



**REPUBLIC OF KENYA**

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

**CAUSE NO 613 OF 2016**

**HUMPHREY BAKHYUYA MARAMBA.....CLAIMANT**

**VS**

**NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 10<sup>th</sup> August 2016 and amended on 17<sup>th</sup> May 2017, the Claimant sued the Respondent for unlawful termination of employment and payment of terminal dues.
2. The Respondent responded by way of a Statement of Response dated 11<sup>th</sup> July 2017 and amended on 8<sup>th</sup> June 2018.
3. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Head of Human Resource and Compliance Gitongah Mwangi. The parties further filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent as a Security Guard from 19<sup>th</sup> March 2013 until 3<sup>rd</sup> December 2013, when his employment was terminated. He was not issued with a written contract of employment. The Claimant further states that prior to the termination of his employment, he had asked for leave to attend his brother’s funeral.
5. The Claimant’s case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) 1 month’s salary in lieu of notice.....Kshs. 11,760
- b) Service pay for 8 months worked.....3,920
- c) 32 off days worked.....13,440
- d) 6 public holidays worked.....5,040
- e) Overtime for 259 days.....81,585
- f) Unexplained deduction.....1,000
- g) 2 months’ salary in compensation.....23,520
- h) Costs plus interest

**The Respondent’s Case**

6. In its Statement of Response as amended on 8<sup>th</sup> June 2018, the Respondent admits having employed the Claimant as a Security Guard but denies unlawfully terminating the employment.

7. The Respondent states that the Claimant absconded duty after he was caught siphoning fuel at the Respondent's premises. The Respondent adds that the Claimant admitted siphoning the fuel, upon being confronted by the Respondent and it is after recording a statement in respect of the incident that he absconded duty and was never available for disciplinary action.

### **Findings and Determination**

8. There are two (2) 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.

### **Unlawful Termination?**

9. The Claimant states that the Respondent unlawfully terminated his employment on 3<sup>rd</sup> December 2013. In denying this claim, the Respondent states that the Claimant himself absconded duty after he was caught siphoning fuel at the Respondent's premises.

10. Absconding duty is itself a ground of termination but it must be proved. The law is settled that an employer alleging that an employee has absconded duty must demonstrate that efforts have been made to reach out to the employee (see *James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR* and *Abdi Osman Jubat Abdi v Bashaeb Brothers Limited [2019] eKLR*).

11. The Respondent did not adduce any evidence to show that efforts had been made to reach out to the Claimant. What is more, the allegations that the Claimant had been involved in syphoning of fuel were not proved, either at the shop floor or before the Court.

12. The corollary of these findings is that the Respondent failed to dislodge the Claimant's claim that his employment was terminated without justifiable cause and in violation of due procedure.

### **Remedies**

13. I therefore find for the Claimant and award him two (2) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's unlawful conduct in the termination transaction.

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

15. Having worked for less than a year, the Claimant is not entitled to service pay.

16. The claims for off days, public holidays, overtime and unexplained deduction were not proved and are dismissed.

17. In the end, I enter judgment in favour of the Claimant in the following terms:

- a) 2 months' salary in compensation.....Kshs. 23,520
- b) 1 month's salary in lieu of notice.....11,760

**Total.....35,280**

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

19. The Claimant will have the costs of the case.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY JULY 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:**

Mrs. Kyalo for the Claimant

Miss Nyaga for the Respondent