



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 403 OF 2013

SARAFINA WANYONYICLAIMANT

V

LESSOS VETERINARY SUPPLIERS LTD....RESPONDENT

JUDGMENT

1. Sarafina Wanyonyi (Claimant) sued Lessos Veterinary Suppliers Ltd (Respondent) on 14 November 2013 alleging unlawful termination of employment and seeking pay in lieu of notice, accrued leave, gratuity and compensation for unfair termination of employment.
2. The Respondent filed a Response on 11 February 2014 and an Amended Response on 12 June 2014.
3. The Cause was heard on 24 March 2016 and the Claimant filed her submissions on 13 April 2016, while the Respondent's submissions were filed on 8 May 2016.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant absconded duty or was unfairly dismissed and appropriate relief/contractual and statutory entitlements due to the Claimant.*
5. The Court wishes to note that it delivered judgment on 6 November 2015 in Nakuru Cause No. 402 of 2013, *Philemon Kiprotich Kirui v Lessos Veterinary Suppliers Ltd (Cicada Hotel)* in which the facts were similar to the instant Cause.

Abscondment or unfair termination of employment

6. The Respondent called its director. He stated that an Assistant Manager called him on 6 October 2011 and informed him that a customer's money had got lost in the hotel and that a report was made to the Police. The Claimant and one Philemon Kirui were arrested after investigations by the Police and were charged.
7. According to the director, the Claimant was released on bond, but she never resumed duty after the release.
8. The Director denied that he verbally or at all dismissed the Claimant from employment.
9. As to whether the Respondent had the Claimant's postal address, the witness stated he was not sure whether the Claimant was contacted, and that most of the employees used the Respondent's address.
10. The director further stated that he did not deal with employees on a day to day basis and that was the

responsibility of the Manager.

11. The Claimant in her testimony stated that she was charged before the Eldoret Magistrate's Court but the case was withdrawn by the Respondent on 15 July 2011.

12. The Claimant confirmed in cross examination that she did not report back to the workplace after release by the Court because a Manager called Philip Ambuni informed her on 5 October 2011 that she was not required and this was on the instructions of the Respondent's director.

13. Cases of abscondment and desertion raise legal and factual difficulties. The first difficulty is based on a legal question of the extent, nature and scope of the protection granted to employees against procedurally unfair termination by section 41 of the Employment Act, 2007 when an employer alleges desertion or employee absconded.

14. Section 41 of the Employment Act, 2007 provides that

41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of *misconduct, poor performance or physical incapacity* explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

15. The Respondent asserts that the Claimant absconded from work. Absconding from work is one of the grounds for summary dismissal under section 44(4) of the Employment Act, 2007. Absence from work without lawful cause or permission is categorised as gross misconduct.

16. The second difficulty arises from the need for the party asserting desertion or abscondment to prove that the employee had no intention to resume work.

17. The need for the employer to prove the intention has been accepted in comparative jurisdictions (see *Department of Education Gauteng v J Msweli & Ors* Case No. JR 2145 of 2008 from the Labour Court of South Africa and *London Transport Executive v Clarke* (1981) IRLR 166).

18. Locally, I addressed the question of desertion in *James Okeyo v Maskant Flower Ltd* (2015) eKLR and in *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR.

19. I have also considered the 2 local decisions by my brothers, *Antony Tendwa Shibayilo v Carzan Flowers Ltd* (2014) eKLR and *Ebrahim John Amwayi v Mabati Rolling Mills Ltd* (2014) eKLR, cited by the Respondent. These decisions did not draw on the comparative jurisprudence I referred to in my decisions mentioned in the preceding paragraph.

20. An employee who absconds from work is in breach of contract. It is a repudiation of contract. Under the common law, repudiation does not automatically terminate the employment contract. The innocent party must accept the repudiation (see *London Transport Executive v Clarke* (1981) IRLR 166) and *Geys v Societe Generale, London Branch* (2012) UKSC 63) and *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR.

21. In the present case, the Claimant admitted that she did not report back to work after she was released by the Magistrate's Court and she gave a reason.

22. That reason was not challenged, the manager was not called and the failure was not explained and the Respondent's director merely stated he was not involved in day to day operations.

23. Moreover, if the Claimant absconded, the Respondent has not shown what attempts if any, it took to reach out to or establish the whereabouts of the Claimant to explain her absence or to show cause why she should not be dismissed for not appearing at the workplace. The Respondent did not suggest that it did not

have the Claimant's contact details.

24. Based on the facts as presented, the Court finds that the Claimant did not abscond, she was dismissed.

25. And if at all the Claimant absconded, then the Respondent being the innocent party did not elect to accept the repudiation. The Respondent could have done this by giving her an ultimatum to resume duty or it would accept her repudiation.

26. And because it is not disputed that a hearing as required by section 41 of the Employment Act, 2007 was not held, the Court finds the dismissal unfair.

Appropriate remedies/contractual and statutory entitlements

Pay in lieu of Notice

27. By virtue of clause 3 of the letter of appointment and section 35 of the Employment Act, 2007, the Claimant should have been given one month written notice. None was issued and the Claimant is therefore entitled to one month pay in lieu of notice.

Accrued leave

28. The Claimant sought Kshs 8,669/- on account of accrued leave. She served the Respondent for some 8 months and would be entitled to *pro rata* leave.

29. No employment records were produced by the Respondent. Pursuant to section 10(3) and (7) and 74 of the Employment Act, 2007, the Court finds for the Claimant.

Compensation

30. The Claimant has succeeded in her claim of unfair termination of employment. Compensation is one of the primary remedies, albeit discretionary.

31. Considering the Claimant's length of service of about 8 months, the Court is of the view that compensation equivalent to 1 month's gross wages would be appropriate and fair.

Conclusion and Orders

32. The Court finds and holds that the Claimant's employment was unfairly terminated and awards her and orders the Respondent to pay her

(a) 1 month pay in lieu of notice Kshs 14,000/-

(b) Accrued leave Kshs 8,669/-

(c) Compensation Kshs 14,000/-

TOTAL Kshs 36,669/-

33. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 2nd day of September 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Rugut instructed by Chepkwony & Co. Advocates

For Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates

Court Assistants Nixon