorandum of Claim.
5. The Cause was heard on 30 October 2018 when the Claimant testified.
6. The Respondent opted to close its case without calling any witness or leading evidence.
7. The Claimant's submissions were not on file by this morning. The Respondent filed its submissions on 3 December 2018.
8. The Court has considered the evidence and submissions and identified the Issues in dispute as
 - (i) whether the Claimant deserted work or had his employment unfairly terminated
 - (ii) whether Respondent was in breach of contract/statute and
 - (iii) Appropriate remedies.

Desertion or unfair termination of employment

Desertion

9. Desertion in employment law is a repudiation of the contract of employment. The employee who deserts is in breach of contract and an employer is entitled to dismiss him on the ground of repudiation of contract. This is because he has no intention of turning up for work.

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

11. The Court also wishes to observe that in *Geys v Societe Generale, London Branch* (2012) UKSC 63, the Supreme Court of the United Kingdom confirmed the principle that a repudiated employment contract does not end until the repudiation is accepted.

12. In the *Geys* decision, the Supreme Court rejected the *automatic termination principle* that repudiated employment contracts are ended immediately upon repudiation in favour of the *election principle*.

13. In this sense, the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.

14. Although asserting that the Claimant deserted work, the Respondent did not lead any evidence to show when and whether the Claimant deserted work.

15. In its submissions, the Respondent drew the attention of the Court to sections 107 and 109 of the Evidence Act to submit that the Claimant had not met the standard of proof expected of him.

16. However, in employment disputes, sections 43 and 45 of the Employment Act, 2007 has specifically placed the onus of proving the reasons for termination of a contract on the employer.

17. The Respondent did not lead any evidence to demonstrate that it called/or attempted to call upon the Claimant to explain his alleged *desertion* or absence from work in terms of sections 35 and 41 of the Employment Act, 2007. There was also no evidence as to exact date the *desertion* occurred.

18. Further, failure to report to work with an intention not to return would also constitute gross misconduct within the meaning of section 44 of the Employment Act, 2007, and by dint of section 41(2) of the Act, a show cause and hearing would be necessary, if practical.

19. The Court can therefore conclude that this was not a case of desertion.

Unfair termination

20. During testimony, the Claimant stated that he used to operate from the Respondent's Uganda offices and from a named client's premises, and that in early May 2014 (after the redundancy notice) he went to the Respondent's offices and found the gate locked.

21. According to the Claimant, he made several attempts to reach the Respondent's Directors on phone to no avail and that when he eventually got hold of the Human Resources Manager around 15 May 2014, she told him to find some other work.

22. The Claimant testified that there was no *notice of termination of employment*.

23. Pursuant to section 35 of the Employment Act, 2007 the Claimant was entitled to *written notice of termination of employment*, and because none was given, and in further consideration of section 47(5) of the Employment Act, 2007, the Court finds that the Claimant has discharged the burden of establishing there was unfair termination of employment.

24. In this respect, the Court is of the view that even a *deserter employee* is entitled to the notice, or an attempt should be made to serve such a notice so that the employee has an opportunity to explain the unlawful absence.

25. And because the Respondent did not even attempt to discharge the statutory burden expected of it by sections 43 and 45 of the Employment Act, 2007, the Court also concludes that there were no valid or fair reasons to terminate the employment of the Claimant.

26. With the findings, the Court holds that the Claimant is entitled to 1 month pay in lieu of notice in the sum of Kshs 250,000/-, and because the Claimant served for about 1 year (length of service), the Court assesses compensation equivalent to 1 month gross wages.

Breach of contract/statute

Unpaid salary for March, April and May 2014

27. Under this head of claim, the Claimant testified that he was not paid his salary for March to May 2014. He sought Kshs 750,000/- for the 3 months.

28. The testimony was not rebutted by production of any pay records.

29. However, because the contract between the Claimant and Respondent effectively terminated through frustration in early May 2014, and the Court finds that the Claimant is only entitled to salary for March and April 2014 amounting to Kshs 500,000/-.

Accrued and unpaid leave

30. An employee is entitled to at least 21 days annual leave with full pay and under this head the Claimant sought Kshs 250,000/-.

31. The Claimant served for slightly under a year, and the Court in consideration of the evidence on record and section 10(3) & (7) of the Employment Act, 2007 will allow this head of claim as the Respondent did not interrogate this particular claim.

National Social Security Fund Contributions

32. The Claimant did not produce any evidence or records to show that he was registered with the *National Social Security Fund* or that any deductions were made from his salary and not remitted to the Fund.

Return air ticket

33. The contract provided that the Claimant was eligible for a return air ticket. Apart from stating that the Respondent did not cater for his air ticket after separation, the Claimant did not produce any evidence of having purchased an air ticket or incurred such costs to return to the country.

34. The Claimant did also not explain how he costed the price of an air ticket at Kshs 40,000/-. This head of claim was not proved.

House allowance

35. Under house allowance, the Claimant sought Kshs 160,000/-.

36. The Claimant was getting a consolidated salary and the Court finds this head of claim has no legal basis.

Airtime

37. The contract provided that the Claimant was eligible for air time allowance in terms of the company policy. The Claimant did not produce any evidence of the company policy or the monthly rate of air time allowance and the Court therefore declines the relief.

Conclusion and Orders

38. The Court finds and holds that the Claimant did not desert work but had his employment unfairly terminated, and that the contract was breached and awards him

(i) Pay in lieu of notice	Kshs 250,000/-
(ii) Unpaid salaries	Kshs 500,000/-
(iii) Leave	Kshs 250,000/-
(iv) Compensation	Kshs 250,000/-
TOTAL	Kshs 1,250,000/-

39. Claimant is denied costs for failing to file and serve submissions within the agreed timeline.

Delivered, dated and signed in Nairobi on this 13th day of December 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Thiongo instructed by McKay & Co. Advocates

For Respondent Ms. Kimaru instructed by Waruhiu K'Owade & Nganga Advocates

Court Assistant Lindsey