



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 445 OF 2013**

**(Originally Nairobi Cause No. 277 of 2012)**

**JOSEPHAT KARIUKI KIRANGI**

**CLAIMANT**

**V**

**BOB MILL INDUSTRIES LTD**

**RESPONDENT**

**JUDGMENT**

1. The issues for determination are whether the Respondent terminated the services of the Claimant or he deserted duty, if termination, whether it was unfair, whether the Claimant is entitled to damages for unfair termination, salary during incapacitation period, leave allowance, service pay, certificate of service and other reliefs set out in the Memorandum of Claim.
2. The Claimant annexed several documents to the Memorandum of Claim and made references to them in testimony.
3. The Claimant's testimony was taken by Ongaya J on 15 July 2014 and the Respondent's case was fixed for 30 September 2014. By then, because of transfer of judges, Ongaya J could not take the Respondent's case. Ultimately, the Respondent opted not to call any witnesses but indicated it would rely on the record.

**Whether Claimant was terminated or deserted**

4. The Claimant testified on 15 July 2014. He stated that on 6 December 2010 while on an official journey to Kitale he was involved in a road traffic accident and suffered injuries. He was admitted at Moi Teaching Referral Hospital and later got transferred to Kenyatta National Hospital on 9 December 2010 and was given sick off and advised the plaster on his leg would be removed after 6 weeks. The plaster was removed on 2 February 2011
5. After the removal of the plaster, the Claimant stated he was told he would need further operations. The Claimant went to Nairobi West Hospital but because of the cost he ended up at PCEA Hospital, Kikuyu and St Teresa's hospital where he was operated on 2 March 2011.
6. While in hospital, he asked for February 2011 wages but did not get a favourable response. On 5 March 2011, the Respondent's Transport Manager called to get his home contact details and on 7 March 2011 the Respondent's messenger called him to tell him he had a letter for him from the Dispatch Manager called Rashid.
7. The Claimant further stated that on the same day he called the Respondent's transport Manager but he told him he was under instructions not to speak to him and that since that time the Respondent's officers

did not pick his phone calls.

8. The Claimant denied that he deserted employment.

9. He also stated that he sought the Respondent to pay his hospital bills and even applied for loans to meet the bills to no avail. The Respondent's General Manager complained the bills were too high.

10. In cross examination, the Claimant stated that he was last paid part of his March 2011 salary and that on 7 June 2011 he called the Respondent's Manager called Tecla seeking to know his employment status but the said Tecla told him to go see the Labour Officer. He further stated that he could not work after the accident and that he was on treatment for a long time.

11. Among the documents the Claimant relied on was a medical certificate dated 5 March 2011 from St. Teresa's Maternity & Nursing Home-Kikuyu which certified that he was unfit to attend to his employment duties for 6 weeks. On 20 April 2011 another medical certificate was issued giving him another 6 weeks off

12. The Directorate of Occupational Health and Safety Services through a letter dated 15 June 2011 certified that the Claimant had been incapacitated for 25 weeks. On 16 June 2011, two doctors on behalf of the Directorate of Occupational Safety and Health Services certified that the Claimant had suffered 25% permanent incapacity and had lost the function of right knee and could not continue with duties as a driver.

13. Pursuant to section 47(5) of the Employment Act, 2007, an employee has the statutory burden to show that an unfair termination has occurred.

14. The certifications relied on by the Claimant were clear that he had lost function in one knee and he could not perform the duties of a driver.

15. In the present case, the Claimant has failed to show that his services were terminated or that such termination was unfair. The 25 weeks he was incapacitated run upto around June 2011 when the certifications by the Directorate of Occupational Health and Safety Services were issued. The contract was frustrated because of the Claimant's health condition.

16. With the above conclusion, it is not necessary for the Court to discuss the unfairness of termination of services or the desertion defence presented by the Respondent.

17. The Court will therefore proceed to discuss the reliefs sought by the Claimant. Some of them flow from the contractual relationship and are not dependent on termination or unfairness of termination of services.

### ***Prayers***

#### ***Unpaid medical expenses***

18. It is not disputed that the Claimant got injured while in the course of employment.

19. Pursuant to rule 2(2) of the Employment (Medical Treatment) Rules 1977, the Respondent was under a statutory obligation to meet all the expenses arising from the injuries sustained by the Claimant in the accident.

20. The Court therefore finds in favour of the Claimant in the sum of Kshs 132,018/- as claimed.

#### ***Leave allowance***

21. The Claimant testified that he did not go on leave for the slightly one year of service. And for this he

sought Kshs 17,941/-. Pursuant to section 28 of the Employment Act, 2007, the Claimant was entitled to at least 21 days leave with full pay.

22. It is the duty of employers to keep and maintain employment records. These were not produced. Pursuant to section 10(3) and (7) of the Employment Act, 2007 the Court finds in favour of the Claimant and award him accrued leave of Kshs 15,791/-.

### ***Damages for unfair termination***

23. The Claimant sought Kshs 215,292/- under this head of claim.

24. In view of the conclusion that there was no unfair termination of services, this prayer does not lie.

### ***Additional salary for 12 months of incapacitation***

25. Under this head, the Claimant sought Kshs 215,292/-. No contractual or statutory basis for this claim was made.

26. But the uncontroverted evidence is that the Claimant was paid wages up to March 2011. He would be entitled to his wages upto 16 June 2011 when he was certified incapable of performing his duties.

27. The evidence before Court is that the Claimant was earning Kshs 17,941/- monthly. The Court would award him three months wages from April 2011 to June 2011 in the sum of Kshs 53,823/-.

### ***Service pay***

28. The Claimant admitted he was a member of the National Social Security Fund.

29. Pursuant to section 35(5) as read with (6) of the Employment Act, 2007, he is not entitled to service pay.

### **Certificate of service**

30. A certificate of service is an employee's statutory right. The Respondent had in pleadings admitted it was ready to issue the Claimant with one. The same should be issued.

### **Conclusion and Orders**

31. From the foregoing discussion, the Court finds and holds that the Respondent did not unfairly terminate the services of the Claimant and that the contract was frustrated by Claimant's injury but finds that he is entitled to and awards him

(a) Unpaid medical expenses	Kshs 132,018/-
(b) Accrued leave	Kshs 15,791/-
(c) Wages April to June 2011	Kshs 53,823/-
<b>TOTAL</b>	<b>Kshs 201,632/-</b>

32. The Respondent to issue the Claimant with a certificate of service.

33. The Claimant to have costs assessed at Kshs 45,000/-.

**Delivered, dated and signed in Nakuru on this 11<sup>th</sup> day of December 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant                      in person

For Respondent              Mr. Gathu instructed by Mucheru-Oyatta & Associates