



REPUBLIC OF KENYA



**Monda v Pelt Security Services Ltd (Cause 91 of 2021)
[2024] KEMC 170 (KLR) (5 September 2024) (Judgment)**

Neutral citation: [2024] KEMC 170 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CAUSE 91 OF 2021
PA NDEGE, SPM
SEPTEMBER 5, 2024**

BETWEEN

EVANS MOSIGISI MONDA CLAIMANT

AND

PELT SECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent asserting that he was unlawfully and unfairly dismissed from his employment with the Respondent. He averred that he was employed as a security supervisor on 01.11.2017 earning Kshs. 14,000/- a month, which constituted an underpayment as it was not commensurate to what a security supervisor should earn. He further averred that he was reporting to work at 6.00am to 6.00pm and was not paid overtime dues, was not going for off duties hence against section 27(2) of the *Employment Act* 2007, was working during public holidays and was not paid on a double hourly rate, was not granted leave nor paid leave for leave not taken hence against section 28(1) (a) of the *Employment Act* 2007, was deducted uniform fees at a sum of Kshs. 700/- for a period of 4 months, an amount that remains unrefunded to date, was not paid salary for 22 days which he had worked for in the month of June 2020, was deducted NSSF and NHIF dues by the respondent which amount were however not remitted for a period of 10 months, and was transferred from Nakuru to Meru and then from Meru to Chuka University, and again from Chuka University to St Ann Hospital, Igoji and finally from Igoji to Nakuru without being paid Kshs. 2,500/- for every transfer as entitled. That on 12/06/2020, the Claimant was told to report back to Nakuru. That on reporting back to Nakuru, he was told by the respondent's manager, one Mr. Kurgat that he had to re-apply for his job. That when he inquired from the manager why he had to re-apply, he was told to hand over all the company's properties and clear with them since he had been terminated. He avers that he had no warning letter on his record, has not been paid his terminal dues, was not given notice nor paid in lieu of notice by the respondent hence against sections 35(1) (c) and 36 of the *Employment Act*, and was not accorded a hearing before termination, hence against section 41 of the *Employment Act*. The Claimant



averred that as a result of the matters aforesaid the subsequent summary dismissal was unfair. He thus sought compensation for his unlawful dismissal being 12 months gross wages compensation under section 49(1) (c) of the *Employment Act* – Kshs. 193,724.40; one month’s gross salary as notice – Kshs. 16,143.70/-; unpaid leave for 2 years and 7 months – Kshs. 36,274.90; Salary for 22 days of June 2020 – Kshs. 14,896.20; Transfer allowances – Kshs. 10,000.00; Uniform deductions – Kshs. 2,800/=; NSSF and NHIF deductions – Kshs. 7,000/=; underpayments – Kshs. 61,841.90; Normal overtime – Kshs. 477,600.35; Off duties – Kshs. 265,333.50; Public holidays Kshs70,549.90; as well as costs of the suit.

2. The Respondent filed a response to the memorandum of claim in which it averred that the Claimant was employed as a security supervisor, but from 01.11.2019. That the claimant was however not dismissed. It averred that because of the uncooperative nature of the Claimant he had to be transferred. The Respondent averred that the Claimant however absconded from his work station at Chuka on 12.06.2020 and all attempts to reach him were in vain despite the respondent being informed reliably that the claimant was within Nakuru town. That similarly, the claimant did not tender any explanation or resignation letter for his absence, that the respondent proceeded to write a letter to the claimant dated 18.06.2020, expecting that the claimant would materialize and explain his absence and despite the respondent indicating its intention to terminate the claimant’s contract on ground of absconding work, the letter did not elicit any response from the claimant nor did the claimant present himself to the respondent’s office. That the claimant has never contacted the respondent and there was no offer to reapply for his previous position. That the claimant was verbally warned for continuously and grossly breaching the respondent’s Human Resource Policy and Manual and was terminated vide a letter dated 18.03.2021. that the claimant did not appear again at the premises of the respondent nor make any contact with the respondent. The respondent therefore denies liability to compensate the claimant as alleged in the memorandum of the claim. The Respondent averred that the suit was therefore not merited and ought to be dismissed with costs. It also curiously prays for 1 month’s salary in lieu of notice, without lodging a pleading – counterclaim- for the same.
3. The Claimant testified that he was a security supervisor with the Respondent. He basically relied on his statement dated 17.02.2021, which basically reiterated his averments in his memorandum. RW1, Rueben Omondi, the security coordinator for the respondent stated that the claimant herein was employed vide a written contract of service dated 01.11.2019 up to and including 31.01.2020. That due to his incompetence, the claimant was not confirmed. That upon the expiry of the contract, the claimant was issued with a new contract valid for 6 months starting 01.02.2020 and expiring on 31.07.2020. That he was indeed transferred to Meru, but that he did not report to his new station on the required date, 21.05.2020, and despite the respondent providing a vehicle to help him transit. That the transfer was because of a number of complaints that had been raised against the claimant. That on 12.06.2020, the claimant absconded from his new work station at St. Anne Hospital assignment in Meru region, and all attempts to reach him were in vain despite the respondent being informed reliably that the claimant was within Nakuru town. To support his case, RW1, produced the following documents as exhibits: -
 - i. Contract of Service dated 01.11.2019 – REXH. No. 2
 - ii. An unsigned Job description of a Supervisor dated 01/11/2019 – REXH. No. 3
 - iii. Transfer letter dated 12.05.2020 – REXH. No. 4
 - iv. Secondment letter dated 18.06.2020 – REXH. No. 5
 - v. Statement Sheet – REXH. No. 6
 - vi. Letter to the Meru County Labor Officer dated 23.06.2020 – REXH. No. 7



4. In cross-examination, he denied that some amounts were deducted from the claimant's pay as uniform fees. He however admitted that the claimant has not been paid for the 11 days he worked in the month of June for the reason that the claimant is yet to be terminated. He however admitted that they have the pay slips for all the employees, but that none has been produced herein.
5. The Claimant submitted that there has been no evidence produced to demonstrate that there was a complaint from St. Anne's hospital that the claimant absconded work as alleged. That it not in dispute that there is no longer an employment relationship between the parties herein. That the relationship has been terminated. That the provisions of section 43, 44 and 45 of the Employment Act place the burden of justifying termination on the employer. On this, learned counsel for the claimant relied on the case of Peter Otabong Ekisa v Cloutny Government Of Busia [2017] eKLR. Learned counsel further submitted that the provisions of sections 41 and 45 of the Employment Act demand that termination decisions must be based on fair procedure. That the claimant ought to have been subjected to a disciplinary hearing which was not the case. The Claimant submitted that the foregoing was clear that the Respondent did not prove that there was a ground for dismissal or that the Claimant absconded from duty. The Claimant submitted that from the above he is entitled to 12 months' salaries being compensation for unfair and illegal termination from employment and all the other reliefs sought given that no documents or records were availed by the respondents to rebut the claims.
6. I have considered these submissions alongside those filed for the respondent. I first need to determine when the claimant was employed. The respondent, through RW1, produced the contract of service (REXH. No. 1) which proves that the employment started on 01.11.2019. The evidence adduced by the claimant, the bank statements, CEXH. No. 5) appears to agree that the employment herein started on 01.11.2019. I do therefore agree with the respondent that the claimant was employed as a security supervisor as from 01.11.2019. I do not find any other evidence to prove otherwise. I also do agree with the claimant that the employment has since been terminated. The onus or proving that the termination was fair and justified lies with the employer, in this case, the respondent.
7. The Claimant was accused of desertion and whereas this is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal, the Respondent failed to produce sufficient evidence that the Claimant deserted duty. Desertion necessarily entails the employee's intention no longer to return to work. The employer would have to establish this intention in a fair process. Desertion requires an employee to infer an intention on the part of the employees, as a result of such employee's conduct, that the employee simply has no intention to return to work. The intent to discontinue employment must be shown by clear proof that it was deliberate and unjustified and because abandonment is a matter of intention and cannot merely be presumed from certain equivocal acts, it must be demonstrated. It cannot be argued that the fact that an employee simply disappeared from their workplace, they are guilty of abandonment. The absence must be accompanied by overt acts pointing to the fact that the employee simply does not want to work anymore and the burden of proof for the unjustified refusal to go to work rests on the employer. The best evidence herein was to come from the user client, the duty station where the claimant was attached. I thus do agree with the learned counsel for the respondent that there ought to have been evidence from St. Anne Hospital in Meru that the claimant actually absconded. Otherwise the letter dated 18/06/2020, REXH. No. 5, is simply a letter from the respondent removing the claimant from the payroll. It does not lay out any elaborate disciplinary hearing or plan as required. It does not also contain the evidence of the claimant's alleged desertion. In my considered view, having failed to establish there was desertion the Respondent is bound to meet the reliefs sought. As a keeper of the employment records in terms of Section 74 of the Employment Act, then all the entitlements of the Claimant were not disputed.



8. His claim for notice pay, 12 months compensation for unfair dismissal, leave, salary for 11 days in June 2020, transfer allowances, uniform deductions, NSSF and NHIF deductions, underpayments from 1.11.2019, normal overtime from 01.11.2019, off duties and public holidays from 01.11.2019 are all hereby allowed, having found that he has proved his case on a balance of probabilities: -

- i. One month's salary in lieu of notice – Kshs. 16, 143/70
 - ii. Compensation – Kshs. 193,724/40
 - iii. Unpaid leave – Kshs. 13991/20
 - iv. Salary for 11 days (June 2020) – Kshs. 7448.10
 - v. Transfer allowance – Kshs. 10,000/=
 - vi. Uniform Deductions – Kshs. 2,800/=
 - vii. NSSF and NHIF Deductions – Kshs. 7,000/=
 - viii. Underpayments – Kshs. 15,005.90
 - ix. Normal overtime – Kshs. 108,848.49
 - x. Off duties – Kshs. 60,471.39
 - xi. Public holidays – Kshs. 12958.15
- Totals Kshs. 448,391.30
- xii. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 05TH DAY OF SEPTEMBER. 2024.

ALOYCE PETER NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Claimant's Counsel; Maina

Respondent's Counsel: n/a

Claimant: n/a

