



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 9 OF 2014

SAMSON KIPKIRUI NGOTWA

CLAIMANT

v

RIFT VALLEY GLAZIERS LIMITED

RESPONDENT

JUDGMENT

1. For determination are the questions, *whether the termination of the employment of Samson Kipkirui Ngotwa (Claimant) was unfair, whether Claimant went on annual leave(s) and appropriate remedies/orders.*

2. The Court has considered the pleadings, evidence and submissions.

Whether termination was unfair

Procedural fairness

3. It is not disputed that the Claimant was arrested and arraigned in Court for an offence of stealing by servant and that the charge was withdrawn.

4. The Respondent contended that the Claimant did not resume duty after his arrest, and therefore his employment was not unlawfully terminated. The Respondent's case in essence is that the Claimant absconded and/or deserted work.

5. The Claimant admitted that he did not resume duty after the arrest and the reason he gave was that he was required by a Supervisor, Mr. Qureshi to apologise before he could be allowed to resume duty, and he declined because he did not know the reason for writing an apology.

6. Accepting that the Claimant failed to report to work, legally, he was in breach of a fundamental obligation arising out of the employment contract and therefore the Respondent could have terminated the contract on account of *misconduct* in terms of section 41 of the Employment Act, 2007.

7. And before terminating the contract, the Respondent ought to have complied with the requirements of section 41 of the Act (procedural fairness) by giving the Claimant an opportunity to explain his whereabouts.

8. Further, assuming the Claimant repudiated the contract by failing to report to work, the Respondent being the innocent party ought to have accepted the repudiation (see *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR, *London Transport Executive v Clarke* (1981) IRLR 166 and *Geys v Societe Generale, London Branch* (2012) UKSC 63). It did not.

9. The Respondent did not place before Court anything to suggest the elementary requirements as to a hearing either orally or documented was followed or that it accepted the repudiation.

10. The Court in effect finds that there was unfair termination of employment.

Substantive fairness

11. With the conclusion, it becomes an academic exercise to examine whether the Respondent met the threshold set out by sections 43 and 45 of the Employment Act, 2007.

Annual leave

12. Entitlement to and whether Claimant went on annual leave was not pleaded in the Memorandum of Claim, but was raised in the Reply to the Response.

13. Even during testimony, the Claimant did not give particulars of the years he did not take annual leave.

14. This issue is therefore in the view of the Court moot.

Appropriate remedies

Compensation

15. With the conclusion that the termination of the Claimant's employment was unfair and in consideration of the length of service, the Court is of the view that compensation equivalent to 12 months gross wages would be fair (gross wage at separation was Kshs 8,507/-).

Gratuity

16. It is not disputed that the Claimant was a contributor to the National Social Security Fund and therefore if by gratuity he meant *service pay* in terms of section 35(5) and (6) of the Employment Act, he would not be entitled to the same.

17. No other basis for gratuity (contractual or legal) was demonstrated.

Certificate of Service

18. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 14 days from date of this judgment.

Conclusion and Orders

19. The Court finds and holds that the employment of the Claimant was unfairly terminated and orders the Respondent to pay him

(a) Compensation **Kshs 102,084/-**

20. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 20th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant Ms. Njoroge instructed by Kiplenge & Kurgat Advocates

For Respondent Mrs Ndeda instructed by Ndeda & Associates

Court Assistant Nixon