

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 162 OF 2018

LEONARD KIPKORIR MUTAL.....CLAIMANT

VERSUS

LICHI SECURITY SYSTEMS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the alleged unlawful and dismissal. He averred that he was employed as a security guard on 15th May 2014 at a monthly wage of Kshs. 7,500/-. The Claimant averred that he was promoted to the position of a supervisor and emergency reliever earning Kshs. 10,000/- a month. The Claimant averred that his services were terminated on 28th June 2017 by Margaret Wanjiru after he fell ill and requested to be deployed on night duties. He averred that he was not paid for the month of December 2015 and he claimed the unpaid salary – Kshs. 10,000/-, one month's salary in lieu of notice – Kshs. 10,000/-, unpaid leave for five years – Kshs. 50,000/-, unpaid public holidays – Kshs. 6,666/-, arrears of NSSF dues and compensation to the maximum 12 months = Kshs. 120,000/-. He also sought costs of the suit.

2. The Respondent averred in defence that the Claimant absconded duty when he was shifted from night shift to day shift. The Respondent averred that the Claimant made a written request but totally failed to report to duty as advised. The Respondent denied refusing to pay the Claimant his dues and averred that he has not cleared with the Respondent as was communicated to him on 3rd July 2017. The Respondent averred that it came to light that the Claimant was employed by another security company at the time. The Respondent averred that the suit was not merited and ought to be dismissed with costs.

3. The Claimant and the Respondent's witness James Wachira Wambugu testified. The Claimant stated that he guarded the door at Outspan and that he was dismissed when he sought to be assigned another shift. He said that he hoped to relax in night duty. He testified that he was asked to return the uniform and was to be paid June salary but it was not remitted. He said they never called him and never paid his salary. In cross-examination he testified that he did not have the Respondent's property. He said that he had returned all their property including the baton. He acknowledged that there was no signature against the said return in the documents produced by the Respondent. He testified that he was asked to return the uniform by Margaret and she terminated his services on 28th June 2017. He stated that there was a time he worked for 247 Guards at a time he had been stopped by Lichi, the Respondent. He stated that he had received salary from 247 Guards and also from the Respondent in the same month. He testified that he was sick and requested for night shift. He stated that he did not get any feedback on his request for shift change. He said that he did not know if the Respondent paid the NSSF dues. In re-examination he stated that he had been shown the statement showing he received two salaries and that there was no letter on the issue of 2 salaries. He stated that he sought night shift as he suffered from back pain due to long hours of standing.

4. The Respondent's witness testified that the Claimant did not clear with the Respondent. He stated that the Claimant applied for a shift change from day to night shift and this was denied, as the Claimant had absconded for 3 days. He said that the Claimant did not come back and that the Claimant was working for another company. In cross-examination he stated that the Claimant absconded and that he was declared an abscondee after he failed to turn up. He testified that the Claimant absconded before he applied for the shift change. He said that the Claimant was declared an abscondee on 3rd July after being absent for 3 days. He admitted that the Claimant was not subjected to a disciplinary process and that for performance issues an employer is to undertake a show cause. He stated that the Claimant had not been denied his dues which were pro rata leave of Kshs. 4,500/- and unpaid public holidays amounting to Kshs. 2,000/-. In re-examination he stated that the Claimant was to show cause and he did not show up. He stated that the Claimant was required to clear as he had their uniform and issue.

5. The parties filed submissions and the Claimant's submissions, if any were filed, were not on file at the time of writing the judgment. The Respondent submitted that the Claimant was working for another company by the name 247 at the time he was working for the Respondent. It submitted that the Claimant was not wrongfully terminated and that he absconded from employment. The Respondent submitted that the Claimant absconded from employment from 27th June 2017 and never reported back and his letter dated 28th June 2017 seeking a shift change was declined on grounds of his absenteeism. The Respondent submitted that it wrote a letter seeking the return of company provisions which plea fell on deaf ears. The Respondent submitted no evidence was tendered by the Claimant on his efforts to return to work. The Respondent cited the case of **Joseph Njoroge Kiama v Summer Ltd [2014] eKLR** in support of the submission that the Claimant had absconded from work.

6. The Claimant was working for another employer from the records availed and thus it may be the reason he insisted on keeping the night shift. He absconded from work and in doing so repudiated the contract of employment. Whereas the law does not prescribe a specific period an employer must wait to deem the employee to have absconded, the employee ought to have left the place of work and does not appear to have any intention of returning to the workplace. Generally, the employee has an obligation to inform his or her employer of any reason why he or she is unable to be at work. Such could be on account of illness or family issues precipitating the absence. Once the employer treats the employee as having absconded it is incumbent upon the employer to seek to know why the employee is absent. The employer would for instance try to contact the employee as was done in this case. The Respondent did the best and as such it cannot be faulted. An employee

cannot default in appearing at work and expect that the employer will deploy additional resources to trace the employee or require him to show cause why his services should not be terminated. Refusal to go to work can be construed as repudiation of the contract. In this case the Claimant failed to prove unfair dismissal the suit is only fit for dismissal. The Claimant is however entitled to receive the pay he was to receive being Kshs. 6,500/- to cater for his pro rata leave and pay for public holidays. Each party is to bear their own costs.

7. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days. On lapse of the 14 days if any execution is to issue, it must be sanctioned by the Court.

It is so ordered.

Dated and delivered at Nyeri this 30th day of March 2020

Nzioki wa Makau

JUDGE