



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 257 OF 2014**

**EDWARD WAITHAKA MWANGI.....CLAIMANT**

**v**

**TULAGA FARMERS COOPERATIVE SOCIETY LTD.....RESPONDENT**

**JUDGMENT**

1. Edward Waithaka Mwangi (Claimant) was employed by Tulaga Farmers Cooperative Society Ltd (Respondent) on 26 August 2003 as a driver.
2. On 14 September 2003, the Respondent issued him with a confirmation letter.
3. On 3 June 2013, the Respondent suspended the Claimant for 2 months pending further investigations over allegations that there were many complaints from farmers about improper service. The Claimant responded to the suspension letter through a letter dated 15 June 2013 denying the allegations and seeking a face to face meeting with the complainants in the presence of a neutral person (labour officer).
4. On 18 September 2013, the Kenya Union of Commercial, Food and Allied Workers reported a trade dispute to the Cabinet Secretary, Labour alleging unlawful/unfair termination of the Claimant.
5. The Cabinet Secretary accepted the trade dispute and appointed A. Karimi as conciliator through a letter dated 16 October 2013. The Conciliator called the parties to a meeting through a letter dated 13 November 2013, but it appears the dispute was not resolved hence the Claimant moved to Court on 27 June 2014 and he stated the issue in dispute as *unfair termination*.
6. The Respondent filed a Response and documents on 14 August 2014 and the Claimant filed a rejoinder on 3 October 2014.
7. The Cause was heard on 2 February 2015, and the Claimant filed his submissions on 25 March 2015. The Respondent's submissions were filed on 20 April 2015.
8. The Court has considered the pleadings, evidence, submissions and authorities, and identified the issues for determination as, *whether the Claimant deserted work or was dismissed, if dismissal, whether the dismissal was unfair and appropriate remedies.*

**Whether the Claimant deserted work**

9. Where an employer asserts that an employee deserted work, it is incumbent upon the employer to prove the same.
10. Desertion is not the same thing as absence from the appointed place of work without permission or lawful cause as provided for in section 44(4) of the Employment Act, 2007.
11. An essential ingredient of desertion is that there must be an intention not to return to work.
12. According to the testimony of the Claimant, he was suspended on 30 June 2013 for 2 months and on 15 June 2013, he wrote to the Respondent challenging the suspension but there was no response. On 2 August 2013, he reported back to work but he was instructed to go back and await

- further communication.
13. The Claimant denied receiving the letter dated 5 August 2013 from the Respondent asking him to report to work within 7 days or else give notice of leaving employment. He stated that he did not use the postal address in the letter. The letter indicated that the Respondent had information that the Claimant had secured alternative employment.
  14. In cross examination, the Claimant stated that he was expecting a letter asking him to resume work after the end of the suspension but was told to wait.
  15. The Respondent called 2 witnesses. It's Chairman James Kimathi stated that the Claimant did not resume duty after the end of the suspension, and therefore the Respondent sent to him the letter of 5 August 2013 directing him to report to work within 7 days but he did not. He also stated that the letter was sent through post to the postal address in the Claimant's file.
  16. The witness also stated that the Respondent's Manager had seen the Claimant driving another vehicle.
  17. The Respondent's Manager Milkah Wanjiku on her part stated that the Claimant deserted work and was given 7 days to report back but he did not.
  18. But the Manager did not testify at all to the contention that she as the Manager is the one who saw the Claimant driving another vehicle.
  19. If the Respondent had proved that the Claimant had secured alternative employment as a driver, the Court would have accepted that he deserted work with no intention of returning back.
  20. In the view of the Court, the fact that the Claimant challenged the suspension through his letter of 15 June 2013 and that a trade dispute was reported to the Minister show that he had not formed an intention not to report back to work.
  21. The failure to prove that the Claimant secured alternative employment coupled with the complaint to the Cabinet Secretary on 18 September 2013 means it is more probable that the Claimant did not have the intention not to resume work.
  22. The Court finds that the Claimant did not desert work and that this was a case of termination of employment/dismissal.

## **Whether dismissal was unfair**

### ***Procedural fairness***

23. Pursuant to section 41 of the Employment Act, 2007 a hearing is required before an employer takes the decision to terminate the employment of an employee on the grounds of *misconduct, poor performance or physical incapacity*.
24. The Claimant was suspended on allegations of improper service which falls under misconduct and performance.
25. But those are not the grounds which the Respondent advanced for the separation. The ground/reason given was desertion of work in that the Claimant did not resume duty after the 2 months suspension.
26. Employees, like the Claimant who desert are also entitled to a hearing. An employer must make attempts (or reasonable attempts) to seek explanations for the desertion through the employee's colleagues or contact details held in the employee's records.
27. According to the Respondent, it wrote to the Claimant on 5 August 2013 and sent the letter to the Claimant through P.O. Box 127 North Kinangop. This address, according to the Respondent's first witness was given by the Claimant and it was in his file.
28. The Claimant denied using P.O. Box 127 North Kinangop, which belonged to a school. He stated that he used the Respondent's P.O. Box 26 North Kinangop.
29. In cross examination, the Claimant admitted that he had used P.O. Box 127 in his letter of apology dated 17 January 2005.
30. In the view of the Court, the Claimant cannot run away from P.O. Box 127 North Kinangop. Although he used the Respondent's address, the school address must have been his home postal address.
31. Because the Claimant only denied receiving the letter but did not controvert or cross examine the Respondent's witnesses on the posting of the letter, the Court cannot find that a fair procedure was not used. The Respondent did what was reasonable in the circumstances.

## ***Substantive fairness***

32. The Claimant was not dismissed because of the allegations which were set out in the letter of suspension but for desertion as outlined in the ultimatum dated 5 August 2013.
33. The other allegations in the said letter could only go towards showing a bad disciplinary record but were not the principal reasons for the separation.
34. It was incumbent upon the Respondent to prove that the Claimant deserted work. Desertion essentially amounts to repudiation of contract and the innocent party must elect to accept it.
35. The Court has already observed that the Respondent has failed to prove the Claimant had an intention not to resume work.
36. The logical conclusion therefrom is that the Respondent has failed to prove the reasons for termination of employment (section 43 of the Employment Act, 2007) or that desertion was a valid and fair reason (section 45 of the Employment Act, 2007).

## **Appropriate remedies**

### ***1 month pay in lieu of Notice***

37. The Claimant would be entitled to one month pay in lieu of notice of Kshs 18,340/- being the equivalent of one month basic pay.

### ***Leave not taken and paid***

38. The summary dismissal letter indicated that the Claimant had annual leave for 2012 which was commuted to Kshs 14,119/-. The Claimant had sought Kshs 12,838/-.
39. The Court would award the Claimant Kshs 14,119/- as calculated by the Respondent.

### ***Wages for June 2013***

40. Under this head, the Claimant sought Kshs 1,834/-. The Claimant is entitled to earned wages.

### ***Severance pay***

41. The Claimant was not declared redundant. He is not entitled to severance pay.

### ***Compensation***

42. The Claimant sought Kshs 220,080/- as compensation. Compensation is a primary though discretionary remedy where the Court finds unfair termination.
43. The Claimant served the Respondent for about 11 years. He has secured alternative employment though contractual. Considering these factors, the Court would award him the equivalent of 5 months wages assessed as Kshs 91,700/-.

### ***Costs***

44. The Claimant has succeeded. Costs do not follow the event in the Employment and Labour Relations Court. The Court would award him costs.

## **Conclusion and Orders**

45. The Court finds that the Claimant did not desert duty but was dismissed unfairly and awards him and orders the Respondent to pay him

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|----------------------------------|---------------|
| a. 1 Month pay in lieu of Notice | Kshs 18,340/- |
| b. Pending leave                 | Kshs 14,119/- |
| c. Wages for June 2013           | Kshs 1,834/-  |

