



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 82 OF 2017

HEZRON NGAIRA SEREUWA.....CLAIMANT

VERSUS

PEMWE SERVICES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted the claim vide a Memorandum of Claim filed on 18th January 2017 against the Respondent for unfair and unlawful dismissal and non-payment of terminal dues and damages. He avers that he was employed by the Respondent as a Night Guard on 2nd March 2000 and that his salary was computed at KShs. 6,000/- per month. The Claimant avers that he used to report to the Respondent's work at 6.00pm and leave at 8.00am from Monday to Sunday including on public holidays and that he never took his annual leave in the years 2000 and 2010. The Claimant avers that the Respondent never provided him with housing or house allowance in lieu thereof and has further never made any service gratuity remittances for him.

2. The Claimant recounts how while on duty on the night of 29th July 2016 he reported to the Respondent's supervisor the suspicious presence of one of the Respondent's employees within the premises, but which employee fled before the supervisor had arrived. The Claimant asserts that in a twist of events, he was held at the police station and released on the evening of 30th July 2016 without any charges having been preferred against him and that upon reporting to work the following evening, the Respondent's Manager one Peter Mbuvi ordered him to go home and never report to work again. He contends that without reasons, notice or warning, he was thus constructively summarily dismissed and which dismissal was unfair, unlawful and inhumane as he had done nothing wrong to warrant the dismissal. Further, no hearing ever took place pertaining to the happenings of the said night or at all. The Claimant thus claims one month's salary in lieu of notice, salary underpayments, unpaid/untaken leave, house allowance, unpaid overtime, unpaid/untaken public holidays, service/gratuity pay, and 12 months' salary compensation.

3. The Respondent filed a Statement of Response dated 13th March 2017 denying that it dismissed the Claimant from work and averring that he absconded on his own volition after being involved in an attempted robbery at Kenplastics Limited where the Respondent was offering security services. It further avers that while the Claimant was in police custody for the incident, he disclosed the other co-conspirators who were employees of Kenplastics Limited and that he was released after the Manager of Kenplastics Limited opted not to take the matter further. The Respondent averred that the Claimant was thereafter never seen at work and that he is thus not entitled to the reliefs sought. It also contends that the Claimant took up all his leave days for every year he worked for the Respondent. It is the Respondent's prayer that the Claimant's case be dismissed with costs to the Respondent. The Respondent also filed a witness statement made by John Mwendwa who states that the Claimant joined the Respondent on 1st May 2000 and not in March of 2000 as pleaded in the Claim. On the said theft incidence, he asserts that a company supervisor who had earlier locked the factory's main gate happened to pass by the factory at 7.30pm when he noticed people moving inside with torches. The Respondent's witness states that the supervisor's response led to the arrest of the Claimant but the rest of the suspects escaped and that upon release, he absconded duty and that as the Claimant is still in possession of the Respondent's property, the same confirms he was never terminated.

4. Claimant's Submissions

The Claimant submits that in the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Fanners Sacco Limited [2014] eKLR** where Mbaru J. stated that Section 41 of the Employment Act is couched in mandatory terms and where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. That similarly in the instant case, he was never given the hearing contemplated under Section 41 of the Employment Act and that the Respondent has not proved the reason for the termination as under Section 43 of the Act. That Section 45 of the Employment Act further emphasizes the need for the employer to prove that the reason for termination is valid and fair and in accordance with fair procedure. The Claimant further submits that **Section 44(a) of the Employment Act** is clear on desertion/absconding presuming that the employer must produce evidence to prove to the Court the elements of absconding which in this case should include:

- i. Record of work-reporting to show that the Claimant never reported.
- ii. Evidence from a supervisor on telephone calls made to the Claimant or a co-worker sent to his residence just in case he was too sick to come to work.
- iii. A notice sent to the Claimant's last recorded address notifying him of the abscondment and the threat of dismissal, including an SMS sent to the Claimant.
- iv. A notice to the labour department.

5. The Claimant submits that the failure to produce evidence on any of the above ingredients proves that the decision was whimsical and that the Respondent did not adduce any evidence to prove that they made efforts to reach him. Further, his alleged absconding was never reported to the labour office and no muster roll was produced before Court to inform the days or period that the Claimant was absent from duty. To this end the Claimant relies on the case of **Joseph Nzioka v Smart Coatings Limited [2017] eKLR** where the Court held that "*dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such an employee to show cause why his services should not be terminated on account of absconding duties*". It is the Claimant's submission that the Respondent has thus failed to prove that fair termination process, both substantive and procedural, was accorded to the Claimant as reiterated in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**. The Claimant submits that he is in the circumstances entitled to: notice payable under Section 36 of the Employment Act; salary underpayments and as the Respondent never availed records of having paid the same as required in the respective Minimum Wages Orders; leave as the Respondent never controverted his claim with proof and which therefore remains payable under Section 28 of the Employment Act; house allowance payable under Section 31 of the Employment Act; overtime and public holidays which the Respondent did not controvert with evidence; and service/gratuity pay under Section 35(5) of the Employment Act because the Respondent never remitted NSSE dues to the relevant authority and did not produce any documentation to the contrary. The Claimant further submits that he is entitled to damages under Section 49 of the Employment Act and urges the Court to award the full 12 months' gross salary in compensation.

6. Respondent's Submissions

The Respondent submits that from the evidence adduced by the Claimant he has not demonstrated who terminated his employment whereas the Respondent's case is that the Claimant was not terminated and is still in possession of company properties. The Respondent submits that as he who alleges must prove. It submits that the Claimant has thus failed to prove his case from the evidence adduced and material before Court. It relies on **Peter Odhiambo Oriwo v Labchem Limited [2012] eKLR** wherein the Claimant absconded duty after being arrested and subsequently released. The Respondent avers that the Claimant's document being the requisition to compel attendance clearly shows and confirms he was to report back on Monday 1st August 2016 and which demonstrates that the Claimant herein is not being candid in his evidence. It is the Respondent's submission that it is guided by **Mwendwa Ndoor Mainiga v Katrina Hotel Limited [2020] eKLR** where the Court held that the claim was not a case of unfair termination of contract but repudiation of the contract. The Respondent further submits that the Claimant is not entitled to any unpaid leave pay and the prayer for the same should fail as the Respondent has attached in its list of documents the leave days taken by the Claimant from 2005 to 2014. The Respondent submits that the claim for compensation is a discretionary remedy and is not appropriate in the circumstances of this case as the Claimant was involved in criminal activity while on duty, which fact he admitted before police officers. It submits that the Claimant having failed to prove his case, the suit herein should be dismissed.

7. The Claimant asserts that he was dismissed by the Respondent while the Respondent asserts the Claimant deserted work. The facts of the case are that there was an attempted theft on the night of 29th July 2016. It is apparent that the company supervisor who had earlier locked the factory's main gate happened to pass by the factory at 7.30pm when he noticed people moving inside with torches and his response led to the arrest of the Claimant but the rest of the suspects escaped and that upon release, the Claimant absconded duty. The Claimant was not able to dislodge the evidence that he was invited back to the office and he declined to report. He states that he was sent away by a manager but has no letter showing his attempts at resumption of duty. In addition, the Claimant is still in possession of the Respondent's property which shows that the Claimant was never dismissed by the Respondent. The Respondent in my view did not owe the Claimant a higher duty than the Claimant owed to himself to report to work. Quite often when an employee absconds work, the employer is not duty bound to look for the employee as the employee cannot be forced to come to work. The requisition to compel attendance issued by the Respondent clearly shows and confirms the Claimant was to report back on Monday 1st August 2016 but he failed to do so and as such his claim lacks merit and is accordingly dismissed. Suit is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2021

Nzioki wa Makau

JUDGE