



**Abwire v SAS Security Company Limited (Cause 1182 of 2018)  
[2023] KEELRC 1807 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1807 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1182 OF 2018**

**L NDOLO, J  
JULY 27, 2023**

**BETWEEN**

**ERICK OTIENO ABWIRE ..... CLAIMANT**

**AND**

**SAS SECURITY COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 19<sup>th</sup> June 2018 and filed in court on 12<sup>th</sup> July 2018, the Claimant makes a claim for terminal dues. The Respondent filed a Statement of Defence and Counterclaim dated 6<sup>th</sup> September 2019.
2. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Operations Manager, Abednego Mandu Mapayile and Managing Director, Nahid Suleman. Both parties also filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent in October 2013 as a night watchman earning a monthly salary of Kshs. 7,500.  
He worked as such until 15<sup>th</sup> February 2018, when he resigned.
4. The Claimant further states that upon his resignation, the Respondent failed to pay him his terminal dues. He therefore claims the following:
  - a. Annual leave for 4 years.....Kshs. 44,416.30
  - b. Service pay for 4 years.....28,841.80



- c. Uniform refund.....9,600.00
- d. Underpayment.....239,204.90
- e. Certificate of service
- f. Costs plus interest

### **The Respondent's Case**

5. In its Statement of Defence and Counterclaim dated and filed in court on 6<sup>th</sup> September 2019, the Respondent admits having employed the Claimant but states that the employment contract commenced on 4<sup>th</sup> August 2014 and terminated on 17<sup>th</sup> January 2019. The Respondent denies the Claimant's averment that his employment commenced in October 2013.
6. The Respondent accuses the Claimant of failure to report to work from 17<sup>th</sup> January 2018 leading to the inference that he had left employment without giving proper notice as required under the *Employment Act*.
7. The Respondent states that the Claimant resurfaced on 15<sup>th</sup> February 2018, when he tendered a resignation letter citing personal reasons. According to the Respondent, the Claimant's employment had long ceased.
8. By way of Counterclaim, the Respondent claims Kshs. 7,500 from the Claimant, being on month's salary in lieu of notice.

### **Findings and Determination**

9. There are two (2) issues for determination in this case:
  - a. Whether the Claimant is entitled to the terminal dues sought;
  - b. Whether the Respondent has made out a proper Counterclaim against the Claimant.

### **Terminal Dues**

10. In opposing the Claimant's claim, the Respondent equivocated on the mode of termination of the employment relationship. In this regard, the Respondent pursued a case of desertion while admitting that the Claimant had issued a resignation letter.
11. Settled jurisprudence on proof of desertion of duty is that an employer must demonstrate efforts made to reach out to the deserting employee with a view to putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016]* eKLR and *Joseph Nzioka v Smart Coatings Limited [2017]* eKLR).
12. There is nothing to suggest compliance with this procedure on the part of the Respondent and the only conclusion to make in the circumstances is that the Claimant's employment came to an end by his resignation.
13. Regarding the claim for leave pay, the Respondent did not provide any records to show that the Claimant had either proceeded on leave or was paid in lieu thereof. This was confirmed by the Respondent's Operations Manager, Abednego Mandu Mapayile in his testimony before the Court. The claim for leave pay therefore succeeds and is allowed.



14. By its own admission, the Respondent did not remit any contributions to the National Social Security Fund in favour of the Claimant, allegedly because the Claimant failed to provide a registration number. The Claimant is therefore entitled to service pay as provided under Section 35(5) of the [Employment Act](#).
15. The claims for uniform refund and underpayment were not proved and are dismissed.

### **The Respondent's Counterclaim**

16. The Respondent's Counterclaim is premised on Section 35(1) of the [Employment Act](#), which provides for a one-month termination notice by either party to an employment relationship. From the evidence on record, the Claimant did not give any notice prior to his resignation. The Counterclaim for one month's salary in lieu of notice therefore succeeds and is allowed.

### **Final Orders**

17. The final award is as follows:
  - a. Kshs. 21,000 in leave pay for 4 years in favour of the Claimant;
  - b. Kshs. 15,000 in service pay for 4 years in favour of the Claimant;
  - c. Kshs. 7,500 in notice pay in favour of the Respondent.
18. The net effect is that the Respondent will pay to the Claimant the sum of Kshs. 28,500.
19. This amount will attract interest at court rates from the date of judgment until payment in full.
20. Each party will bear their own for costs.

**DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Alividza for the Claimant

Mr. Mwachofi for the Respondent

