



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 402 OF 2013

PHILEMON KIPROTICH KIRUI CLAIMANT

v

LESSOS VETERINARY SUPPLIERS LTD
(CICADA HOTEL) RESPONDENT

JUDGMENT

1. Philemon Kiprotich Kirui (Claimant) sued Lessos Veterinary Suppliers Ltd (Respondent) on 14 November 2013 alleging unlawful termination of employment and seeking pay in lieu of notice, accrued leave, gratuity and compensation for unfair termination of employment.
2. The Respondent filed a Response on 11 February 2014 and an Amended Response on 12 June 2014.
3. The Cause was heard on 2 December 2014 and 2 June 2015. The Claimant filed his submissions on 11 June 2015 while the Respondent filed its submissions on 3 July 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant absconded duty or was unfairly dismissed and appropriate relief/ contractual and statutory entitlements due to the Claimant.*

Abscondment or unfair termination of employment

5. The Respondent called 2 witnesses. The first witness was the Operations Manager. He stated that a customer's money got lost and a report was made to the Police. The Claimant was arrested and charged and never resumed duty.
6. The witness also stated that the Respondent's Director did not verbally dismiss the Claimant from employment.
7. The Respondent's Director Dr. Mwangi Gitonga also testified. He stated that the Claimant and another employee could not account for a customer's Kshs 90,000/-. A report was made to the Police and the Claimant and another employee were arrested and charged.
8. He further stated that the Claimant did not resume duty after he was released on bond and that the Claimant was therefore not dismissed.
9. The Claimant in his testimony stated that he was charged and was later released on bond and that he went back to the workplace but a Manager called Philip Ambuni informed him he was not required because he was a criminal.
10. In cross examination, the Claimant stated that the Respondent's Director did not tell him he had been dismissed.
11. Cases of abscondment and desertion raise legal and factual difficulties. The first difficulty is based on a legal question of the extent, nature and scope of the protection granted to employees against procedurally unfair termination by section 41 of the Employment Act, 2007 when an employer

alleges desertion or employee absconded.
12. Section 41 of the Employment Act, 2007 provides that

41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of *misconduct, poor performance or physical incapacity* explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

13. The Respondent asserts that the Claimant absconded from work. Absconding from work is one of the grounds for summary dismissal under section 44(4) of the Employment Act, 2007. Absence from work without lawful cause or permission is categorised as gross misconduct.
14. The second difficulty arises from the need for the party asserting desertion or abscondment to prove that the employee had no intention to resume work.
15. The need for the employer to prove the intention has been accepted in comparative jurisdictions (see *Department of Education Gauteng v J Msweli & Ors* Case No. JR 2145 of 2008 from the Labour Court of South Africa and *London Transport Executive v Clarke* (1981) IRLR 166).
16. 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.
17. I have also considered the 2 local decisions by my brothers, *Antony Tendwa Shibayilo v Carzan Flowers Ltd* (2014) eKLR and *Ebrahim John Amwayi v Mabati Rolling Mills Ltd* (2014) eKLR, cited by the Respondent. These decisions did not draw on the comparative jurisprudence I referred to in my decisions mentioned in the preceding paragraph.
18. An employee who absconds from work is in breach of contract. It is a repudiation of contract. Under the common law, repudiation does not automatically terminate the employment contract. The innocent party must accept the repudiation (see *London Transport Executive v Clarke* (1981) IRLR 166) and *Geys v Societe Generale, London Branch* (2012) UKSC 63) and *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR.
19. In the present case, the Respondent has not demonstrated that the Claimant had an intention not to resume work. Similarly, the Respondent has not shown what attempts if any it took to reach out to or establish the whereabouts of the Claimant to explain his absence or to show cause why he should not be dismissed for not appearing at the workplace. The Respondent did not suggest that it did not have the Claimant's contact details.
20. Based on the facts as presented, the Court finds that the Claimant did not abscond, he was dismissed. And if he absconded, the Respondent being the innocent party did not elect to accept the repudiation. The Respondent could have done this by giving him an ultimatum to resume duty or it would accept his repudiation.
21. And because it is not disputed that a hearing as required by section 41 of the Employment Act, 2007 was not held, the Court finds the dismissal unfair.

Appropriate remedies/contractual and statutory entitlements

Pay in lieu of Notice

22. By virtue of clause 2 of the letter of appointment and section 35 of the Employment Act, 2007, the Claimant should have been given one month written notice. None was issued and the Claimant is therefore entitled to one month pay in lieu of notice.

Accrued leave

23. The Claimant sought Kshs 10,681/- on account of accrued leave. He stated in testimony that he did not go on leave during the period of employment.
24. The testimony was not controverted. No employment records were produced by the Respondent. Pursuant to section 10(3) and (7) and 74 of the Employment Act, 2007, the Court finds for the Claimant.

Gratuity

25. Gratuity must have either a contractual or statutory basis. The Claimant did not provide any contractual agreement on gratuity. He equally did not draw the attention of the Court to a statutory foundation for the gratuity or suggest it is the same as service pay provided for in section 35 of the Employment Act, 2007.

Compensation

26. The Claimant has succeeded in his claim of unfair termination of employment. Compensation is one of the primary remedies, though albeit discretionary.

27. Considering the Claimant's length of service of about 1 year, the Court would award the equivalent of 2 months gross wages as compensation, based on the wage indicated in the appointment letter (Kshs 9,500/).

Conclusion and Orders

28. The Court finds and holds that the Claimant's employment was unfairly terminated and awards him and orders the Respondent to pay him

(a) 1 month pay in lieu of notice	Kshs 9,500/-
(b) Accrued leave	Kshs 10,681/-
(c) 2 months wages compensation	Kshs 19,000/-
TOTAL	Kshs 39,181/-

29. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 6th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Bichanga instructed by Chepkwony & Co. Advocates

For Respondent Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates

Court Assistants Mwangi/Nixon