

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 346 OF 2016

BHARATKUMAR P. SHAH..... CLAIMANT

VERSUS

VICTORIA FURNITURE LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 8th March 2016. He averred that he was employed as a senior manager of the Respondent from 15th July 2015. It was pleaded that he earned Kshs. 150,000/- at the time of termination. He averred that during his employment he worked diligently and was never subject of any disciplinary process that would warrant his termination of employment. He averred that on 3rd December 2015, in violation of the Employment law without any colour of right or justification whatsoever, the Respondent terminated the Claimant's employment. It was pleaded that he was just asked not to report to work the following day and that no reasons were given to him. It was averred that no notice was given and that the Claimant was never given an opportunity to be heard. The Claimant pleaded that he had not been issued with an appointment letter as required by the Employment Act 2007 and was denied his annual leave. He thus sought a declaration that the action to terminate his employment was illegal and unprocedural, the payment of one month's salary in lieu of notice, salary for 3 days in the month of December 2015 as well as 12 month's salary in compensation for wrongful termination, ten and a half days pro rata leave days not taken, certificate of service, costs of the claim and interest thereon. He attached a payslips for payments made as well as the demand letter from his advocate.

2. The Respondent filed a defence on 15th April 2016 and averred that the Claimant was employed on temporary basis from 1st August 2015 and worked for the Respondent until 3rd December 2015 whereupon after the close of business on the said date he failed to report to work on subsequent days. The Respondent denied the averments of termination of employment made by the Claimant in his statement of claim. It was pleaded that the Respondent tried to reach the Claimant to confirm why he failed to report to work and that the Claimant clearly indicated that he was not interested in the Respondent's employment. It was averred that had the Claimant served the probation period of 6 months and continued on permanent basis a letter of appointment would have been issued. The Respondent averred that the Claimant was not dismissed from work but absconded and any claim by the Claimant is an attempt at unjust enrichment.

3. The Claimant testified on 18th October 2017 and stated that he was a senior manager of the Respondent at Koinange Street and that he oversaw the business premises to make sure that work was done properly, dispatches were sent properly and that the premises were clean. He testified that he commenced work on 15th July 2015 and earned Kshs. 150,000/- a month. He stated that on 3rd December 2015 he was at work and the director told him to go to Victoria Courts at Mpaka Road Westlands and was given task to re-arrange a store in 2 hours and had 2 workers. He stated that it was impossible as the 2 workers were taken away to do other work and that when he told the director Rupen Shah he was told that he was useless and should go home and not come back. He testified that Rupen Shah had given him the task and Rupen was one of the CEO's of Victoria Courts. He stated that he never took leave at all and that he was not given any termination notice nor did he receive any pay for the days worked. He prayed that he be paid the salary in lieu of notice Kshs. 150,000/-, 3 days worked in December, compensation for 12 months and 10½ days pro rata leave not taken.

4. In cross-examination he testified that he was working with the Respondent from 15th July 2015 and had been hired by Mr. Vinubhai Shah who personally knew him. He testified that he was transferred to the other office by Vinubhai. He stated that he worked for 1 month 3 days under Rupen Shah the CEO of Victoria Courts and the son of Vinubhai Shah. He stated that he went wherever he was told to go and the payslips were all from Victoria Furniture. He testified that he was given a task that was to be completed within a given time and the workers assigned to him were taken away and that he could not demand them to continue doing the task he had been assigned. He stated that he was told to go and not come back again by the son and that he did not return. He testified that Rupen was CEO of Victoria Court and that he was the one who sacked him. He stated that he was given a task to frustrate him so that he would be forced out as the task was 100% impossible. He testified that he never went back to Vinu Shah. He admitted that in his statement filed before court he never mentioned Rupen Shah or Victoria Courts. He testified that he was not aware if Rupen Shah was a director and that he was not called and he never reported back. He testified that he had been sent to Westlands from his initial station and that he did not return because of what he was told by Rupen Shah. He stated that there was no probation period. He testified that he was a Form 4 leaver and had worked as a salesman and a goods manufacturer before his employ by the Respondent. He stated that he was employed due to his experience and worked from July 15th to December a period of 4½ months. He blamed both father and son for his predicament and that he and Vinu were community friends and came from the same village in India. He stated that he worked for 6 days in a week and had not taken any leave.

5. In re-examination he testified that he was paid each month by the Respondent and if the other was a sister company he would have been told. He stated that he had to obey the instructions given and that it was Vinubhai himself who sent him. He testified that he was working and the goods were lying there as the people never came back. He stated that he was just told to go home and not return.

6. The Respondent called Jailesh Gandechar a senior manager at Victoria Furniture where he has been for 8 years. He stated that he was based at Koinange Street and that he knew the Claimant. He stated that in August 2015 the Claimant had been taken under probation for 6 months and that the Claimant reported to him as he was the head of the department at the time. He testified that the Claimant oversaw the stock and the staff in short the day by day operations. He stated that the Respondent has a branch in Westlands but he was not aware if the Claimant was transferred there. He testified that from 3rd or 4th the Claimant stopped coming to work and when the Claimant was called he said that he would not come back. He stated that the Claimant may have been sent to Westlands when one of the managers was out of the country for 15 or 20 days and that Victoria Court was a sister company to Victoria Furniture. He stated that he did not know what happened on 3rd December and that the Claimant just stopped coming and that he met the Claimant who told him he was not interested. He testified that the Claimant never came back to say that he had been dismissed by Rupen Shah. He had no idea why the Claimant stopped coming to work and that there was no dismissal. He stated that the Claimant should actually pay as the company had to get a replacement since the Claimant never came back.

7. In cross-examination he testified that he was familiar with the company and that he had worked for it for 8 years. He stated that the payslip for 1½ months was for the 15 days before the Claimant commenced work. He stated that the Claimant was paid for the 15 days as he used to come and see how work was undertaken and that the company always issued a letter after probation period. He testified that the branch in Westlands is in the same compound with Victoria Courts but on different floors. He stated that there are directors who are common for Victoria Courts and Victoria Furniture and that it was not common to share employees. He said that it was the directorships that showed the companies were connected. He stated that he was not sure that Rupen Shah was a director of Victoria Furniture as he was the boss of Victoria Courts. He testified that Rupen Shah would have to consult the town branch if Rupen was terminating the Claimant.

8. In re-examination he testified that if there is a client Rupen would just refer the client to the town office and would not interfere with management. He testified that Vinu Shah is the director in charge of Victoria Furniture and did not interfere with Victoria Courts. That marked the end of oral testimony. Parties were to file written submissions and the Claimant's submissions were filed on 8th November 2017 while the

Respondent filed its submissions on 22nd November 2017.

9. In his submissions, the Claimant submitted that the issues for determination were two – whether the Claimant was unfairly, unlawfully and unprocedurally terminated and secondly, whether the Claimant was entitled to his terminal dues. The Claimant submits that after working for 4 months as a senior manager his services were terminated on 3rd December 2015 without any colour of right or justification whatsoever. The Claimant submits that the dismissal was without any notice or due process whatsoever. He submitted that he was not given reasons for the termination nor was he subjected to a hearing contrary to Section 41 of the Employment Act. The Claimant relied on the case of **Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan K) [2013] eKLR** where Radido J. held that the Employment Act in a radical departure from the position that obtained prior to 2nd June 2008 and under the common law has made it mandatory by virtue of Section 41 for an employer to notify and hear representations an employee may wish to make whenever his/her termination is under contemplation by the employer if the grounds for the termination relates to the employee misconduct, poor performance or physical incapacity. The employee is even entitled to have a representative present. The Claimant cited the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers SACCO Limited [2014] eKLR** where the court reaffirmed the due process procedure under Section 41. The Claimant submitted that the dismissal of an employee without according him an opportunity to be heard amounted to unfair termination. The Claimant relied on the case of **Alphonse Maganga Mwachanya v Operation 680 Limited [2013] eKLR** for the criteria to be considered in the award of compensation under Section 49(4) of the Employment Act per Radido J. The Claimant submitted that judgment be entered in favour of the Claimant as prayed in the memorandum of claim as the Respondent had disregarded the tenets of fair labour practice as enshrined in Article 41 of the Constitution both in word and spirit.

10. The Respondent submitted that the Claimant did not give any evidence of having been terminated from working for the Respondent. It was submitted that the events leading to his being told not to go the Respondent was not disclosed to his employer and/or the court until the hearing. The Respondent submitted that even the Claimant's supervisor was not aware. The Respondent asserts that the fact that the Claimant did not notify his employer of that occurrence confirms that the Claimant deserted employment for reasons that were not disclosed to the employer. It was submitted that the allegations that the two companies shared directors remained just that, an allegation. The Respondent submitted that the Claimant worked under the Respondent's witness's department and that after payment of the November 2015 salary did not report to work from 3rd December 2015. It was submitted that the Respondent's witness tried to reach out to the Claimant and the Claimant indicated he was not interested in working for the Respondent without disclosing any details. The Respondent submitted that the Claimant is the one who actually should have given notice before leaving the employ of the Respondent. The Respondent submitted that the authorities cited by the Claimant while correctly stating the law were not applicable to this case as the facts herein were totally different.

11. The claim is one of unfair, unlawful and unprocedural dismissal. The Claimant asserts that he was assigned to the Respondent's sister company for some work and was told to go home and not return to work by the director of Victoria Courts one Rupen Shah who was stated to be a son of Vinu Shah the director of the Respondent. If indeed that is what transpired, the Claimant was not terminated by the Respondent or the Respondent's officers. From the testimony adduced as well as the evidence on record, there is no nexus shown between Rupen Shah and the Respondent. Allegations made that the said Rupen Shah was a director of the Respondent remain just that, allegations. It was the duty of the Claimant to prove the dismissal was unfair in terms of Sections 43 and 45 of the Employment Act. That duty did not shift to the Respondent to prove that Rupen Shah was not its director. In my view, the claim is unproved and I dismiss it with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 19th day of December 2017

Nzioki wa Makau

JUDGE