



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 808 OF 2017

ROBERT ADERE MONARI.....CLAIMANT

VS

RILEY SERVICES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated and filed in court on 10th October 2017 the Claimant claims compensation for unlawful termination of employment and payment of terminal dues.
2. In response, the Respondent filed a Memorandum of Reply dated 24th May 2018 and amended on 24th January 2020. The Claimant filed a reply to the Respondent’s amended Response on 6th February 2020.
3. The matter went to full trial where the Claimant testified on his own behalf. The Respondent called William Otieno Winga and Bundi Morara Evans. Both parties also filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a security guard on 1st August 2008. He worked until 1st July 2015, when his employment was terminated. The Claimant pleads his monthly salary as at the time of termination as Kshs. 11,145.
5. The Claimant states that on 1st June 2015, he asked for permission from his supervisor, Evans Morara to attend to his sick wife, who was admitted in hospital. He adds that the sickness of his wife persisted and he had to continue taking care of her as he had nobody to assist him.
6. The Claimant states that his supervisor visited him and his wife at the hospital and was therefore well aware of the situation the Claimant was in.
7. The Claimant avers that upon resuming duty on 1st July 2015, the Manager, William Winga told him that there was no more work for him.
8. The Claimant’s case is that the decision to terminate his employment was unlawful and unfair.
9. The Claimant goes on to plead that he was not allowed to go on leave and was not paid house allowance. In addition, he states that the Respondent did not remit his National Social Security Fund (NSSF) dues for the months of March, April, May, June and October 2009.
10. The Claimant further claims to have worked during public holidays without full pay. He adds that at termination, he was not refunded his uniform deductions.
11. The Claimant’s claim against the Respondent is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 11,145.00
- b) Unpaid leave for 6 years.....66,870.00
- c) House allowance for 83 months.....138,755.25

- d) Uniform deductions refund.....7,055.00
- e) Un-submitted NSSF dues for 5 months.....2,000.00
- f) 70 Public holidays.....234,045.00
- g) 12 months' salary in compensation.....133,740.00
- h) Certificate of service
- i) Costs plus interest

The Respondent's Case

12. In its Memorandum of Reply as amended on 24th January 2020, the Respondent admits having employed the Claimant as a guard but denies terminating his employment. The Respondent states that the Claimant deserted duty without notice, thus leaving his assignment unattended.

13. The Respondent states that upon inquiry by the Claimant's supervisor, Evans Morara, of the Claimant's whereabouts, the supervisor was notified by the Claimant's relatives that his wife was sick and admitted at Coast General Hospital. Upon receipt of this information, Morara went to the hospital, where he met the Claimant and his sick wife.

14. The Respondent further states that Morara advised the Claimant to write a formal letter to ask for permission to enable him attend to his wife, which advice the Claimant ignored. Morara is said to have gone further to mobilise the Claimant's workmates to contribute funds to support the Claimant's sick wife; a total sum of Kshs. 21,000 was raised and during its handing over, the Claimant was reminded to formally ask for leave of absence, but he ignored.

15. The Claimant is said to have reported back to work after three (3) months. The Claimant was informed by Winga that his name had been deleted from the Respondent's system and was advised that the only option available to him was to re-apply for a job, for consideration as a new employee. The Claimant agreed to this proposal, promising to submit his application, which he never did. Instead, the Respondent was served with a demand letter by the Claimant's Advocate, followed by this suit.

16. The Respondent accuses the Claimant of desertion of duty and failure to hand over company property. The Respondent therefore maintains that the Claimant cannot claim uniform refund because he has not handed over.

17. The Respondent denies the claims for leave pay, house allowance, public holidays and un-remitted NSSF dues and puts the Claimant to strict proof.

18. By way of counterclaim, the Respondent seeks one (1) month's salary in lieu of notice, from the Claimant; the basis being that the Claimant had left employment without giving notice.

19. The Respondent further seeks an order directing the Claimant to hand over the Respondent's property (uniform).

Findings and Determination

20. There are three (3) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

Unlawful Termination?

21. The Claimant testified that his employment was terminated verbally by the Respondent's Branch Manager, William Winga on 1st July 2015. According to the Claimant, he had been away for a month attending to his sick wife, with permission from his supervisor, Evans Morara.

22. The Respondent's witnesses, William Winga and Evans Morara conceded that the Claimant's wife had been unwell but denied that the Claimant's absence had been authorised. Morara told the Court that he had given the Claimant 4 off days, after which he told him to write a letter asking for unpaid leave but the Claimant did not comply. On his part, Winga testified that he had asked the Claimant to reapply for his position, a request that the Claimant did not respond to.

23. Neither Morara's instructions to the Claimant to make a formal application for unpaid leave nor Winga's request to the Claimant to reapply for his position was documented. The Court was unable to understand why a well-established employer, such as the Respondent would make such crucial communication informally. Additionally, the Court was left wondering why the Respondent would issue verbal

instructions to the Claimant, while insisting that the Claimant himself documents his request for leave, to take care of his sick wife. Instructively, the Claimant denied receiving any communication from the Respondent.

24. Moreover, there was no clarity as to the date from which the Respondent deemed the Claimant to have deserted duty. Winga told the Court that the Claimant was away for 3 months but was paid salary for 2 months. Morara could not remember the exact date when the Claimant reported back to work.

25. The Respondent's defence is that the Claimant himself deserted duty. Desertion is not a self-evident defence. Firstly, there is a clear distinction between desertion and absenteeism. In the South African case of *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the following distinction was made:

“.....desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand.....an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”

26. Secondly and flowing from the *Seablo Case* (supra) which has been cited with approval in our jurisdiction, an employer alleging desertion against an employee, must show efforts made towards reaching out to the deserting employee, so as to put them on notice that termination of their employment, on account of desertion is being considered.

27. In *Godfrey Anjere v Unique Suppliers Limited [2013] eKLR* it was held:

“in a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse.”

28. It was common cause that the Claimant's absence from work was occasioned by the illness of his wife, who eventually and quite unfortunately passed away. For such an employee, the employer was required to exercise due care and sensitivity. It appeared to the Court that the Respondent, as an employer, handled the Claimant's case carelessly and irresponsibly and in the end, the Claimant not only lost his wife but also his job.

29. At any rate, even if the Respondent did not care to show empathy, it ought to have followed the law in discharging the Claimant. This did not happen and the Court finds and holds that the Respondent terminated the Claimant's employment unlawfully and unfairly and the Claimant is thus entitled to compensation.

Remedies

30. I therefore award the Claimant ten (10) months' salary in compensation. In making this award, I have considered the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

31. I further award the Claimant one (1) month's salary in lieu of notice.

32. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides that:

31.(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

33. According to the Claimant's payslips availed to the Court, the Claimant was paid a basic wage without house allowance. I therefore allow house allowance at 15% of the basic wage and adopt the resultant figure of Kshs. 12,817 as the Claimant's monthly salary for purposes of this claim.

34. The Respondent did not produce any leave records to show that the Claimant had expended his annual leave. The claim for leave pay thus succeeds.

35. The claim for uniform refund was admitted and is payable.

36. Regarding the claim for unremitted NSSF dues, the only thing I will say is that any such dues would be payable to NSSF and not to the

Claimant.

37. The claim for public holidays, being in the nature of special damages ought to have been specifically pleaded and proved. The Claimant did not meet this standard and the claim must therefore fail.

The Respondent's Counterclaim

38. The Respondent's counterclaim against the Claimant was based on the assertion that the Claimant had deserted duty. In view of the finding that the Respondent had failed to prove desertion by the Claimant, the counterclaim collapses.

Final Orders

39. In the end, I enter judgment in favour of the Claimant and against the Respondent as follows:

- a) 10 months' salary in compensation.....Kshs. 128,170
- b) 1 month's salary in lieu of notice.....12,817
- c) House allowance for 83 months @ Kshs. 1,672138,776
- d) Leave pay for 6 years (12,817/30*21*6).....53,831
- e) Prorata leave for 11 months (12,817/30*1.75*11).....8,224
- f) Uniform deductions refund.....6,000

- Total.....347,818**

40. This amount will attract interest at court rates from the date of judgment until payment in full.

41. The Claimant is also entitled to a certificate of service plus costs of the case.

42. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

Mrs. Ogoti for the Respondent