



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1919 OF 2013

KENNEDY OTIENO OLUOCH.....CLAIMANT

VERSUS

ROTO MOULDERS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant averred that on 8TH November, 2011 while on duty he got involved in a road accident as a result of which he sustained injuries and got hospitalized. After recovery he reported back to work but was informed by the respondent that he could not be deployed because the vehicle assigned to him was extensively damaged during the accident and had not been replaced.
2. According to him he was asked to stay away until another vehicle was found. Therefore between 4th February 2012 and June 2013 he kept inquiring about the vehicle but got no response.
3. On 17th June he was handed a letter dated 15th February 2013 terminating his services on account of desertion of duties. According to him, his dismissal was unlawful and unfair hence he claimed terminal benefits and damages from the respondent.
4. The respondent on the other hand did not deny the claimant was his employee but denied his services were terminated as alleged. According to the respondent, the claimant absconded from work for a continuous period of three months and upon returning to work in June, 2013 opted to voluntarily resign for reason that he was of poor health and was recuperating in hospital. The respondent denied coercing the claimant to resign.
5. In his oral testimony in Court, the claimant reiterated most of the averments in the memorandum of claim. He further stated that he got the accident around Narok but was treated at a hospital in his rural home (Kombewa). It was his evidence that his employer knew about the accident.
6. According to him he got frustrated waiting to be called to work so he asked to be paid his dues but was told that in order to be paid he should resign first which he did.
7. In cross-examination he stated that he went to hospital in Kombewa because his family was there. He stated that according to the respondent's policy, when one was unwell he/she was issued with a sick off. According to him he signed for a sick off and went for a checkup after two days and put on medication. He was further advised to go home and rest. It was his evidence that

he took himself to hospital.

8. The respondent's witness Mr. Jeremiah Mwinzi told the Court that the claimant took leave for eight days in February but never returned to work thereafter. The respondent tried to contact him without success. He stated further that when the claimant showed up he said he was unwell but had no medical documents.

9. Mr. Mwinzi informed the Court further that the claimant was insured and could have attended facilities designated by the insurer. The claimant did not have to meet his medical expenses. He further stated that the respondent had no record that the claimant was injured in an accident.

10. The burden of proof in termination of employment cases is apportioned between the employer and the employee. The employer must prove that it had a valid and or justifiable reason to terminate an employee's services while the employee must show that the termination was unfair or dismissal wrongful.

11. The claimant herein claims he was forced to resign in order to be paid his dues. The respondent on the other hand maintained that the claimant was terminated on account of absconding duties.

12. The claimant averred that he was involved in an accident while on duty on 8th November, 2012 around Narok. According to him he applied for sick off two days after the accident and travelled upcountry for treatment. It was his evidence that he opted to be treated up country because that was where his family was.

13. The respondent on the other hand stated that it received no report of the claimant's injury in any accident. The respondent further stated that it took out insurance for its staff hence if it was indeed true that the claimant was injured in an accident in the course of his duties, he should have attended on the insurers approved facilities.

14. It is a settled rule of evidence that any person who intends that a Court or tribunal makes a finding in favour of allegations made by such person must prove such allegations according to laid down standards of proof.

15. The letter warning the claimant about his desertion from employment is dated 15th February, 2013. He claims to have received the same on 17th June, 2013 when he wrote his resignation letter. The respondent on the other hand claims the same was sent by registered post but returned unclaimed. No certificate or proof of postage was however produced.

16. The claimant on the other hand exhibited an undated letter purportedly from the Medical Officer of Health Kisumu West District. The letter is stamped and dated 10th November, 2012 by Records Department Kombewa District Hospital. The letter purports to give the claimant three months rest. Assuming the letter was given to the claimant immediately upon the date he claimed to have been seen at Kombewa District Hospital, it is not clear why the letter was not immediately sent to his employer, the respondent.

17. Further the Court find it odd, hence agrees with the respondent, that the claimant chose to attend medical treatment at a hospital in his rural home while his employer had a medical cover for him in Nairobi where he lived and worked.

18. In this particular case the Court is confronted with situation where the claimant had not to the required standards shown that the respondent unfairly terminated or wrongfully dismissed him. On one hand and on the other the respondent who although had a valid and justifiable reason to dismiss or terminate the claimant, failed to show the required standards that it followed the law in

terminating the claimant's services.

19. To this extent the Court hereby finds that the parties separate from the contract of employment as if the same was to be done under normal circumstances. That is to say the claimant shall be paid one month's salary in lieu of notice of termination and service pay at the rate of fifteen day's salary for each complete year of service. There will be no order on costs. Parties to liase with the Deputy Registrar of the Court for computation of the award.

20. It is so ordered.

Dated at Nairobi this 17th day of June 2016

Abuodha Jorum Nelson

Judge

Delivered this 17th day of June 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge