



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 431 OF 2012

OMAMBA DOUGLAS NYAITO.....CLAIMANT

VERSUS

TEXT BOOK CENTRE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 15th March 2012. He sought to have the issue of the illegal dismissal of the Claimant resolved. The Claimant averred that he was employed in February 2009 as a Sales Representative earning Kshs. 15,000/- and at the time of termination on 9th February 2012 was earning Kshs. 25,200/- a month. He averred that he served the Respondent diligently and with care and that he was asked to resign from his job on 3rd and 4th February 2012 by the Human Resources Manager an offer he declined. He avers that he was dismissed on 9th February 2012 by the Managing Director. He sought reinstatement, six months salary in lieu of notice, salary, overtime and field allowances up to the time he would have retired. He prayed for judgment against the Respondent for a declaration that the dismissal was evil, null and void, a declaration that the rights of the Claimant were infringed upon and trampled, a declaration that the Respondent must obey and respect the law in dealings with the Claimant, an order that the Respondent pays the Claimant all the wages due to the Claimant from 2009 till the time the Claimant would have retired including promotions that would have been earned, the Respondent to pay any other loss consequent upon the illegal dismissal, unpaid salary for February 2012, Kshs. 25,200/-, overtime, offs, field allowances and public holidays plus weekends, leave allowances for the period worked, costs of the suit and any other relief this Court may deem fit to grant.
2. The Respondent filed a Memorandum of Defence on 10th May 2012 denying the Claimant's claim and also filed a Supplementary Response on 15th June 2012. The Supplementary Response annexed the letters exchanged between the parties being the employment letter dated 28th February 2008, confirmation in employment letter dated 30th September 2012, letter of demand by the advocates for the Claimant dated 7th February 2012, the reply by the Managing Director dated 16th February 2012 and finally the Respondent letter of termination of services dated 9th February 2012.

3. The Claimant testified on 9th July 2012 and in his testimony stated that he was presently looking for a job. He testified that he was a sales and marketing officer of the Respondent at the material times to this suit based in Coast Province. He stated he had no idea why he was asked to resign and if he failed to he would be sacked. He sought legal advice and his advocate wrote a letter to the Respondent to which there was a reply that he had absconded from duty. He denied absconding from work even for one day.
4. In cross exam by the Respondent's counsel, the Claimant testified that his main duty was to serve customers and bring in new ones his role was to bring in new business. He stated that payments were to be made directly to the office. He testified that where the customer is well known by the company the customer can receive supply without payment in cash. He testified that he was called to the meeting of 3rd February 2012 and at the meeting was his immediate manager, the HR manager and the 2 directors - Rajiv and Sarit. He stated that he was informed of the complaint from a customer in Malindi. He testified that he was not asked to explain in writing and that he did not go to work and he had a reason as to why. He had been asked to resign and the matter was with his lawyer. He admitted that he did not go on duty on 8th February 2012. He testified that he was on duty on Monday, Tuesday, Wednesday and Thursday he did not go to work. He stated that as per his work there was no way he could go for duty without allowances. He testified that he did not go for the money.
5. In re-examination he testified that he had an office in Mombasa, Coast region. He testified that he was not enabled to leave Nairobi. He stated there was no letter and there was no indication they had abandoned the quest for his resignation. He testified that he knew the customer who complained and that he answered the complaint.
6. The Respondent called Suleiman Gakuria who testified on 14th October 2014. He stated that he was a Sales Manager in charge of all the Sales representatives countrywide. He testified that the sales representatives reported to him and that the Claimant was a sales representative for the Coast region. He testified that his colleague in Finance received a call in January 2012 from a customer in Malindi. The customer wanted to purchase some envelopes and the customer had been advised by the Claimant to avail cash. He testified that it was unacceptable for the sales representatives to handle cash unless customer is settling debt and cash is banked immediately into the account. He testified that the Claimant was asked to come to the office at the end of the month and the customer was advised not to give cash. He testified that the Claimant was asked to explain what his intentions were in asking the customer to give cash. The Claimant sought time to prepare the report and submit it to management. In his recollection the meeting was quite cordial. He testified that when staff come from the field he did not expect them to hang around Nairobi. He expected the response on Friday or on the next day Saturday. He did not get a response on 3rd, 4th February and the Claimant did not return to work on 6th February. He testified that they received the letter on 7th February and the Claimant was not at work on 7th or 8th February and the Claimant was given a termination letter on 9th February 2012. He stated that the Claimant was given one month in lieu of notice, days worked, leave due and return of samples. He testified that the Claimant did not return and all that they received was letter from the Claimant's advocate. He testified that the Respondent wished to part amicably and acted in good faith. The allegations on the Claimant's wish to receive cash from a customer were serious and the Claimant absconded from duty. The Respondent was lenient and gave him a termination by notice and the Respondent was willing to pay his dues as per the letter.
7. In cross examination he testified that the Claimant was called to a meeting but it was not minuted. He stated that the Respondent used to give cash and allowances for fieldwork. He testified that sales representatives are given float of between 30,000/- and 35,000/- and when there is a claim they reimburse. He testified as of the beginning of February they had not paid the Claimant. He testified that they did not write any show cause letter and there was no disciplinary matter pending. He stated that the customer Shruti Enterprises wrote stating what had happened and the Claimant was dismissed for absconding from duty. He testified that the Respondent first dismissed

the employee then responded to his lawyer. He stated that if an employee absconds from duty he can be dismissed. He testified that records were held at finance on the Claimant's dues. He denied that there was mention to the Claimant that he should resign.

8. In re-examination he testified that the Claimant did not come to the office to collect money to go to the field. That marked the end of the testimony. Parties agreed to file written submissions.
9. The Claimant filed written submissions on 12th November 2014 and the Respondent on 2nd December 2014. The Claimant submitted that the Claimant was terminated unfairly and unlawfully hence he ought to be compensated. It was submitted on the strength of **Robinson v Harmans (1948) I Exch. 850** that 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.' It was submitted that this Court was empowered under Section 12 to grant relief including declaratory orders and an award of damages. He submitted that the principle to be followed when awarding damages for breach of contract is to put the aggrieved party to a position as close as possible to that in which he would have been had the breach not happened. It was submitted the Claimant would have retired at 60 years had the Respondent not breached his contract of employment and a sum of 10 million was sought under this head. The Claimant also sought substantial general damages for the serial breach of the Claimant's services 5 million, damages for harassment and discrimination of the Claimant Kshs 2 million, general damages for the illegal acts and non-compliance of Employment laws Kshs. 2 million, for mental anguish 2 million and for tort of mental anguish Kshs 1 million. The Claimant relied on the case of **Beatrice Achieng Osir v Board of Trustees Teleposta Pension Scheme [2012] eKLR** where an award of 13,592,817.30 was made by Ongaya J. The Claimant also sought exemplary damages.
10. The Respondent submitted that the Claimant was not candid as regards the matters leading to his termination. According to him he did not know why he was dismissed. The Respondent submitted that on cross examination it was when the Claimant admitted attending a meeting on Friday 3rd February 2012 where he was informed of a complaint by a customer based in Malindi. It was submitted that the Claimant did not report back to work on 4th as requested, 6th, 7th or 8th February 2012. The Respondent submitted that the Claimant was required to give a written explanation and he did not and instead instructed advocates to write a demand letter. It was submitted that the absence from work was a fundamental breach of contract as contemplated by Section 44(3) of the Employment Act. It was submitted that the Claimant refused to return to work and thus was not interested in being heard. It was submitted that the Claimant did not avail himself of the alternative dispute mechanisms available. Respondent submitted that the Claimant had not discharged his burden under Section 47(5) of the Employment Act. The Respondent placed reliance on the case of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR**.
11. The Claimant's case is that he was dismissed by the Respondent and the dismissal was unfair and unlawful. For that he claims damages both general and exemplary to the tune of Kshs. 23 million. It was his case that he was not told of the reasons for his termination and that he was asked to resign but refused to do so. The Respondent on the other hand stated that the Claimant was called and asked to give an explanation as to why he was asking a customer for money and the Claimant failed to respond and was absent from work prompting his dismissal.
12. I have carefully evaluated the evidence adduced. As is amply clear the burden on the employee is to prove the termination was unfair or unlawful within the meaning of the law in order to recover. The Respondent has a burden to discharge as well. The respective burden is captured succinctly in Section 47(5) of the Employment Act. The section provides:-

47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

13. The Claimant woefully failed to discharge his burden. He claims that he was not given an opportunity yet from all accounts including his own response to questions in cross-examination was that he was given an opportunity and failed to explain. He also was not able to explain his absence from work. He never went back to claim his expenses and allowances so that he could return to Mombasa his station. He thus did not avail of the opportunity that was open. Section 41 on procedural fairness does not contemplate the refusal of the employee to engage in the hearing. Where an employee fails to partake of the hearing can that employee be heard to say he was not heard? I think not. The law would not countenance the refusal by employee as a refusal by the employer to accord the employee the fairness dictated by statute. In the premises I find that the Claimant suit is not proved on a balance of probabilities and I dismiss the suit with costs. The Claimant to seek the balance of his dues (if any) from the sums he would have received as unpaid salary, notice and leave days not taken.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of February 2015

Nzioki wa Makau

JUDGE