



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 197 OF 2018

JOSEPH KILONZO NDETEI.....CLAIMANT

VERSUS

AFRICAN COTTON INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Joseph Kilonzo Ndetei, the Claimant in this case, was an employee of African Cotton Industries Limited. He brought the present claim seeking compensation for wrongful dismissal and payment of terminal dues.
2. The claim is condensed in a Memorandum of Claim dated 7th March 2018 and filed in court on 5th April 2018. The Respondent filed a Response on 9th July 2018. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Francis Ogolla. The parties further filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 25th August 2007 in the position of Machine Operator. He earned a monthly salary of Kshs.7,256.
4. The Claimant claims to have worked for the Respondent until 23rd July 2016, when he was dismissed. He contends that the dismissal was wrongful as no reason was advanced for it and he was not given notice.
5. The Claimant claims that his dismissal was instigated by the fact that he had sued the Respondent in a work injury claim being **CMCC No 1617 of 2016: Joseph Kilonzo Ndetei v African Cotton Industries Ltd.**
6. The Claimant now seeks the following from the Respondent:
 - a)... 1 month’s salary in lieu of notice..... Kshs.14,511
 - b)... Leave pay for 9 years..... Kshs.65,304
 - c)... Gratuity for 9 years..... Kshs.65,304
 - d)... 12 months’ salary in compensation..... Kshs.174,132
 - e)... Reinstatement
 - f)... Certificate of service
 - g)... Costs plus interest

The Respondent’s Case

7. In its response dated and filed in court on 9th July 2018, the Respondent states that the Claimant was employed as a daily casual employee from 25th August 2001 until 1st January 2010, when he was engaged as a Machine Operator on fixed term contracts, renewable every three (3) months.
8. The Respondent further states that the terms of employment between the parties, were strictly on contract basis for a fixed period of time, renewable at the Respondent's discretion.
9. The Respondent denies wrongfully dismissing the Claimant and avers that the Claimant himself absconded duty on 20th June 2016, without reason and without notice. The Respondent adds that efforts to trace the Claimant had borne no fruit.
10. The Respondent states that after failing to hear from the Claimant and his whereabouts being unknown, he was declared a deserter.
11. The Respondent concedes that the Claimant had been injured at work on 23rd May 2016. The Respondent states that it catered for the Claimant's medical bills up to the time he resumed duty on 10th June 2016. The Respondent adds that upon resuming duty, the Claimant only worked up to 20th June 2016, when he deserted duty.
12. The Respondent avers that it never heard from the Claimant until August 2016, when he filed his work injury claim.
13. The Respondent denies the Claimant's entire claim and puts him to strict proof.

Findings and Determination

14. There are two (2) issues for determination in this case:
 - a) Whether the Claimant has made out a case of wrongful dismissal;
 - b) Whether the Claimant is entitled to the remedies sought.

Wrongful Dismissal?

15. In response to the Claimant's claim of wrongful dismissal, the Respondent states that the Claimant himself deserted duty. The Respondent further states that at the time he left, the Claimant was a casual employee.
16. On the issue of desertion, the law is well settled that an employer alleging desertion against an employee must demonstrate efforts made towards reaching out to the deserting employee.
17. In its decision in *Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR* this Court stated the following:

“Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to 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 against 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.”

18. There was no evidence that the Respondent attempted to reach out to the Claimant and the allegation that he deserted duty was therefore unproved.
19. Similarly, the allegation that the Claimant was a casual employee was not supported by any employment records.
20. At any rate, the Respondent's Human Resource Officer, Francis Ogolla told the Court that on 20th June 2016, the Claimant was told by the Branch Manager that there was no work. This is in accord with the Claimant's assertion that he was dismissed without justifiable cause and in violation of due procedure.

21. The Court therefore finds and holds that the Claimant has proved a case of wrongful dismissal and he is entitled to compensation.

Remedies

22. Consequently, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's unlawful conduct in the dismissal transaction.
23. I further award the Claimant one (1) month's salary in lieu of notice.
24. The Claimant told the Court that he used to go on leave. The claim for leave pay is therefore misplaced.
25. No basis was established for the claim for gratuity which therefore fails and is dismissed.

26. Finally, I enter judgment in favour of the Claimant as follows:

a).... 10 months' salary in compensation..... Kshs.145,110

b).... 1 month's salary in lieu of notice..... Kshs. 14,511

Total..... Kshs.159,621

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

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

29. Orders accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY SEPTEMBER 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. Thiaka for the Claimant

Mr. Mathare for the Respondent