



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE NO 360 OF 2018

LUKAS SAMARWA KONDO.....CLAIMANT

VS

NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment claim by Lukas Samarwa Kondo against Njuca Consolidated Company Limited. The claim is by way of a Memorandum of Claim dated 30th May 2018 and filed in court on 31st May 2018.
2. The Respondent filed a Memorandum of Defence on 5th July 2018 to which the Claimant responded on 9th July 2018.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Head of Legal, Human Resource and Compliance, Gitongah Mwangi. The parties also filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a security guard, earning a monthly salary of Kshs. 12,600 from June 2015. He was assigned to guard the Respondent's Yard at Weighbridge Area in Mariakani.
5. The Claimant further states that in addition to his duty as a security guard, he worked overtime as a dog handler at night and attended to the dogs by feeding them, washing them and cleaning their den.
6. On 26th January 2016 at 4.00 am, while assigned to guard a store at the Respondent's site/yard at Mariakani, the Claimant was bitten by a snake on his right hand. He was first treated at Jocham Hospital and later transferred to Coast General Hospital.
7. The Claimant avers that despite reporting the incident to the Respondent he was not compensated forcing him to file industrial accident cause *Mariakani PMCC No 171 of 2017*.
8. The Claimant further avers that on 29th November 2016, his Advocate wrote to Njuca Welfare Self

Help Group, requesting that the Company compensates him for the snake bite injury he had sustained on 26th January

2016 but the letter was ignored. Instead, the Respondent summoned the Claimant to its office and threatened to terminate his services if he continued with his intention to sue the Company.

9. On 23rd December 2016, the Claimant was called by the Respondent's supervisor and directed to return his uniform. Upon inquiry, he was informed that the Company could not retain him as he had already threatened to sue.

10. The Claimant lays a claim of unlawful and unfair termination of employment. He gives the following particulars in this regard:

- a) Failure to explain the reason for termination;
- b) Failure to give notice;
- c) Failure to follow due process;
- d) Failure to pay terminal dues.

11. The Claimant particularises his claim as follows:

- a) Notice pay.....Kshs. 12,600
- b) 12 months' salary in compensation.....151,200
- c) Overtime for 12 months.....151,200
- d) Leave pay for one year.....12,600
- e) Gratuity.....6,300
- f) Underpayment + house allowance.....24,718
- g) 17 months' pay for general labourer @ 10,954.70.....186,229
- h) Certificate of service
- i) Costs

The Respondent's Case

12. In its Memorandum of Defence dated 5th July 2018 and filed in court on even date, the Respondent admits having employed the Claimant as a security guard but denies that he worked overtime.

13. The Respondent states that the Claimant's duties as a security guard required him to have dog handling skills but adds that the Claimant did not cook, wash, clean dens or feed the dogs as averred in the Memorandum of Claim.

14. The Respondent further admits that the Claimant was bitten by a snake while on duty but adds that the Claimant was duly compensated for the injuries sustained after successfully proving his case in ***Mariakani PMCC No 171 of 2017***.

15. The Respondent denies having refused to compensate the Claimant as averred in the Memorandum of

Claim and states that the Claimant failed to engage with the Respondent's insurer, Mayfair Insurance Limited, with a view to having the matter settled, without necessarily going to court.

16. The Respondent denies threatening to terminate the Claimant's employment.

17. The Respondent further denies any relationship with Njuca Welfare Self Help Group, especially on the issue of compensation for injuries and states that the said Group was in no position to address the Claimant's issues.

18. While denying the Claimant's assertion that his employment was unlawfully terminated, the Respondent states that the Claimant absconded duty after he was instructed to return to the Head Office in Mombasa to be assigned further duties as the Respondent's project at Mariakani was coming to an end.

19. The Respondent maintains that by absconding duty, the Claimant forfeited any and all benefits that would have been due to him.

Findings and Determination

20. There are two (2) issues for determination in this case:

a) Did the Claimant desert duty or was his employment unlawfully terminated?

b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

21. In response to the Claimant's claim that his employment was unlawfully terminated, the Respondent states that the Claimant absconded duty after he was instructed to return to the Head Office for redeployment.

22. In his witness statement dated 17th November 2018, the Respondent's Head of Legal, Human Resource and Compliance, Gitongah Mwangi states that the Claimant was, pursuant to letter dated 22nd December 2016, called to the office at Chaani on 23rd December 2016 for further deployment as the Mariakani Bridge project was coming to an end.

23. Mwangi further states that the Claimant failed to report to the Chaani office as required upon which a show cause letter dated 30th December 2016 was issued asking the Claimant to respond by 7th January 2017. Mwangi adds that the Claimant failed to respond to the show cause letter or to appear at the Respondent's office and was therefore issued with a summary dismissal letter dated 14th January 2017.

24. The Claimant denied receipt of any of these letters and Mwangi told the Court that he was not present when they were allegedly served on the Claimant. Neither the Respondent's Director, A.M Njoroge who authored the three letters nor the person who handed the letters over to the Claimant was called as a witness.

25. The Claimant's assertion that he did not receive any of the aforesaid letters was therefore unshaken. In the final submissions filed on behalf of the Claimant reference was made to the decision in ***Richard Kiplimo Koech v Yako Supermarket Ltd [2015] eKLR*** where my brother **Radido J** held that it is incumbent upon an employer alleging that an employee has deserted duty to make reasonable effort to reach out to and seek an explanation from the employee.

26. In the absence of any proof that the Respondent actually made contact with the Claimant after 23rd December 2016, the allegation that the Claimant deserted duty cannot stand.

27. The corollary is a finding that the Claimant has proved a case of unlawful and unfair termination of

employment thus meriting compensation.

Remedies

28. In view of the foregoing, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's failure to follow the law in bringing the Claimant's employment to an end.

29. I further award the Claimant one (1) month's salary in lieu of notice.

30. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

31. No basis was laid for the claim for gratuity which therefore fails and is dismissed.

32. The claims for overtime and underpayment were not proved and are dismissed.

33. In the end, I enter judgment in favour of the Claimant as follows:

- a) 6 months' salary in compensation.....Kshs. 75,600
- b) 1 month's salary in lieu of notice.....12,600
- c) Leave pay for 1 year (12,600/30x21).....8,820
- d) Prorata leave for 6 months (12,600/30x1.75x6).....4,410
- Total.....101,430**

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

35. The Claimant is also entitled to a certificate of service plus costs of the case.

36. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Mr. Otwere for the Claimant

Mr. Chiuri for the Respondent