



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 277 OF 2014

DAVID RONO ROTICH.....CLAIMANT

VERSUS

NATIONAL CEMENT COMPANY LTD.....RESPONDENT

JUDGMENT

1. David Rono Rotich (Claimant) commenced legal proceedings against National Cement Co. Ltd (Respondent) on 26 February 2014 alleging unfair termination of employment and breach of contract.
2. In its Response filed on 4 April 2014, the Respondent denied unfairly terminating the Claimant's employment or being in breach of contract.
3. The Claimant filed a Reply to Response on 15 May 2014.
4. On 9 September 2016, the Respondent filed an *Amended Response and Counterclaim* after getting leave on 8 September 2016. As a consequence, the Claimant filed a *Reply to Amended Response and Defence to Counterclaim* on 17 October 2016.
5. The Cause was heard on 7 November 2018 when the Claimant testified, and on 21 November 2018 when the Respondent's Human Resources Manager testified.
6. The Claimant filed his submissions on 10 December 2018 (should have been filed/served on or before 30 November 2018) while the Respondent filed its submissions on 7 December 2018.
7. The Court has considered the pleadings, evidence and submissions and condensed the Issues arising for determination under the listed headings.

Competency of the Cause

8. The Respondent in its submissions challenged the competency of the cause of action advanced by the Claimant on the ground that he had not served for more than 13 months and therefore the cause of action was in violation of the provisions of section 45(3) of the Employment Act, 2007.
9. For the information of the Respondent, the said provision of law was declared as being inconsistent with the Constitution in *Samuel G. Momanyi vs. Attorney General & Ar.* (2012) eKLR.

Unfair termination of employment

Desertion

10. Desertion in employment law is a repudiation of the contract of employment. The employee who deserts is in fundamental breach of contractual obligation 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.
11. 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).

12. The Court also wishes to observe that in *Societe Generale, London Branch v Geys* (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.

13. 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*.

14. 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.

15. Desertion by its nature is more serious than a mere absence as it rotates around an intention by the employee never to return to work.

16. In the face of the fundamental obligation to report to work, which makes *desertion* tantamount to gross misconduct warranting summary dismissal, an employer should make an attempt to comply with the provisions of section 41(2) of the Employment Act, 2007.

17. There was no evidence from the Respondent that it asked the Claimant to explain or show cause for his absence from 7 January 2014, if indeed it is true he *deserted*.

18. If the Claimant deserted as contended, the Respondent did not explain how the company assets which the Claimant had been issued with such as a car were recovered and when and by whom.

19. In the view of the Court, the *desertion* defence was an afterthought.

20. For the above reasons, even if the Respondent had demonstrated *desertion*, which it failed to, the Court finds that the Claimant did not *desert* work.

21. This was a case of termination of employment at the behest of the Respondent.

Procedural fairness

22. Section 35 of the Employment Act, 2007 envisages written notice of termination of employment while section 41 of the Act contemplates a hearing which can either be oral or through correspondence or combination of both.

23. The Respondent's witness asserted that a notice dated 5 December 2013 was served upon the Claimant.

24. The Claimant on his part testified that the notice was not served upon him as he had travelled to Sotik on official duty on 5 December 2013 and that from Sotik he commenced his official leave which was to end on 7 January 2014.

25. The Claimant testified that while on leave, on 23 December 2013, the Respondent's Managing Director sent to him a text message advising him that his contract was being terminated and that he should report to him on 7 January 2014.

26. According to the Claimant, he reported to the Managing Director on 7 January 2014 and the Director informed him that his employment had been terminated. The Claimant stated that he handed over to a (named) Manager.

27. The Claimant denied that the notice dated 5 December 2013 had been served upon him or that a hearing was conducted.

28. When challenged to disclose how the notice of 5 December 2013 was served, the Respondent's witness failed to disclose how and/or the name of the person who delivered the notice to the Claimant. Even the place where the notice was delivered was not disclosed.

29. In the opinion of the Court, the Respondent's witness was not credible at all and was most probably lying through the teeth, otherwise he would have named the person he sent to deliver the notice to the Claimant.

30. The Respondent's witness was also not privy to what transpired in Ruiru on 7 January 2014 when the Claimant went to meet the Managing Director. No minutes or notes of the meeting, if any, were produced and the Managing Director was not called to testify. The failure to call him was not explained.

31. The Court is satisfied that the notice dated 5 December 2013 was not served upon the Claimant to put him on notice that the termination of his employment was on the cards and to afford him an opportunity to make representations.

32. Having failed to comply with the procedural fairness requirements, the Court finds that the termination of the Claimant's employment was procedurally unfair.

Substantive fairness

33. With the conclusion on procedural fairness, it is not necessary for the Court to examine whether the Respondent has discharged the burden which was expected of it by sections 43 and 45 of the Employment Act, 2007.

Counterclaim

34. The Court having made a finding that the Claimant did not breach his contract of employment by *deserting* finds no merit in the Counterclaim.

Appropriate remedies

Salary in lieu of notice

35. The Claimant's contract did not provide for notice or pay in lieu of notice, and the Court will turn to the default provision in section 35 as read with section 36 of the Employment Act, 2007 and find the Claimant is entitled to the equivalent of 1 month pay in lieu of notice.

Compensation

36. The Claimant had served the Respondent for slightly under 1 year. He had been headhunted from another employment and expected to grow his career with the Respondent but was dismissed in unfortunate circumstances.

37. Considering the two factors, the Court is of the view that the equivalent of 3 months gross wages would be appropriate.

Damages for unfair termination

38. Having awarded compensation, the Court holds that the Claimant is not entitled to damages for unfair termination of employment on the strength of the mandate given to the Court by section 12 of the Employment and Labour Relations Court's Act since the Employment Act, 2007 has provided for specific remedies.

Salary up to 7 January 2014

39. The Claimant sought Kshs 112,000/- under this head of claim, and because that was the effective date of separation, the Court finds he is entitled to the earned wages.

Expenses incurred on trip to Sotik

40. No proof was produced in Court to support the expenses of Kshs 23,500/- and the relief is declined.

Certificate of Service

41. A certificate of service is a statutory right and the Respondent should issue one to the Respondent within 10 days.

Conclusion and Orders

42. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) Pay in lieu of notice	Kshs 480,000/-
(b) Compensation	Kshs 1,440,000/-
(c) Salary to 7 January 2014	Kshs 112,000/-
TOTAL	Kshs 2,032,000/-

43. Certificate of Service to be issued within 10 days.

44. The Claimant did not file/serve submissions within the timelines agreed with the Court and no reason was tendered for that failure (Respondent filed its submissions before the Claimant), and the Court therefore declines to award him costs.

Delivered, dated and signed in Nairobi on this 17th day of December 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Bwire/Mr. Mukuha instructed by Echessa & Bwire Advocates

For Respondent Mr. Babu instructed by Wilfred K. Babu & Co. Advocates

Court Assistant Lindsey