



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 389 OF 2016**

**BONFACE SEDEKIA OTUNGO.....CLAIMANT**

**VERSUS**

**MWAKI SACCO.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim dated 10<sup>th</sup> October, 2016 on the 18<sup>th</sup> November, 2016 through the firm of Ndeda and Associates Advocates contending unfair termination of his employment by the Respondent. He thus prayed for the following reliefs

- i. That the Honourable court do find the action taken by the respondent when terminating the claimant's employment was wrongful and totally unfair.**
- ii. That the Honourable Court do order the respondent to pay the claimant his August salary of Kshs. 10,000.**
- iii. That the Respondent pay the claimant 1-month salary based on the correct pay as given by the government gazetted minimum wages order legal Notice no, 117 of 1<sup>st</sup> May, 20115, pay of a night watchmen Kshs. 11,330.10/- per month.**
- iv. That the Respondent to pay the claimant 1 year and 3 months' annual leave.**
- v. That the respondent to pay the claimant underpayment of wages based on the correct government gazetted minimum wages order Legal Notice No. 117 of Kshs. 11,330.10/- plus 15% housing allowance of Kshs. 1,699.50 totaling to Kshs. 13,029.60/- less Kshs. 10,000/- paid balance Kshs. 3,029.60/- underpayment per month for 15 months.**
- vi. That the respondent to pay the claimant off duty for 6 months and 11 public holidays worked for 1 year 3 months.**
- vii. That the respondent to pay costs of this suit.**
- viii. That the respondent to pay the claimant compensation based on the provisions of sections 49 (1)(c) of the Employment Act**

2. The Claimant's case is that he was employed by the Respondent on 14<sup>th</sup> May, 2015 as a night watchman, under a monthly salary of Kshs. 10,000/- and working from 6pm to 6am.

3. The claimant avers that he was given 4 days off as is usually given every month by one Mr. Jimmy Njenga, commencing on 25<sup>th</sup> August, 2016 to 28<sup>th</sup> August, 2016. however, on resuming duty on 28<sup>th</sup> August, 2016 in the evening, he was informed by one Paul, the cashier of the Respondent, to write an apology for being absent from work without permission.

4. The claimant states that, he explained to the said Paul that he was on leave given by Mr. Jimmy however Paul insisted to be furnished with a letter explaining how the said leave was obtained and asked the claimant to go back home and only report with the said letter which the claimant obliged and reported the next day with the said letter marked as Exhibit-2 which was rejected by the Respondent.

5. It was averred that on 29<sup>th</sup> August, 2016, the claimant requested to speak to Jimmy to clarify how the said leave was granted but the said Jimmy failed to show up at the respondent office on 30<sup>th</sup> August 2016 as agreed and the claimant was ordered by Mr. Paul to go back home.

6. The claimant states that he went back as directed and reported on 3<sup>rd</sup> September, 2016 and requested for his August salary but the said Mr. Paul decline the request insisting that the he should write an apology letter before he is paid his august salary.

7. The claimant avers that, a few days letter he went back to the Respondent's office to ask for his August salary and was met with a letter allegedly drawn by the labour office, that he has left work on his own, requiring him to append his signature before he is paid his salary, which he refused to sign and the respondent declined to pay his August salary.

8. The claimant avers that he has served the respondent for 1 year 3 months diligently without any warning or disciplinary action against him till his termination which he avers was not subjected to due procedure provided by law.

9. The respondent entered Appearance on 31<sup>st</sup> January, 2017 though the firm of Rubua Ngure and Company Advocates and filed its Defence on 14<sup>th</sup> February, 2017 denying all the averment in the memorandum of claim herein and putting the claimant to strict proof.

10. The Respondent denied having terminated the service of the claimant but that the claimant abandoned work for 4 days without permission. Further that the claimant refused to go collect his salary when the same was ready for collection.

### Hearings

11. The matter herein proceeded for hearing on 19<sup>th</sup> January, 2021 where the claimant, **CW-1** testified and reiterated his claim and produced the letter explaining his absence from work from 25<sup>th</sup> August, 2016 to 28<sup>th</sup> August, 2016 as BSO-2.

12. On cross examination, CW-1 testified that he had not deserted work but was on 4 days off granted by Mr. Jimmy. Further that he declined to sign the letter from the labour office because it had indicated that he had left work on his own. He confirmed that he didn't have any document to show that he worked for the respondent as none was issued to him.

13. The respondent's case proceeded for hearing on 18<sup>th</sup> March, 2021, where the Respondent called one witness, its secretary, **Paul Gatuma Ndege, (RW-1)** who testified and adopted his witness statement filed in court on 10<sup>th</sup> March, 2021 as his examination in chief.

14. On cross examination, RW-1 confirmed that they had employed the claimant but did not issue him with appointment letter. He testified that, the claimant was paid Kshs. 10,000/- per month and was entitled to a day off each week.

15. He testified that, the claimant off day was on 25<sup>th</sup> August, 2016 only but the claimant failed to report to work till 28<sup>th</sup> August, 2016. He avers that Jimmy, who allegedly gave the claimant permission was a Pump attendant who had no authority to give the claimant permission.

16. He testified that the claimant was never terminated as alleged but that he left the respondent's employ on his volition.

### Claimant's Submissions

17. The claimant submitted that he sought the 4 days off from one, Jimmy whom he knew as his supervisor and who has been giving him the four days leave each and every month from the time he was employed at the Respondents employ about 1 year and 3 months. Therefore, cannot be faulted for dealing with the said Jimmy in this case.

18. The claimant submitted that his employment was terminated without reason and the respondent forced him to sign a letter purportedly from the Labour office before payment of his August 2016 salary contrary to the Law. Further that since he was not given reasons for his dismissal neither was he granted hearing before the dismissal, he was constructively dismissed and therefore urged this court to hold as such and grant him the reliefs sought in his Memorandum of Claim.

### Respondent's submissions.

19. The gist of the Respondent's submissions is that the claimant absconded duty after taking his entitled one day off per week on 25<sup>th</sup> August, 2016 and extended the same without permission till 29<sup>th</sup> August, 2016 only to allege that he had sought permission from one Jimmy, a pump attendant, who was in no authority to give permission to the claimant or any other employee. Further that, the claimant deliberately failed to call the said Jimmy as his witness to affirm his allegation when the burden of proving that he did not abscond duty lies with him.

20. The respondent submitted that the letter produced by the claimant explaining his whereabouts from 26<sup>th</sup> August, 2016 to 28<sup>th</sup> August 2016 was never received by them and all efforts to have the claimant explain himself became futile when the claimant left employment without any action on the part of the respondent. Therefore, it was argued that the prayers sought by the claimant in his claim are not merited as his employment was never terminated but he deserted employment and cited the case of **Robert Baraza Malo –vs- One Way Cleaning Services limited [2015] eKLR** where the court dismissed the claimant claim after finding out that he had absconded duty.

21. The respondent argues that the claimant is entitled to leave but that the same was never requested by the claimant. Further that the claimant during hearing admitted taking his four off days every month therefore the prayer for off days sought ought to be declined.

22. On the prayer for underpayment, the respondent submitted that the claimant on his own admission indicated to this Court that the parties herein agreed to the said salary and no issue was raised during his tenure at the respondent employ.

23. The respondent, in conclusion urged this Court to find that the claimant deserted employment and dismiss his claim in entirety.
24. I have examined the evidence and submissions of the parties herein. The contention by the claimant is that he was unfairly dismissed by the respondent upon his return to work from his off day. The Respondents deny that the claimant was given off day by Jimmy as the said Jimmy had no authority to grant the claimant offday.
25. There is no evidence produced to indicate the terms of employment of the claimant as he was not issued with any employment contract.
26. Under Section 10 (7) of the Employment Act 2007, where there is any dispute or any terms of a contract the onus of proving the same lies upon the employer.
27. The employer having not been issued with any employment contract, it is not clear who could grant him permission to go on off or not.
28. The Respondents indeed agreed that the Claimant was given off but by a person not authorized to do so.
29. The onus thereof indicating who was to issue the claimant with off days lies upon the Respondent and this can only be demonstrated by the previous practice if not Jimmy as indicated and which the Respondents have not discharged.
30. I find as stated and submitted by the claimant that he was entitled to off and proceeded on off as expected just to be terminated.
31. The Respondents aver that he absconded duty but this is disputable as there is no indication that the Respondents sought out for him through correspondences or otherwise.
32. The issue of the claimant absconding duty is therefore not true and is not proved.
33. On issue of him being under paid his salary, it is the claimant's duty to demonstrate what he was paid as against his entitlement and which he has not doen.
34. In the circumstances of this case, I find that the respondents terminated the claimant unfairly without valid reasons and without following due process.
35. I find that the claimant is entitled to the following remedies;
1. **1 month salary in lieu of notice = 10,000/=**
  2. **10 month salary as compensation for unfair and unjustified termination  $10 \times 10,000 = 100,000/=$**
  3. **Salary for August 2016 = 10,000/=**
  4. **Leave for 1 year = 10,000/=**
  5. **Total = 130,000/= less statutory deduction**
  6. **The claimant is entitled to issuance of a certificate of service.**
  7. **The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED IN OPEN COURT THIS 18<sup>TH</sup> DAY OF MAY, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mr. Owuor for Claimant – present

Mr. Gikonyo holding brief for Ngunjiri for Respondent

Court Assistant - Wanyoike