



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 735 OF 2017**

**KENGA CHARO KATANA.....CLAIMANT**

**VERSUS**

**R.K. SANGHANI.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant in this case, Kenga Charo Katana was an employee of R.K. Sanghani, working in the position of Security Guard. He brought this claim following termination of his employment on 17<sup>th</sup> February 2017.
2. The claim is by way of a Memorandum of Claim dated 4<sup>th</sup> September 2017 and amended on 13<sup>th</sup> September 2017. The Respondent filed a Memorandum of Response on 22<sup>nd</sup> December 2017.
3. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Administrator, Said Charo Kaingu. The parties also filed written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent in its Security Section on 9<sup>th</sup> September 2002, earning a monthly salary of Kshs. 12,000. He was not issued with a written employment contract.
5. The Claimant worked for the Respondent until 17<sup>th</sup> February 2017, when his employment was terminated, on allegations of desertion and absenting himself from work without permission, which allegations the Claimant denies.
6. The Claimant states that from 12<sup>th</sup> to 16<sup>th</sup> February 2017, he was unwell and on reporting for duty on 17<sup>th</sup> February 2017, he presented a treatment card and sick note to the Human Resource Manager who told him that his employment had been terminated. The Claimant was to be paid one (1) month's pay.
7. The Claimant goes on to state that the Human Resource Manager instructed the gate security guard not to allow the Claimant into the premises, as he was no longer an employee of the Respondent. The Claimant was then escorted out of the premises.
8. The Claimant submits that he was not issued with any termination notice nor was he paid salary in lieu thereof.
9. He further submits that the termination of his employment was without justifiable cause and in violation of due procedure.
10. The Claimant sets out his claim as follows:
  - a) One month's salary in lieu of notice.....Kshs. 12,000
  - b) 12 months' salary in compensation.....144,000
  - c) Certificate of service
  - d) Costs plus interest

## **The Respondent's Case**

11. In its Memorandum of Response dated 21<sup>st</sup> December 2017 and filed in court on 22<sup>nd</sup> December 2017, the Respondent denies that it is a limited liability company as described in the Memorandum of Claim.
12. The Respondent further denies having employed the Claimant from 9<sup>th</sup> September 2002 as alleged by the Claimant.
13. The Respondent states that in so far as the Claimant alleges that he was in its employment, it was the Claimant's duty to report to work on time and execute his duties with diligence.
14. The Respondent denies terminating the Claimant's employment on 17<sup>th</sup> February 2017 and instead avers that the Claimant absconded duty on various occasions for which he was served with warning letters.
15. The Respondent denies that the Claimant was turned away by the Human Resource Manager and states that the Claimant was called for a meeting on 22<sup>nd</sup> March 2017 at 11.00 am but the Claimant did not turn up for the said meeting.
16. The Respondent asserts that the Claimant had a perpetual habit of absenteeism and desertion and on various occasions, the management warned him against this habit.
17. The Respondent denies that the Claimant was unwell between 12<sup>th</sup> and 16<sup>th</sup> February 2017. In any event, the Respondent states that the Claimant never reported back to work; instead, the Respondent was served with a demand letter, with unfounded allegations, to which the Respondent responded by letter dated 9<sup>th</sup> March 2017.

## **Findings and Determination**

18. There are two (2) issues for determination in this case:
  - a) Whether the Claimant has established a case of unlawful termination of employment;
  - b) Whether the Claimant is entitled to the remedies sought.

## **Unlawful Termination?**

19. The Claimant states that his employment was unlawfully terminated upon resuming duty from sick off on 17<sup>th</sup> February 2017.
20. On its part, the Respondent denies that the Claimant was on sick off between 12<sup>th</sup> and 16<sup>th</sup> February 2017, as stated by the Claimant. In support of this position, the Respondent produced shift attendance records showing that the Claimant was on duty at the time he claims to have been on sick off. The Claimant admitted having signed the subject attendance sheets.
21. Moreover, the treatment notes produced by the Claimant are dated 6<sup>th</sup> February 2017, a week before the date he claims to have been put on sick off. At any rate, all the treatment notes reveal is a diagnosis of what the Claimant may have been suffering from. There is no indication of the Claimant having been granted sick off.
22. Further, even assuming that the Claimant had indeed been granted sick off, he was under an obligation to communicate this to his employer as soon as practicable. The Court was not convinced that he made any attempt to do so.
23. Additionally, the Claimant failed to explain why he failed to attend the meeting with the Respondent's officers, which he himself had confirmed for 22<sup>nd</sup> March 2017.
24. Section 47(5) of the Employment Act states as follows:

***(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***
25. From the foregoing circumstances of this case, the Claimant failed to discharge his burden under Section 47(5) of the Employment Act and his entire case must therefore fail.
26. Each party will bear their own costs.
27. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF MAY 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 15<sup>th</sup> 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.

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Sidinyu for the Claimant

Mr. Bosire for the Respondent