



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NUMBER 332 OF 2011**

**DANIEL OCHIENG.....CLAIMANT**

**VERSUS**

**EZEMAK REFRIGERATION AND CONTRACTORS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The undisputed facts of this case are that the claimant was hired by the respondent in June, 1997 as a painter on a monthly salary of Kshs.4000/= which was revised from time to time and was Kshs.19,000/= by the time the claimant's services were terminated.
2. According to the claimant however, the respondent unlawfully and without justification terminated his services after serving for twelve years, without notice as required by law.
3. In his evidence in Court, he testified that on 14<sup>th</sup> September, 2009, the respondent sent him on compulsory leave for one month. He further testified that he was not told of the reasons for his compulsory leave and after the expiry of the one month suspension period he was never called or written to in regard to returning to work.
4. On being suspended he consulted his lawyer who issued a demand letter to the respondent seeking to know why he was sent on compulsory leave. The demand letter and the response thereto was produced as C-ex 1 and 2. It was his evidence that he was enrolled to National Social Security Fund in 2003 but some of his contributions were never remitted by the respondent.
5. In cross-examination he denied refusing to work and that the respondent's Managing Director asked him to leave immediately after issuing him with the letter sending him on compulsory leave. He further stated that he never went back to work but there was communication between his lawyer and the respondent. It was further his evidence that it took him three years before he brought the present claim because there was still correspondence between his lawyers and the respondent. He testified that he was afraid to go to work as he was not sure what would happen to him. Instead he just asked his lawyer to demand his dues. He denied ever being paid leave dues.
6. The respondent on its part called one Irene Muthoni Macharia. She testified that the claimant had been assigned painting work but declined to perform the same. He was consequently sent on compulsory leave and asked to return after one month, but the claimant did not return after the expiry of one month. According to her therefore, the claimant deserted employment.

7. Concerning leave it was her evidence that the claimant regularly took his leave and whenever he did not, he was paid in lieu of leave.
8. The claimant's counsel in his closing submissions stated that an employer is duty bound, after sending an employee on suspension or compulsory leave, to summon back the employee or initiate disciplinary proceedings starting from issuing the employee with a show cause letter, that will eventually lead to his dismissal. According to Counsel, the claimant was neither told the reason for his dismissal nor called back by the respondent after the expiry of the suspension period. Counsel submitted further that the suspension letter did not expressly inform the claimant that he should return to work on 14<sup>th</sup> October, 2009 as pleaded by the respondent.
9. Regarding the compulsory leave counsel submitted that the procedure for sending his client on such leave was irregular since the respondent did not hear and consider any representations which the claimant had to make as required by section 41 (2) of the Employment Act. Further that the letter sending the claimant on compulsory leave did not indicate the reason why he was being sent on such leave and the letter further omitted to expressly state when the claimant was expected back to work.
10. The respondent's counsel on the other hand submitted that the suspension letter did not amount to termination of employment but rather was a disciplinary action. The respondent therefore expected the claimant to come back to work and resume his duties after the expiry of one months' suspension period.
11. Regarding reasons for suspension counsel submitted that this was because of insubordination as the claimant refused to obey a lawful instruction to do what he was employed to do. Concerning leave Counsel submitted that the claimant regularly took leave and only outstanding leave days were 14 days which the respondent does not refuse paying for.
12. The respondent in this suit denied terminating the claimant's services. It is their position that the claimant was sent on compulsory leave of one month as a disciplinary measure and was expected to return to work upon expiry of the compulsory leave period. The claimant on the other hand claims that he was dismissed from employment or rather his services were terminated by the respondent since he was never called back to work upon the expiry of the suspension period. The respondent on the other hand maintains that they called the claimant back to work but he refused to do so preferring to engage in correspondence through his lawyers.
13. The Employment Act does not provide for any procedure to be followed prior to sending an employee on suspension or compulsory leave. These are usually contained in internal human resource manuals or code of regulations. The provisions of section 41 which requires giving of reasons and accord an employee a chance to respond to such reasons prior to termination of such employee's services does not apply to a situation where an employer is considering suspension or sending an employee on compulsory leave.
14. As noted above, the respondent took the position that it never terminated the claimant's services but rather that the claimant neither came for his September, 2009 salary nor returned to work upon the expiry of his compulsory leave period. The only burden on the respondent therefore is to show that efforts were made to ask the claimant back to work while the burden of proving there was termination of services and unfairness thereof lie on the claimant.
15. By undated letter received by the Counsel for the claimant on 28<sup>th</sup> October, 2009 and produced as D-ex 2, the respondent states among other things that the claimant was sent on compulsory leave after he was given an urgent assignment but declined to undertake the same. Further, the claimant was called back but refused. The letter further informed the claimant's counsel that if the claimant wanted to resign they had no problem but his behavior at work had deteriorated. The letter stated he could come back to work with a written explanation but for the leave, he had exhausted his days except for 2009.
16. No evidence of a reply to this letter was adduced in Court nor did the claimant testify of any attempt to resume work but was refused by the respondent. In fact it was his evidence before the Court that he

never went back to work after suspension but communicated with the respondent through his advocate.

17. Taking into account that proof in civil cases is on a balance of probabilities, the Court forms the view that it was more probable than not that the claimant was the one who deserted work. His claim for wrongful and unfair termination of employment is hereby dismissed.

18. The respondent will however pay the claimant his salary for the month of September, 2009 and 14 days in October, 2009 being the period when the claimant was under suspension.

19. Each party shall bear their own costs.

20. It is so ordered.

Dated at Nairobi this 7<sup>th</sup> day of May 2015

Abuodha J. N.

Judge

Delivered this 7<sup>th</sup> day of May 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge