



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 392 OF 2014

BENSON OWINO ODONGO

CLAIMANT

v

MENENGA OIL REFINERY LTD

RESPONDENT

JUDGMENT

1. Benson Owino Odongo (Claimant) sued Menengai Oil Refinery Ltd (Respondent) 25 August 2014 alleging unfair termination of employment and seeking payment of *pay in lieu of notice, overtime, outstanding leave, compensation and a Certificate of Service*.
2. The Respondent filed a Response on 28 October 2014 alleging that the Claimant's employment was not unfairly terminated but that he deserted employment.
3. The Cause was heard on 27 May 2015 and the Claimant filed his written submissions on 17 June 2014. The Respondent filed its submissions on 10 June 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as *whether the Claimant deserted duty or had his employment terminated unfairly and appropriate remedies including entitlements accruing to the Claimant because of the employment relationship*.

Desertion or unfair termination of employment

5. The Respondent contended that the Claimant deserted employment from 1 April 2014 after getting an introductory letter to apply for a loan. Attempts to get him on phone and through workmates did not succeed.
6. The Respondent's Human Resources Assistant testified that it could not write a show cause letter to the Claimant because the address he had used was that of the employer and that as a result of the desertion, the Respondent wrote to the Local Labour Officer on 15 April 2014 to inform his office of the Claimant's dismissal on account of desertion.
7. According to the witness, it was not possible to hold a disciplinary hearing in the circumstances.
8. The Claimant testified. He stated that he got injured at home on the evening of 31 March 2014 but he could not manage to get the Respondent's Transport Manager who was his supervisor on phone to alert him of the injury.
9. He also stated that he managed to report back to work only on 14 April 2014 when he was instructed to go back home and collect a letter the next day. The next day, he was denied entry by security guards.
10. In cross examination, the Claimant stated that he did not report to work because he was unable to walk and that he did not seek medical attention from a hospital but bought drugs from a chemist.
11. He further stated that he did not send his brother to inform the Respondent of the injury he had sustained.
12. It cannot be disputed that the Claimant did not report to work with effect from 1 April 2014. He

- only went back on 14 April 2014.
13. An employee should be absent from work with permission or for lawful cause. The Claimant did not have permission to be away though his injury was a lawful cause to be absent from work.
 14. The Claimant in this respect had options available to him. He could have secured permission through phone or a workmate. He could not tell in Court the Transport Manager's phone number allegedly because he had lost his phone.
 15. This explanation is wanting. Being a factory worker, he could have sent a neighbour or workmate to inform the Respondent of his condition but he did not.
 16. Another option was to seek medical treatment from a recognised medical practitioner or hospital so that when he went back to work he could explain his absence. The Claimant took matters casually.
 17. The Court finds the testimony of the Respondent's Human Resources Assistant more probable.
 18. The Claimant has not demonstrated that he had lawful cause to be away.
 19. But did the Claimant dismiss himself. To prove desertion, the employer must not only prove absence but also an intention not to resume work. That is the gist of the decision of *Department of Education Gauteng v J Msweli & Ors* Case No. JR 2145 of 2008 from the Labour Court of South Africa.
 20. 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.
 21. In the *Maskant Flower Ltd* case I observed that

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.

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).

22. The Respondent has not proved the Claimant had an intention not to resume work.
23. In the circumstances, the Respondent after having failed to reach the Claimant on phone and through workmates should have held a disciplinary hearing on 14 April 2014 when the Claimant resurfaced.
24. The Respondent did not hold a hearing and the Court therefore finds that it acted unfairly in declaring the Claimant dismissed.

Appropriate remedies/entitlements

25. In the employment relationship, some entitlements accrue to the employee and fall due despite and in spite of the manner of separation. The Court will consider these together with other appropriate remedies.

Pay in lieu of Notice

26. The Claimant would be entitled to 1 month pay in lieu of notice in consideration that the Court has found his dismissal unfair. The Claimant's basic wage was Kshs 12,880/- at the time of dismissal.

Overtime

27. The Claimant's evidence that he used to report to work at 8.00am and leave at 8.00pm was not challenged or controverted. The Respondent's witness merely stated that overtime worked was paid.
28. The Respondent was on notice that it was facing a claim for overtime. Being the employer, it should have produced the relevant employment records on working hours but it did not.

29. The Court would therefore find for the Claimant in the sum of Kshs 334,439/95 as pleaded.
30. The Court would once again exhort practitioners not to take casually the production of employment records when confronted with this type of claims.

Leave

31. The Respondent's witness admitted that the Claimant did not go on leave for 2013/2014 but stated that the same was offset with pay in lieu of notice. The witness did not disclose the amount.
32. The Claimant pleaded the leave equivalent in cash as Kshs 10,367/- and the Court awards him the same.

Compensation

33. This is one of the primary remedies for unfair termination. However, it is a discretionary remedy.
34. The Claimant's cause of action for unfair termination of employment has succeeded largely because of a legal technicality. Further, he has succeeded in respect of the other claims.
35. The Court declines to award compensation in the circumstances.

Conclusion and Orders

36. The Court finds and holds that the Respondent has failed to prove that the Claimant deserted and so the summary dismissal was unfair and awards the Claimant and orders the Respondent to pay him

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|----------------------------------|-----------------|
| i. 1 month pay in lieu of notice | Kshs 12,880/- |
| ii. Overtime | Kshs 334,439/95 |
| iii. Accrued leave | Kshs 10,367/- |

TOTAL **Kshs 357,686/95**

37. Compensation is declined.
38. Each party to bear own costs as Claimant did not abide with timelines for filing of submissions.

Delivered, dated and signed in Nakuru on this 30th day of October 2015.

Radido Stephen

Judge

Appearances

For Claimant	Ms. Wachira instructed by Korongo & Co. Advocates
For Respondent Employers	Mr. Masese, Senior Legal Officer, Federation of Kenya
Court Assistant	Nixon