



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 65 OF 2014

DANIEL MUEKE.....CLAIMANT

v

BHOGALS AUTO WORLD.....RESPONDENT

JUDGMENT

1. The questions arising for determination in this judgment are, whether the Claimant was employed by the Respondent as a junior clerk in 2005, whether the services of the Claimant was terminated or he absconded duty, whether the termination of services were unfair and whether the Claimant is entitled to the reliefs sought.
2. The Court has considered the parties respective submissions filed in Court on 20 November 2014 and 27 November 2014 and authorities cited therein.

Whether Claimant was employed as a Junior Clerk in 2005

3. The Claimant pleaded and testified that he was employed by the Respondent as a junior clerk on 7 February 2005 and was issued with an appointment letter of even date. The Claimant annexed and produced the appointment letter (exh. 1).
4. The Respondent in its Response denied employing the Claimant as a junior clerk on 7 February 2005. But its witness confirmed that the Claimant was employed as a junior clerk in the parts department.
5. The Respondent did not deny issuing the appointment letter produced and the Court finds that he was employed as a junior clerk on the terms and conditions set out in the appointment letter.

Whether services of Claimant were terminated or he absconded

6. The Claimant pleaded that he was asked to leave by the Respondent's Personnel Officer, Mr. Mutinda and the Operations Director, Mr. Rajan Bhasi on 13 April 2012.
7. In testimony the Claimant reiterated what he had pleaded and added that he talked with the Respondent's Parts Manager, a Mr. Zahir after he was asked to leave but he got no help.
8. He also stated that he was asked to handover to another employee and asked to leave, and wait to be called back.
9. The Respondent's contention was that the Claimant was caught on 13 April 2012 by a security guard having sold a set of brake pads to a customer without a cash sale and when asked to explain he walked

away and did not report back to work.

10. The Respondent's Personnel Officer testified that on the material day, between 10.00 am and 11.00 am, the Claimant was seen by a security guard handing over a brake pad to a customer who gave him unknown amount of money and which was not receipted.

11. The witness stated that the guard attempted to intervene and there was a commotion which attracted the attention of the Parts Manager who in turn called him (witness). They found the guard had recovered the brake pads from the customer.

12. The witness further stated that the Claimant and another employee from the store were summoned to the office to write statements but they did not turn up in the office. He denied that the Claimant handed over to another employee.

13. According to the witness, the Claimant did not return to work but absconded.

14. The Claimant did not inform the Court of the name of the employee he was directed to hand over to. The Respondent's witness testimony as to the sequence of events was not challenged or controverted.

15. In the circumstances, the Court, on a balance believes the Respondent's case and finds that the Claimant after being summoned to the office to explain what happened after the incident involving the brake pads left the work station and did not return.

16. By leaving the work station and not returning, the Claimant repudiated his employment contract. He was in breach of contract. The Claimant abandoned work.

17. The Claimant has not discharged the very low threshold placed upon an employee in a complaint of unfair termination by section 47(5) of the Employment Act, 2007.

18. It is not necessary therefore to embark on an inquiry as to whether the Respondent complied with sections 41, 43, 45 and 47(5) of the Employment Act, 2007. The question as to whether there was unfair termination of services is therefore not necessary.

19. But the Court observes that questions of desertion or *abscondment* raise difficult questions of law. The 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.

20. Section 41 of the Employment Act, 2007 provide 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.

21. 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.

22. Employers are expected to keep records of employees and a question would arise whether an employer should make reasonable attempts to reach absconding or deserting employees and inform them to explain the absence or risk termination of services.

Reliefs

23. Some reliefs in employment contracts are either contractual or statutory entitlements with no nexus on unfairness of termination. The Court will look at each head of claim sought by the Claimant bearing

this in mind.

One month salary in lieu of notice

24. In light of the conclusion reached, this head of relief is not available to the Claimant.

Salary for 13 days worked in April 2012

25. This head of claim is not related to unfairness or otherwise of termination of services. The Claimant would be entitled to earned wages up to 13 April 2012. He pleaded the sum of Kshs 4,621/-. The Court awards him the sum of Kshs 4,621/-.

Annual leave

26. No evidential foundation for this head of relief was placed before the Court. It was not disclosed for which leave year the leave related to but the Respondent in its submissions admitted pro rata leave of Kshs 5,915/18. The Court awards the admitted sum.

Compensation

27. This is one of the primary remedies for unfair termination. The remedy is however discretionary. The Court has found the services of the Claimant were not unfairly terminated. In the circumstances of this case, the relief is not available.

Damages caused by loss of employment

28. No evidential, contractual or statutory basis for this relief was led though the Claimant pleaded an amount of Kshs 2,433,672/-. Pleadings are just pleadings and evidence must be led to support the pleadings. The relief is declined.

Gratuity

29. Gratuity must also have either a contractual or statutory basis. The Claimant pleaded Kshs 37,359/- under this head. There was no evidence to support this claim either. The relief is declined.

Certificate of Service

30. This is a statutory entitlement of an employee and the Respondent should issue one to the Claimant.

Conclusion and Orders

31. The Court finds and holds that the Claimant has failed to establish that the Respondent terminated his services unfairly.

32. However the Claimant is entitled to and the Court awards him

- a. 13 days wages for April 2012 Kshs 4,621/-
- b. Pro rated leave days Kshs 5,915/-

TOTAL **Kshs 10,536/-**

33. Save for the awards, the Memorandum of Claim filed in Court on 14 March 2014 is therefore dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 11th day of December 2014.

Radido Stephen

Judge

Appearances

For Claimant Ms. Wanjiru instructed by Njuguna Kamanga & Co. Advocates

For Respondent Mr. Kisila instructed by Seth & Wathigo Advocates