



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 532 OF 2016**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**BENARD MUSILA NGWIO.....CLAIMANT**

**VERSUS**

**SADPH DEVELOPMENT COMPANY LTD T/A OFFROAD BAR & LODGE.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant brought his claim vide his memorandum of claim dated 6<sup>th</sup> April, 2016.

The Respondent filed his response vide his memorandum of response dated 4<sup>th</sup> May, 2016.

**CLAIMANT'S EVIDENCE**

2. The Claimant states that on or around May, 2013 he was employed by the Respondent as a Bar attendant earning a salary of Kshs.14,500/= per month. He says he was not given an appointment letter.

3. He says that on 28<sup>th</sup> July, 2018 the Respondent unlawfully terminated his services and failed to pay his terminal dues totalling Kshs.450,126.60 as claimed in paragraph 5 of the claim.

He says during the period he worked for the Respondent he did not go on leave and was not paid house allowance.

4. He says he did not get payment for working overtime and his NSSF dues were not being remitted. He says he was orally dismissed and was not accorded a hearing in the presence of a fellow employee or a shop floor steward.

**RESPONDENT'S EVIDENCE**

5. The Respondent in his response states he has no capacity to sue or be sued. He also denies he terminated the complainant's employment but that the Claimant absconded duty after illegal misappropriation of funds entrusted to him and is under police action as OB.NO.19/28/7/2015.

6. As for NSSF remittance the Respondent avers the same were remitted appropriately. He also states any overtime worked was paid for and as for house allowance he alleged it was consolidated into his salary. The Respondent therefore denies he owes the Claimant Kshs.450,126/= and puts the Claimant to strict proof.

He prays for dismissal of the suit with costs.

7. The issues in question are threefold:-

(1) Was the Claimant's employment terminated or he absconded duty.

(2) If he was terminated was termination unlawful.

(3) Is he entitled to the reliefs prayed.

### **DETERMINATION**

8. I have considered the pleadings, facts and submissions hereto. The Claimant says that at the close of his working day on 27<sup>th</sup> July, 2015 he made stock summary and put the money he had sold in the safe.

He says the following morning he was accused of stealing and asked him to leave work.

The Respondent alleges that the Claimant absconded from work and never returned.

9. Desertion was distinguished in the case of **SEABOLO VS BELGRAVA HOTEL (1997)** 6 BLIR 829 as absence without leave and such as employee never intends to return to work. Alternatively, desertion can be described as where an employee having left his post subsequently formulates intention not to return.

10. The Respondent's assertion was that the Claimant misappropriated funds and then absconded from employment. He says the matter was then reported to the police.

11. It is mandatory that an employer who intends to terminate the employment of an employee for gross misconduct poor performance or physical incapacity explains to the employee in a language he understands the reason for which the employer is considering terminating the employee and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. This is provided in Section 41 of the Employment Act 2007. The employee must be heard in the presence of his witness before such a termination can be effected.

12. In this case the Claimant states he was accused of stealing and was told to leave. There is no evidence that the procedure provided in the Employment Act was followed. There is no evidence of proof of the said theft, the amount stolen and how it was stolen. The respondent alleges he reported the matter to the police but there is no evidence to that effect.

13. The well known case of **WALTER OGAL ANURO VERSUS TEACHERS SERVICE COMMISSION (2013) eKLR** provide that

“for termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification was to do with establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer to effect termination.

14. Even if the Respondent claims the claimant misappropriated some funds there is no evidence adduced to prove what he stole, how and when. He claims he reported the matter to the police but again there is no proof of any such report and/or investigation by the police.

Mere allegations cannot be relied on to terminate employment without tangible evidence.

The Respondent has flouted the fairness test in totality as he did not establish a valid reason as to why he considered to terminate the employee's employment.

15. At the same time he did not follow the procedure stipulated in Section 41 of the Employment Act.

I find I have no choice but to find the Respondent failed to prove fairness and equity in terminating the employees employment.

16. It is noted that he claimed the Claimant deserted his employment. Once again it is now clear that an employer claiming desertion from the employee must demonstrate efforts made towards getting the employee to resume duty. In the case of **FELISTAS ACHEHA VS CHARLES PETER OTIENO (2018) eKLR** it was held that the employer must demonstrate he made efforts to get employee to resume duty.

At the very least the employer is expected to issue a notice to the deserting employee that termination of employment on the grounds of desertion is being considered.

17. The employer has a duty under Section 43 of the Employment Act to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

18. The Respondent did not adduce any evidence to show the Claimant deserted work once again apart from his mere assertion. He did not give him notice that he was considering terminating his employment. The court finds the Respondent has failed to prove valid grounds to terminate the Claimant from his employment and also failed to show he followed the required procedure.

Under the circumstances the court finds the Claimant's termination was unfair and unprocedural. It was against fair labour practices.

### **RELIEFS AWARDED**

19. Having entered judgment in favour of the Claimant, the court proceeds to award some of the reliefs prayed as follows:-

- (1) One month salary in lieu of notice..Kshs.14,500.00
- (2) Annual leave.....Kshs.21,999.70
- (3) NSSF remittance – there is evidence of payment of the dues so prayer is declined.
- (4) House allowance.....Kshs.56,550.00
- (5) Overtime is declined for lack of particulars.
- (6) Compensation for unfair termination  
at 2 months.....Kshs.29,000

Totalling .....Kshs.122,049.70

- (7) Costs follow the event and so are awarded to the Claimant.
- (8) Interest will apply at court rates till full payment.
- (9) Certificate of service to be issued to the Claimant forthwith.

**CONCLUSION**

The net effect of the award is Kshs.122,049.70 plus costs and interest.

Delivered, dated and signed in Nairobi this 20<sup>th</sup> day of January 2022

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**