



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2415 OF 2016**

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

**WILLIAM MUHANDO MUNDA.....CLAIMANT**

**VERSUS**

**INTER SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant filed a memorandum of claim dated 23<sup>rd</sup> November, 2016 and the Respondent put a defence and counter claim dated 7<sup>th</sup> February, 2017.

**CLAIMANT'S EVIDENCE**

2. The Claimant states he was in the employment of the Respondent from April, 2005 to November, 2014. He says in November, 2014 he was in an unexplained and unjustified position dismissed from employment. He says he was informed there was no work.

3. He says he was summarily dismissed without notice and he was not paid his terminal benefits. He claims therefore for his terminal benefits amounting to Kshs.820,328/= as particularized in paragraph 6 of his memorandum of claim.

4. He prays that the court declares his dismissal unlawful and award him the terminal dues amounting to Kshs.820,328/= plus interest and costs.

**RESPONDENT'S CASE**

5. The Respondent claims the Claimant was in his employment from 23<sup>rd</sup> April, 2005 to 24<sup>th</sup> October, 2013 when without notice failed to report to duty. He says his whereabouts remained unknown and so treated him as if he had absconded.

6. He says the Claimant then resurfaced on 22<sup>nd</sup> April, 2014 and after pleas he agreed to re-employ him on fresh terms. He then worked upto 30<sup>th</sup> November, 2014 and again failed to report on duty and was not heard of since then.

7. He says the Claimant left his employment at his accord.

8. The Respondent prays for an order dismissing the Claimants claim with costs and payment of two months salary in lieu of notice.

He also prays for refund of Kshs.6,610/= and VAT for the Respondent's uniform.

He prays for any other relief the court may deem fit to grant.

**ISSUES FOR DETERMINATION**

9. (i) was the Claimant unlawfully terminated from his employment.

(ii) did he abscond from employment.

(iii) Is he entitled to the reliefs prayed.

## **DECISION**

10. The Claimant says he was dismissed from employment in November, 2014 on the grounds that there was no work.

The Respondent on the other hand avers the Claimant who had absconded employment from 25<sup>th</sup> October, 2013 upto 23<sup>rd</sup> April, 2014 deserted again in November, 2014 and was not heard of again.

11. Unfortunately the Respondent has no records or anything in writing to show the Claimant failed to turn up for work. It is always very difficult to determine legal proceedings where there is nothing in writing.

12. At least when the Claimant allegedly deserted employment in 2013 he wrote a letter at the instigation of the Respondent and he admitted he had deserted his employment. This was his letter of 22<sup>nd</sup> April, 2014 and he apologized.

In this particular time there is no evidence oral or written to show the Claimant absconded from work.

He actually says he got a call and was informed the company had rejected him.

He says he was not paid his terminal dues.

13. In cases where an employer claims there is desertion he should show that he attempted to get in touch with the employee.

In the case of **RONALDO N. DAUDI VS TORNADO CARRIERS LIMITED CAUSE NO.238 OF 2016** it was held "desertion of duty is a grave administrative offence which if proved would render an employee liable for summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion of an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.

14. There is no evidence from the Respondent that they complied with the requirement. Indeed the Claimant claims he was simply called by the controller of the Respondent and was informed the company had rejected him.

15. With these conflicting accounts and having considered the respective pleadings and submissions the court did not see any viable reason why the Respondent terminated the Claimant's employment.

Further the respondent did not convene a disciplinary meeting where the Claimant was given an opportunity to defend himself before a witness of his choice be it a fellow workmate or a union representative as provided in Section 41 of the Employment Act.

Section 41 of the Employment Act provides that "an employer shall before the termination of employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee in a language that the employee understands the reason for which the employer is considering termination." This should be in the presence of a fellow employee of his choice or before a shop floor union representative.

16. In light of the foregoing and the fact that the Respondent did not convince the court that the Claimant deserted employment in November, 2014 I am left with no alternative but to find the Claimant was instead unlawfully terminated by the Respondent without a justifiable reason.

## **REMEDIES**

17. Having entered judgment in favour of the Claimant, I award the following reliefs:-

(i) One month pay in lieu of notice Kshs.10,478/=.

(ii) Unpaid leave not proved and so is disallowed.

(iii) Severance pay is not proved and also is disallowed.

(iv) Unpaid leave allowance is just a prayer in generality and is not proved. It is declined.

(v) 2 months compensation is in my opinion sufficient damages under the circumstances Kshs.20,956/=.

Total awarded is Kshs.31,434/= plus interest at court rates from date of Judgment until full payment.

Costs are awarded to the Claimant.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF FEBRUARY 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**