



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 238 OF 2013

EZRA NYAMWEYA MOTARICLAIMANT

V

KANINI HARAKA ENTERPRISES LTD RESPONDENT

JUDGMENT

[1] In a Memorandum of Claim filed in Court on 25 July 2013, Ezra Nyamweya Motari (Claimant) stated the issues in dispute as

(!) Unfair termination

(2) Underpayments.

[2] However, in the remedies section of the Claim, the Claimant sought *pay in lieu of notice, wages for June 2013, underpayments, overtime arrears, compensation and damages* all totalling Kshs 859,094/40.

[3] Kanini Haraka Enterprises Ltd (Respondent) in an Answer to Claim filed on 1 April 2014 alleged that the Claimant deserted work, was not underpaid and was paid all due overtime. It was also contended that the Claimant was not entitled to compensation.

[4] The Claimant filed a Response to the Answer to Claim on 7 May 2014 and a List of Documents on 5 July 2016.

[5] The Cause was heard on 24 February 2016 and 11 July 2016. The Claimant filed his submissions on 26 July 2016 while the Respondent's submissions were not on file by this morning.

[6] The Court has given due consideration to the pleadings, testimony and documentary evidence and the submissions and identifies the issues for determination as, *whether the Claimant deserted or was dismissed and if dismissal whether it was unfair, whether the Claimant was underpaid, whether the Claimant is owed overtime pay and appropriate remedies.*

[7] Although the Court gave the parties time to reach an out of Court settlement, the negotiations fell through.

Desertion

[8] Desertion is not the same as being absent from the place appointed from work without permission or

lawful cause as envisaged under section 44(4)(a) of the Employment Act, 2007.

[9] It needs no debating that absence without permission or lawful cause attracts summary dismissal. But the employee who is absent has *no intention* of not resuming work.

[10] Desertion, on the other hand 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.

[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 *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.

[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] Where an employer alleges desertion, it must prove the ingredients of desertion.

[16] A primary ingredient of desertion to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract).

[17] Establishing the intention not to return to work will depend on the facts as presented in evidence.

[18] The Respondent's Operation Manager testified. He stated that a stock take carried out on 5 June 2013 established that goods under the custody of the Claimant worth Kshs 71,940/10 missing.

[19] When the Claimant was confronted with the stock take report, he acknowledged responsibility for the loss by signing a copy of the report, and it was decided to recover the loss from his wages. However, according to the witness, the Claimant deserted work from 8 June 2013.

[20] According to the witness, the Claimant was not assaulted because no such report was brought to the Respondent's attention though he admitted he did not know how the Claimant left.

[21] The Claimant on his part testified that he was dismissed on 8 June 2013 by a manager called Benard Munyua Gacheru who also beat him up together with 2 police officers as a result of which he reported to the Police and he was issued with a P3 form (produced). The Claimant also produced treatment notes from Thika Level 5 Hospital.

[22] The manager who allegedly dismissed and assaulted the Claimant was not called to testify. His whereabouts or the failure to call him was not explained.

[23] The above, coupled with the P3 form and the treatment notes make it more probable that the narration as given by the Claimant is correct.

[24] The Court in the circumstances finds that the Respondent has failed to show that the Claimant deserted work. The Claimant was dismissed.

Whether dismissal was unfair

[25] The Respondent's case was anchored on the Claimant's purported desertion which has not been proved.

[26] Because of the position taken by the Respondent, it did not attempt to demonstrate whether the procedural fairness requirements of section 41 of the Employment Act, 2007 were complied with.

[27] The Court therefore reaches a conclusion that the dismissal of the Claimant was procedurally unfair and that it becomes superfluous to examine whether the Respondent has discharged the burden placed on employers by sections 43 and 45 of the Employment Act, 2007.

[28] Were the Court wrong on the conclusion on procedural fairness of the dismissal, the Court would nevertheless have held that the dismissal was unfair on the ground that the Respondent did not demonstrate that it had elected to accept the repudiation of contract by the Claimant on the ground of desertion through ultimatum(s) to resume work, show cause for not reporting to work or attempts to reach to him to explain his whereabouts.

Underpayments

[29] The Claimant was confirmed through a letter dated 31 August 2009 as a General worker.

[30] On 15 June 2010, the Claimant was designated as Assistant Storekeeper. The letter also advised him that his basic pay was Kshs 8,450/- and house allowance Kshs 1,267/-.

[31] Based on the documentary evidence, the Court finds that the Claimant was a Storekeeper and entitled to benefit to the prescribed minimum wages for Storekeeper as from 15 June 2010 and any claim for underpayment should be examined from that date.

2010-2011

[32] The prescribed basic minimum wage for a storekeeper from 1 May 2010 to 30 April 2011 according to Legal Notice No. 96 of 2010 was Kshs 9,495/-.

[33] Factoring in 15% of the prescribed basic wage as house allowance, the Claimant was entitled to house allowance of Kshs 1,425/-.

[34] He was therefore underpaid by Kshs 14,388/- up to 30 April 2011.

2011-2012

[35] The Claimant did not allege underpayments during this period.

2012-2013

[36] In terms of Legal Notice No. 71 of 2012, the prescribed basic minimum wage for a storekeeper during this period was Kshs 12,081/-.

[37] The Claimant's basic wage for the period ranged from Kshs 10,781/- to Kshs 11,150.

[38] The Court finds that there were underpayments during this period.

Overtime

[39] The contract between the Claimant and Respondent pegged overtime pay at not more than Kshs 9,328/- and the Claimant agreed to and worked under that arrangement.

[40] The claim for overtime is therefore declined.

Appropriate remedies

Pay in lieu of notice

[41] With the finding on the separation, the Court finds that the Claimant is entitled to 1 month pay in lieu of notice of Kshs 12,081/- (prescribed basic minimum wage at time of separation).

Wages for June 2013

[42] The Respondent admitted this head of claim and the Claimant is entitled to the Kshs 4,648/- as pleaded.

Underpayments

[43] The Court finds as indicated in the body of this judgment that the Claimant was underpaid and the parties are directed to jointly agree on the exact amount owed.

Overtime

[44] The head of claim is declined.

Compensation

[45] The Claimant served the Respondent for about 7 years as a general labourer and storekeeper.

[46] Considering the length of service, the Court is of the view that the equivalent of 7 months gross wages would be fair and appropriate (gross wage in April 2013 was Kshs 25,135/-).

Conclusion and Orders

[47] The Court finds and holds that the Claimant was unfairly dismissed and awards him and orders the Respondent to pay him

- (a) 1 month pay in lieu of notice Kshs 12,081/-
- (b) June 2013 wages Kshs 4,468/-
- (c) Underpayments (to be computed and filed)
- (d) Compensation Kshs 175,945/-

[48] Parties to agree on amount of underpayments and file the agreed computations in Court before issuance of decree.

[49] Claimant to have costs.

Delivered, dated and signed in Nakuru on this 19th day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Opar instructed by Muthanwa & Co. Advocates

Court Assistant Nixon