



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 460 OF 2016

JUMAA KITSAO KAHINDI.....CLAIMANT

VS

SAILESH HILA T/A ASSOCIATED ELECTRICAL

& HARDWARE SUPPLIERS LTD.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 28th April 2016 and filed in court on 16th June 2016, the Claimant lays a claim for unlawful termination of employment. The Respondent filed a Statement of Defence on 12th July 2016 but did not attend the trial and did not file written submissions in spite of due notification. The Claimant testified before the Court and also filed written submissions.
2. This judgment takes into account of the Respondent’s defence on record.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a house boy on 13th December 2003. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 10,504.
4. The Claimant avers that his employment was terminated on 29th January 2016 without justifiable cause and in violation of due procedure. He adds that prior to the termination, he had raised a complaint after being assigned extra duties, as a result of which he was issued with a termination letter dated 29th January 2016.
5. The Claimant further avers that upon termination, he was paid Kshs. 36,161 but was not notified how this amount had been tabulated. The Claimant complains that he was underpaid and that the Respondent did not remit all his National Social Security Fund (NSSF) dues.
6. The Claimant’s claim against the Respondent is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 10,504
- b) Leave pay for 8 years.....67,872
- c) Service pay for 7 years.....42,420
- d) Public holidays for 11 years.....88,880
- e) Underpayment.....42,744
- f) 12 months’ salary in compensation.....126,000
- g) Costs plus interest

The Respondent’s Case

7. In his Statement of Defence dated 11th July 2015 and filed in court on 12th July 2015, the Respondent denies terminating the Claimant's employment and states that the Claimant himself deserted duty but later re-surfaced to claim his dues, which were paid.

8. The Respondent further denies assigning the Claimant extra duties.

9. The Respondent goes on to deny having employed the Claimant.

Findings and Determination

10. 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?

11. The Claimant filed a letter dated 29th January 2016 addressed to him by the Respondent. The letter states:

“RE: TERMINATION OF SERVICES

Please note that we have terminated your services with effect from 29th January 2016.

Kindly arrange to return any company property in your possession immediately.

Yours faithfully.

For & on behalf of:

Associated Electrical & Hardware Suppliers Ltd.

(signed)

Shailesh P. Hira

Director”

12. This letter does not disclose any reason for the termination of the Claimant's employment. In his testimony before the Court, the Claimant stated that his employment was terminated after he complained of increased duties without compensation.

13. In his Statement of Defence, the Respondent states that the Claimant himself deserted duty but later resurfaced to claim his dues which were paid.

14. It is now well settled that an employer asserting that an employee has deserted duty must show that efforts have been made to reach out to the employee, with a view to putting them on notice that termination of their employment on account of desertion is under consideration.

15. In ***James Okeyo v Maskant Flower Limited [2015] eKLR*** and ***Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR*** it was held that a deserting employee is entitled to a hearing.

16. From the evidence on record, the Respondent did not bother to issue any notice to the Claimant to show cause why his employment should not be terminated on account of desertion of duty. The allegation of desertion was therefore not proved.

17. In the result, the Court finds and holds that the Respondent terminated the Claimant's employment without any justifiable cause and without observing due procedure. The Claimant is therefore entitled to compensation.

Remedies

18. On the heels of the foregoing findings, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have considered the Claimant's long service plus the Respondent's wrongful conduct in effecting the termination.

19. According to terminal dues tabulation filed by the Respondent, the Claimant was paid one (1) month's salary in lieu of notice as well as leave pay up to 2016. The claims for notice and leave pay are therefore spent.

20. The claim for service pay was abandoned at the trial.

21. The claims for public holidays and underpayment were not proved and are dismissed.

22. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs.132,684** being 12 months' salary in compensation for unlawful termination of employment.

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

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

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF FEBRUARY 2020

LINNET NDOLO

JUDGE

Appearance:

Miss Kitoo for the Claimant

No appearance for the Respondent