



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 244 OF 2014

JAMES OKEYO

CLAIMANT

v

MASKANT FLOWER LIMITED

RESPONDENT

JUDGMENT

1. James Okeyo (Claimant) was employed by Maskant Flower Ltd (Respondent) on 9 June 2009 as a Supervisor.
2. On 26 June 2014, the Claimant lodged legal proceedings against the Respondent alleging unlawful/wrongful dismissal and seeking a total of Kshs 160,000/- being wages for June and July 2011, one month pay in lieu of notice, service gratuity and 12 months compensation.
3. The Respondent filed a Response on 6 August 2014, to which the Claimant filed a rejoinder on 12 August 2014. On 26 September 2014, the Respondent filed its List of Documents.
4. The Cause was heard on 19 January 2015 and 10 March 2015. The Claimant filed his submissions on 24 March 2015, while the Respondent filed its submissions on 8 April 2015.
5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant deserted duty or was dismissed, whether dismissal was unfair/wrongful and if so, appropriate remedies.*

Whether Claimant deserted duty or was dismissed

6. The Claimant's pleaded case was that his employment was unlawfully/wrongfully terminated around July 2011 without notice or a hearing.
7. In testimony, the Claimant stated on 26 July 2011 at around 11.00 am, he was called by a Mr. Don, owner of the Respondent. When he went to the office, he was told his services were no longer required due to reduced business. He was not given a letter of termination of employment but he was escorted out by security guards, and thereafter he made a complaint to the Labour office.
8. He also stated that he was not given any notice of the termination of employment.
9. The Claimant denied that he was absent on 21 July 2011 or 25 July 2011 and stated that he did not desert duty.
10. In cross examination, the Claimant denied that he was absent from work without permission for 2 days in April 2011, and also stated that in June 2011 he was away with permission for 6 days.
11. Shown the July 2011 muster roll, the Claimant stated that the roll indicated he was present for the first 12 days, after which he was marked absent.
12. The Respondent on its part denied unlawfully/wrongfully dismissing the Claimant. It was contended that the Claimant worked until 12 July 2011 and was scheduled to proceed on leave

- from 13 July 2011 to 17 July 2011 and was allowed to be away until 19 July 2011 to report back on 20 July 2011 but he failed to report back.
13. According to the Respondent, the Claimant deserted duty without giving any reasons.
 14. The Respondent's first witness, Robert Sila Muindi stated that according to the June 2011 muster roll, the Claimant was absent with permission for 6 days and that in July 2011, the Claimant was marked present until 13 July when he was away on leave until 17 July 2011. The Claimant then requested for 2 days leave which was granted and that after the 2 days, the Claimant was marked as absent without permission as he did not resume work.
 15. The witness stated that there was an attendance register and that there appeared to be alterations in the muster roll.
 16. The witness stated that the Claimant was not dismissed but deserted duty.
 17. In cross examination, the witness stated that the Claimant was his neighbor and that the residential compound was under 24 hour guard and he did not know how the Claimant moved his household items without being noticed.
 18. The Respondent's second witness was its Director, Don Goossens. He stated that he dismissed a Manager John Sasi and the Claimant approached him to be given the managerial position, but he declined because the Claimant did not have the knowledge for the position.
 19. The witness also stated that the Claimant walked away when he declined to offer him the position of Manager. He further stated that the Claimant did not report back on duty after 19 July 2011 but only came to take up his belongings.
 20. The witness denied he terminated the Claimant's employment because according to him, there was no reason to terminate the Claimant's services.
 21. In brief, the above is a narration of the version of the facts as stated by the parties. That the versions are inconsistent needs no belabouring but nevertheless the Court must establish where the truth lies by applying the law to the facts.
 22. The Respondent's primary defence is that the Claimant deserted and it therefore becomes imperative to discuss what legally constitutes desertion, a term which is commonly used in respect of the armed services.

What is desertion for legal purposes ?

23. The question of what constitutes desertion in employment law is not a straight forward one.
24. 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.
25. 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.
26. 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.
27. 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).
28. 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 (my decision in *Daniel Mueke v Bhogals Auto World* (2014) eKLR was made without the benefit of the authorities cited in the *Uni-World* case).
29. 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*.
30. 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.
31. Where an employer alleges desertion, it must prove the ingredients of desertion. 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).
32. Establishing the intention not to return to work will depend on the facts as presented in evidence.
 33. The Respondent did not present any facts from which the Court could conclude that the Claimant had no intention to return to work. The Respondent failed to discharge the burden of proving that desertion was a reason for termination of employment as required by section 43 of the Employment Act, 2007.
 34. Further, under the statutory framework in our jurisdiction, even the deserting employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through colleagues, contact details in the employees file (records).
 35. An employer can also issue an ultimatum such as through a show cause letter addressed to the employee's contact details on its records.
 36. There was no suggestion here that the Respondent made any or any reasonable attempts to reach out to the Claimant to explain his absence or alleged desertion.
 37. The Court therefore finds that the Claimant did not desert duty but his employment was terminated without affording him an opportunity to be heard and therefore the dismissal was unfair.

Appropriate remedies

Days worked in June and July 2011

38. The Claimant sought Kshs 20,000/- on account of wages for the 2 months. He testified that he was not paid. The Respondent's Director on his part stated that he paid the Claimant the wages but he did not have any records.
39. The Respondent knew there was a claim for wages for the 2 months. Nothing would have been easier than to produce the wage records for the period. This was not done and with the word of the one against the other, the Court finds in favour of the Claimant.

1 month pay in lieu of Notice

40. With the conclusion reached that the termination of Claimant's employment was unfair, he is entitled to one month pay in lieu of notice pursuant to section 35(1)(c) of the Employment Act, 2007.

Service gratuity

41. Under this head, the Claimant sought Kshs 10,000/-. No material was presented to demonstrate that the Claimant was a contributor to the National Social Security Fund or a member of a pension scheme.
42. By dint of sections 35(5) and (6) of the Employment Act, 2007, he is entitled to service pay.

12 months compensation

43. The Claimant sought the maximum compensation for unfair termination/wrongful dismissal.
44. The Court has reached a conclusion the termination of employment was unfair and therefore compensation is available. Compensation is discretionary and the Court is enjoined to consider any, some or all of the factors outlined in section 49(4) of the Employment Act, 2007.
45. The Claimant served the Respondent for about 2 years. Considering the length of service, the Court would award him the equivalent of 2 months gross wages assessed as Kshs 20,000/-.

Conclusion and Orders

46. The Court finds and holds that the employment of the Claimant was unfairly terminated and awards him and orders the Respondent to pay him

