

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 262 OF 2017

KUTUS MUSLIM DAR ABDALLA CHILDREN HOME.....CLAIMANT

VERSUS

ALI ALIYO SOMO.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged absconding and neglect of duty. It was averred that the Claimant had employed the Respondent as a watchman on 20th September 2012 and he absconded his duties as a watchman. It was averred he did not issue a notice, had been paid in advance for 2 months when he did not work. The Claimant thus sought Kshs. 9,000/- being 2 months salary and Kshs. 6,000/- being money for 2 sets of uniform. The Claimant averred that the Respondent had breached the duty of care owed to the employer by the employee and claimed damages as well as costs of the suit.

2. The Respondent filed a defence and in his defence he averred that he was employed as a watchman earning Kshs. 4,500/- a month from 1st October 2010. He averred that the contract between them was oral. The Respondent averred that he was committed to his work and this was recognized by the Claimant and a certificate of appreciation issued to him. The Respondent averred that on 7th February 2017, Mr. Faisal the manager of the Claimant gave the Respondent a verbal notice to quit and wrote a follow up letter on 8th February 2017. The Respondent averred he did not abscond duty and only left employment after it was terminated by the Claimant's manager. The Respondent averred that he reported the unlawful dismissal to the County Labour Officer, Kirinyaga and they were invited for a conciliation meeting and despite invitation to appear the Claimant declined to do so. The Respondent averred the complaint is still pending before the Labour office for conciliation and that the Claimant was ordered to pay the Respondent his dues. He averred that the suit is an effort to defeat the determination at the Labour Office. The Respondent thus urged the dismissal of the claim with costs. By way of an amended response he filed a defence and counterclaim. In the amended defence and counterclaim he averred that he was paid a salary of Kshs. 7,000/- a month. By way of counterclaim he averred that he had been in employment with the Claimant for 8 years and that he initially earned a salary of Kshs. 3,000/- at the time of engagement and which had risen to Kshs. 7,000/- at the time of termination. He averred that he worked for 7 days a week reporting at 6.00am and leaving at 6.00pm in the evening with no overtime pay. He averred that he was not given off during public holidays and weekends. He averred that he not issued with any warnings regarding his service and no reason for his termination was given. He thus claimed Kshs. 128,333/- being payment in lieu of notice – Kshs. 7,000/-, severance pay – Kshs. 28,000/-, leave days – Kshs. 7,000/-, unpaid 10 days worked in February 2017 – Kshs. 2,333/-, 12 months compensation – Kshs. 84,000/- and interest on the sums claimed as well as costs for the counterclaim.

3. The Claimant did file a defence to counterclaim and in it averred that the Respondent terminated his contract of service by deserting his workplace and allegations of unlawful dismissal frivolous and unwarranted. The Claimant averred that contrary to averments in the counterclaim the Respondent was issued with a warning letter which he was to abide by after which he absconded duties. In response to allegations that the Claimant eschewed the conciliation process, the Claimant averred that it indicated to the Labour Officer the matter was pending before court and therefore they could not get directives and orders from the Labour Office. The Claimant averred that the counterclaim lacked merit and was an abuse of the court. The Claimant sought the dismissal of the response and counterclaim with costs and the claim by the Claimant allowed as prayed.

4. The claim proceeded to hearing in absence of the Respondent duly served. The Claimant's witness Faisal Hatib testified and stated that the Respondent was the Claimant's watchman and he absconded duties without issuing any notice that he intended to cease working for the Claimant. He testified that the letter he issued to the Respondent on 7th February 2017 was a warning letter not a dismissal letter. He said that he did not dismiss the Claimant but only urged him to perform better. He stated that the matter was reported to the Labour Office and they were summoned. He stated that he appeared alongside the committee of Kutus Muslim and indicated that they had not terminated the Respondent. He testified that the Labour Officer recommended that the Claimant re-employs the Respondent which they could not do as they had already hired a guard. He conceded there were dues they were due to pay the Respondent and he stated that they could not pay the dues as they were the ones owed as they had paid salary for work not done.

5. The parties filed submissions after an attempt to reopen the case floundered. The Claimant submitted that the Respondent was employed in September 2012 till sometime in February 2017 when he absconded duty. The Claimant submitted that the Respondent had been given a salary advance of Kshs. 9,000/- and he did not report to work. The Claimant submitted that the Respondent's counterclaim lacked merit and was fit for dismissal. The Claimant urged the grant of orders in the suit and dismissal of the Respondent's defence and counterclaim.

6. The Respondent submitted that the failure to testify in his defence did not lessen the burden or duty imposed on the Claimant to adduce evidence and prove its case on a balance of probabilities. The Respondent submitted that the Claimant failed to prove its case and there was nothing for the defence to rebut. He cited the elementary principle of law 'he who alleges must prove' which was emphasized by Section 107 of the Evidence Act. The Respondent submitted that the Claimant did not prove the sum of Kshs. 9,000/- alleged to have been paid as salary advance was indeed paid or that the Respondent absconded from work as alleged. He cited the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where the court held that '*As a general proposition the legal burden of proof lies upon the party who invokes*

the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides: 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The Respondent submitted the Claimant had not met the threshold of burden of proof. The Respondent submitted that the Claimant's suit should be dismissed with costs.

7. The Claimant sued for desertion by its employee the Respondent. In his defence the Respondent asserted he was verbally dismissed and to bolster that assertion gave the letter he called a follow up letter dated 8th February 2017. The letter authored in Kiswahili is to the effect that the Respondent was required to work in accordance with the guidelines of the Claimant in place. He was warned that if he felt he was unable to do as required he could write a resignation letter. Contrary to his assertions the employment was formal with a letter of employment exhibited by the Claimant. The Respondent's salary was indicated as Kshs. 4,500/- a month and not the Kshs. 7,000/- he asserted was his salary per his counterclaim. Curiously in his defence he had averred he earned Kshs. 4,500/- before he raised the sum to Kshs. 7,000/- in the counterclaim. It would seem the Respondent reported the dispute to the Labour Office and the officer was seized of the matter to a point he ordered the Claimant to deposit some Kshs. 44,333/- to the office as terminal dues for the Respondent. The suit was filed after the demand was made. The Claimant did not prove there was Kshs. 9,000/- paid as a salary advance to the Respondent. Whereas absconding of work was alleged, there was no register produced or any evidence led as to the absconding alleged to have been the cause for the suit. As the law provides, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The Claimant failed to prove the fact of salary advance and the desertion which was the linchpin for the suit against the Respondent. As the Claimant failed to prove the said allegations the suit was not proved on a balance of probabilities. As regards the counterclaim, the same was not proved either and it fails as well. The counterclaim is dismissed as not being proved on a balance of probabilities. Each party will bear their own costs for the suit.

8. 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.

It is so ordered.

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

Nzioki wa Makau

JUDGE