



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 209 OF 2014

BERNARD ZAKARIACLAIMANT

VERSUS

DR. SUBHASH M. SHAHRESPONDENT

J U D G M E N T

I N T R O D U C T I O N

The claimant filed this suit on 14/4/2014 claiming employment terminal dues plus damages for unfair termination by the respondent on 8/4/2014. In response the respondent has denied liability for the alleged unfair termination and instead accused the claimant for deserting work without notice. In addition the respondent has filed a counterclaim seeking to recover one month salary in lieu of notice plus outstanding loan balance of ksh.69500.

The suit was heard on 4/6/2014 when the claimant testified as CW1 and the respondent testified as RW1 and called Mr. Sammy Kyalo as RW2.

CLAIMANT'S CASE

CW1 was employed by the respondent in 1997 as a driver and worked continuously until August 2012 when the contract of employment was terminated on mutual agreement. The claimant was paid all his employment dues for the years served. By contract dated 1/8/2013 the claimant was re-employed by the respondent as a driver for a salary of ksh.15180 per month. The contract was for a term of 2 years. On 8/4/2014 his son fell sick and sought a loan or salary advance of ksh.5000 from the respondent but the respondent refused saying that he was not a bank. The respondent also told him to go away. The respondent and his wife drove away all the 2 cars and returned 1 pm for lunch. After lunch they slept until 3 pm when RW2 came and gave CW1 a paper to write a resignation letter but CW1 refused. RW1 then ordered CW1 to go away and report wherever he wished to.

CW1 called RW1 the following day but RW1 told him that he needed to terminate one employee. CW1 then reported the dismissal to the labour officer who advised him to file suit in court. CW1 contended that the dismissal was wrongful and unfair because he was not given any notice. He prayed for one month salary in lieu of notice, salary for the remainder of the contract being 16 months and leave for the 2 years term.

On cross examination he confirmed that his claim was only in relation to the 2 years contract. He contended that RW1 changed his attitude after employment was changed from permanent to term contract. He admitted that he owed the respondent a loan of ksh.61500 which he was repaying by salary deduction of ksh.2500 per month but he did not complete the payment after the dismissal. He maintained that it is the RW1 who dismissed him after CW1 asked for a loan of ksh.5000 to take his child to hospital. CW1 denied ever deserting work. He remained at the RW1's home with the other workers when he drove away and waited until he returned in the afternoon. He further denied ever showing disrespect to the RW1.

DEFENCE CASE

RW1 confirmed that he had employed CW1 from 1998 as a driver until 8/4/2014. He also confirmed that CW1 earned a consolidated of ksh.15180. RW1 contended that on 8/4/2014, CW1 requested him for a loan of ksh.20,000 for rebuilding his kiosk at Kongowea which was burnt down. RW1 declined the request because CW1 had another loan balance of ksh.69500.

CW1 then changed the request to one of salary advance for the month of April 2014 but RW1 refused because it was only the 8th day of the month. CW1 then declared that he would not work any more unless his demands were granted. RW1 called RW2 to talk to the claimant but the latter was not pursued and left. CW1 called RW1 the following day and RW1 referred him to RW2 because RW1 had not dismissed him.

RW1 contended that he could not deny CW1 a loan of ksh.5000 for medication when between 31/8/2013 and December 2013 RW1 had given CW1 ksh.86500 loan to build a rural house. RW1 contended that on 9/4/2014 he notified the labour office writing about the claimant's desertion of work.

On cross examination by the claimant he denied the allegation that he denied CW1 a loan of ksh.5000 for medication of his child and maintained that the loan requested for was ksh.20000 for rebuilding of a kiosk. He also denied that he left CW1 at his (RW1) compound. He maintained that he met CW1 and the RW2 and asked RW2 to persuade CW1 but not ask him to sign a resignation letter. RW2 is the HR manager for respondent's Group of companies.

On 8/4/2014 he was called by RW1 to his house and on arrival he found CW1 outside the gate. RW1 informed him that CW1 was demanding a loan of ksh.20,000 to rebuild his kiosk at the market. RW2 then talked to CW1 asking him to be humble and persuade RW1 for the loan and not to make demand. CW1 became very emotional and demanded his salary so that he could go away. RW2 reminded him that he was bound by the contract to serve a notice before termination. RW2 confirmed that they wrote a letter to the labour officer about the desertion. According to RW2, it's the claimant who deserted work and denied that RW1 dismissed CW1.

On cross-examination by the claimant, RW2 agreed that the meeting at RW1's house was attended also by the RW1's wife. RW2 denied ever using harsh words against CW1. He also denied ever telling CW1 to resign. RW2 confirmed that the relationship between CW1 and RW1 was good.

After the close of the hearing both parties filed written submissions.

ANALYSIS AND DETERMINATION

After carefully going through the pleadings, evidence and the submissions, the court summarized the issues for determination as follows:

- 1. Whether the claimant deserted work or was unfairly dismissed.**
- 2. Whether the counterclaim has merits**
- 3. Which orders should issue.**

Desertion or unfair dismissal

The claimant alleges that on 8/4/2014 morning, the RW1 told him to go away after requesting for a loan and salary advance of ksh,5000. The RW1 and his wife then drove away all the cars and left him at their home compound until they returned in the afternoon. That at around 3pm, RW2 came to RW1's home and they called CW1 for a meeting whereby RW2 was giving CW1 a paper to write a resignation letter. When CW1 refused to write the resignation letter RW1 ordered him to go away and dismissed him without any pay. He denied that he deserted work and maintained that he was dismissed without notice.

RW1 has denied that he drove away and left CW1 at his home compound. He stated that When he declined to grant CW1 a loan, or salary advance, CW1 said that he would not work any more and went away. RW1 then called RW2 to come and persuade the CW1. RW2 has corroborated that evidence when he said that he was called by RW1 to his house and on arrival he found CW1 outside the RW1's home gate. Although the defence witnesses did not specify the time when all this was happening, the court has no reason to doubt their consistent evidence.

RW2 confirmed the evidence of RW1 when he said that he tried to persuade CW1 to be humble to the employer and stop making demands but CW1 stood his ground that he would not continue working if the loan or salary advance was not given to him. According to RW2, he challenged the CW1 to put his resignation down in writing but he refused and demanded for his due salary because he was not to continue with work. When RW2 told him that the contract bound him to give notice or forfeit salary, Cw1 became emotional and went away. The court believes the evidence of the defence witness that the claimant deserted work on 8/4/2014 after he was denied his request for a loan or salary advance. It is immaterial the amount or the purpose for the request loan or salary advance.

Consequently, the court finds on a balance of probability that the claimant was not dismissed but he deserted work on his own volition.

COUNTER-CLAIM

The claimant admitted that he got a loan of ksh.61500 from the respondent of which he was repaying by installments of ksh.2500 per month through salary deductions. He did not admit receiving any other loan as alleged by the defence. He also did not state how much debt was still outstanding as at the time he left employment. The respondent on the other hand stated that on 1/8/2013, he advanced a loan of ksh.61500 to the claimant to build a rural house. That on 26/10/2013, respondent advanced a further ksh.20000 loan to the claimant to complete his said rural house. In addition to the foregoing while the respondent was abroad, the claimant obtained another loan of ksh.5000 from RW1's brother in November 2013. According to the respondent he advanced to the claimant a total of ksh.86500 between 1/8/2013 and December 2013. He however, did not explain how much was repaid by the claimant as at the time he left the employment.

The court has seen photocopies of some documents filed together with his defence. The said documents were however never explained to the court or referred to by the witnesses during their testimonies. On the other hand the alleged brother to the respondent never testified to confirm that he advanced a loan of ksh.5000 to the claimant. Even if he did advance the said loan of ksh.5000, the respondent is not privy to that loan contract and he lacks *locus standi* to sue for its recovery.

The foregoing finding reduces the counterclaim to ksh.81500 as the loan allegedly advanced to the claimant by the respondent personally. Out of the said sum, the defence did not lead the claimant to admit the loan of ksh.20000 allegedly advanced on the claimant on 26/10/2013 during his cross examination.

Likewise the respondent did prove during the defence case that the claimant did request and eventually receive the alleged ksh.20000 loan on 26/10/2010.

The only document having the semblance of a loan application for ksh.20000 by the claimant, among the respondent documents, is not dated. It does not also prove whether or when the claimant finally received the ksh.20000 loan. Consequently the only loan applied and received by the claimant from the

respondent is ksh.61500 which the claimant admitted on oath. It is that sum that was being repaid by monthly installments of ksh.2500. However due to lack of evidence to prove the exact balance owing as at the time of the termination of the employment contract, the court is unable to resolve the dispute in the counter claim without making assumptions.

Reliefs

In view of the findings, above, that the claimant is the one who terminated the contract without notice by desertion, his prayer for notice pay and compensation by 16 months salary is dismissed. He will however get the prayer for leave for the 8 months served. The leave is calculated on pro-rata basis to 16 days out of the 24 days per year. This pay in lieu of leave is $16 \times 15180 / 26 = \text{ksh.9341.55}$

On the other hand the respondent has succeeded in proving that the claimant breached the contract of employment by deserting work without serving a 30 days notice. The claimant who was not represented by counsel prayed for any other relief that is deserving and the court awards him the salary for the 8 days worked in April 2014 being ksh.4048. He will also get certificate of service. He will therefore get ksh.15180 being one month salary in lieu of notice.

As regards the prayer for outstanding loan balance by the respondent,, the court has already made a finding above that, the exact amount due was not proved. The court can only make assumptions. The first assumption would be that the alleged debt due of ksh.69500 is inclusive of the ksh.20000 allegedly advanced on 26/10/2013 and ksh.5000 allegedly advance by the respondent brother in November 2013. Consequently, then in view of the earlier finding that the said two items were not proved would reduce the alleged debt to ksh.45500.

The second assumption the court would make is that the respondent deducted ksh.2500 per month for 8 months which total to ksh.20000 going by the first assumption the debt owing would ksh.45500 less ksh.20,000 recovered to leave a net amount of ksh.25,500. The respondent is awarded ksh.15180 in lieu of notice. In total the respondent will get ksh.40680 less the ksh.13,389.55 awarded to the claimant above. The net award to the respondent shall be ksh.27,290.45

DISPOSITION

Judgment is entered in favour of the respondent against the claimant for ksh.27,290.45. The respondent directed to issue the claimant with a certificate of service. Each party shall bear his own costs because both parties partially succeeded in their cases to the extent shown above.

Dated, Signed and delivered this 25th July 2014

O.N. Makau

Judge