



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CASE NO. 166 OF 2018**

**ALFRED KINYUA NJIRU.....CLAIMANT**

**VERSUS**

**ABDI FARAH OSMAN.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent asserting that he was a former employee of the Respondent and that his services were terminated on 6<sup>th</sup> January 2018. He averred that he had been employed as a farm hand on 1<sup>st</sup> October 2010 as a farmhand and earned Kshs. 14,000/- a month. The Claimant averred that due to immobility as a result of injuries sustained at the workplace, before his recovery from the aforesaid injuries, his employment was orally terminated by one Zulekha Osman the Respondent's daughter. He averred that no notice to show cause was issued before the dismissal nor was there proof of any misconduct before his dismissal. He averred that the Respondent failed, refused and/or neglected to pay his arrears of salary for the month of December 2017, one month's salary in lieu of notice, unpaid leave for 2 years and unpaid public holidays as well as unremitted NSSF dues. The Claimant averred that as a result of the matters aforesaid the subsequent summary dismissal was unfair, unprocedural and illegal and/or unlawful. He thus sought maximum compensation being 12 month's salary pay, salary arrears of Kshs. 7,000/- for the part of December 2017, 1 month's salary being notice at Kshs. 14,000/- and costs of the suit.

2. The Respondent filed a defence in which he averred that the Claimant was provided food and accommodation in addition to earning his salary and full control of the land during the entire period of his employment which ended in January 2018 after the Claimant continually deserted work. The Respondent denied that the Claimant broke his leg in the course of his employment. The Respondent averred that he issued several warnings on the Claimant's conduct and on the Claimant's failure to report to work. The Respondent averred that the Claimant was involved in some illegal activities for the time he was working as a farm hand by subleasing about an acre of the Respondent's land to third parties for planting nappier grass who would in turn sell it to him and he would sell it to the Respondent at an exorbitant price. The Respondent averred that the Claimant was offered money to build a house for his family on humanitarian grounds and that in addition used the farm tools such as the chaff-cutter, hack-saw and two water pumps without the Respondent's consent for which the Respondent paid ridiculously high electricity bills. The Respondent denied breaching any express or implied term of the employment contract and that it was the Claimant who breached the terms of the contract by failing to show up for work, sometimes even missing work for weeks prompting the Respondent to employ someone else to take his place at the farm. The Respondent averred that the Claimant later came seeking reinstatement and he was offered work to cut the hedge. The Respondent averred that the employment came to an end on account of the failure and refusal to report back to work and criminal activities thus disentitling the Claimant to any of the reliefs sought. The Respondent sought the dismissal of the claim with costs.

3. The Claimant and the Respondent's witness Zuleikha Abdurahman Farah Osman testified. The Claimant testified that he was employed by the Respondent in 2010 and that he worked until dismissal in 2018. He stated that presently he was a farmer residing in Mbeere, Embu. He stated in cross-examination that he was a permanent employee though he did not have a letter to prove that. He stated that he was dismissed as he had an injury to his foot. He denied being a poor performer or receiving any assistance from the Respondent. She stated that she paid the Claimant everything in full and that he had borrowed money and that she kept bringing him back. She said she was not malicious and that she did not owe the Claimant anything adding that he is the one who owes her. She stated that the Claimant even took an animal. In cross-exam she stated that the Claimant was employed by her father as a farmhand on casual basis. She said that she paid him in cash but towards

paid his wages, not salary, into the account. She testified that the Claimant absconded from duty and misappropriated the property. She admitted that she had not stated the Claimant had taken items from the farm in her statement. She stated that the Claimant came back and she felt sorry for him and asked him to take care of the hedge but he disappeared again. She testified that her father trusted the Claimant and gave him cash. She stated that the Claimant contributed to his termination and in re-examination stated that the Claimant failed to show up for work for weeks. She stated that the pleadings captured the element of absconding. She said that they had absolute faith in the Claimant and trusted him and he was left to run the whole place. That marked the end of oral testimony and parties were to file written submissions.

4. The Respondent's witness testified that she was the daughter of the Respondent and that the Claimant was employed to take care of animals on the farm on a casual basis. She stated that she took over the farm when her father fell ill. She stated that she terminated the employment of the Claimant when he absconded work. She said that she also discovered he was stealing and also mistreating the animals. She testified that the Claimant had leased some part of the shamba. She stated that she found out when the Claimant absconded.

5. The Claimant submitted that he was dismissed unprocedurally as no notice to show cause was issued to him nor was he called for a hearing of his case per the dictates of Section 41(2) of the Employment Act, 2007. The Claimant submitted as the termination was unprocedural and substantively unfair he was entitled to compensation under Section 49(1)(c) of the Employment Act at the rate of 12 month's salary as the termination was malicious and most unfair and without reason as contemplated under Section 43 of the Employment Act. The Claimant submitted that in addition he had worked diligently for 8 years which should be considered as a factor under Section 49(4) (e) of the Employment Act, 2007. He urged the grant of his prayers in the claim.

6. The Respondent submitted that the Claimant had absconded work and cited the case of **SABC v CCMA and Others (2002) 8 BLLR 693 (LAC)** where it was held that *desertion necessarily entails the employee's intention no longer to return to work*. The Respondent also cited the case of **SACWU v Dyasi 2001 7D LLR 731 (LAL)** on the issue of desertion. The Respondent submitted that the Claimant continually deserted work and the termination of employment was justifiable in terms of Section 44(3) of the Employment Act and he was thus not entitled to any of the reliefs sought.

7. The parties submissions especially the Respondent's were wanting. Despite citing 2 cases from South Africa's Labour Court, none of the cited authorities was attached. This lackadaisical approach to practice is deprecated. The Claimant on his part did not cite any decision to support his submissions on the various aspects of his case hence the diatribe. Be that as it may, it seems the case revolves around the allegations of dismissal without cause and desertion. Desertion at its core consists of the employee's absence from work without any authorization from the employer. Normally to qualify as desertion such absence is with the intent to remain away from his/her employment permanently. The intent is to determined on a case by case basis and is generally inferred from the circumstances of the absence of the employee as well as the period of absence which are discernible indicators of the employee's intention not to continue with the contract of employment. Once there is desertion there is a basis for the employer to invoke the effect of Section 44(4) which provides as follows:-

*44(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—*

*(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*

The Claimant is alleged to have absconded and was summarily dismissed for the absence and failure to report to work. Unfortunately, no document to that effect was produced by the Respondent. In order to benefit from the safeguards under Section 44(4) of the Employment Act, an employer would have to indicate invocation of the summary dismissal option. What better way than through a letter? We do not know exactly when the dismissal occurred as there is no record before the court of the summary dismissal. The summary dismissal would have been justified by the reasons advanced by the Respondent. In the final analysis I find for the Claimant and order as follows:-

(i) One month's salary in lieu of notice – Kshs. 14,000/-

(ii) 2 month's salary as compensation – Kshs. 28,000/-

(iii) Costs capped at Kshs. 30,000/-

8. This decision was rendered online with 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 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> 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 24<sup>th</sup> day of April 2020**

**Nzioki wa Makau**

**JUDGE**