



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 627 OF 2017

TITUS DELAX OPIYO WERE.....CLAIMANT

VS

CREATIVE CONSOLIDATED SYSTEMS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim against the Respondent is by way of a Memorandum of Claim dated 31st July 2017 and filed in court on 3rd August 2017.
2. The Respondent filed a Memorandum of Response on 4th November 2019 but did not attend the trial in spite of due notification. The Claimant testified on his own behalf. Both parties filed written submissions.

The Claimant's Case

3. The Claimant claims to have been employed by the Respondent, in the position of Steward, from 18th March 2012 until 13th April 2017. His primary duty was to provide cleaning and fumigation services to the Respondent's clients.
4. The Claimant states that no formal employment contract was executed between the parties but adds that he retained continuous employment for a period in excess of three (3) months thus rendering his employment status that of a permanent nature.
5. Upon employment the Claimant was paid a monthly salary of Kshs. 8,000 which was progressively increased to Kshs. 10,400 from February 2014 until the time of termination of his employment.
6. The Claimant avers that his work conditions were poor and states that:
 - a. The Respondent underpaid him in contravention of the law;
 - b. The Respondent never provided the Claimant with reasonable housing accommodation nor was the Claimant paid a housing allowance, contrary to Section 31 of the Employment Act;
 - c. The Respondent did not allow the Claimant to take annual leave nor was the Claimant paid in lieu of unutilised leave days, contrary to Section 28 of the Employment Act;
 - d. The Respondent did not issue the Claimant with a written contract of employment, contrary to Section 9 of the Employment Act;
 - e. The Respondent did not issue the Claimant with an itemised pay statement, contrary to Section 20 of the Employment Act.
7. The Claimant avers that on 7th April 2017, his supervisor, Sospeter Otieno informed all the Respondent's employees who had been deployed to work at Vivo Energy that the contract between the Respondent and Vivo had been terminated and as such, all the employees, including the Claimant were not to report to work from 14th April 2017.
8. The Claimant accuses the Respondent of unlawfully terminating his employment and cites the following particulars in this regard:

- a. Failing to give the Claimant and his fellow employees one month's termination notice;
- b. Terminating the Claimant's employment without a fair or valid reason;
- c. Failing to accord the Claimant a hearing, discussion or dialogue prior to effecting the said termination;
- d. Failing to deploy the Claimant to another department or place of work;
- e. Disregarding the rules of natural justice as regards the Claimant's termination;
- f. Failing to pay the Claimant severance pay at the rate of 15 days' salary for each complete year worked, which the Claimant was entitled to by law;
- g. Failing to pay the Claimant other terminal and accrued dues;
- h. Failing to issue the Claimant with a Certificate of Service, contrary to Section 51 of the Employment Act.

9. The Claimant therefore claims the following from the Respondent:

- a. One month's salary in lieu of notice.....Kshs. 12,597.90
- b. Salary for the months of March & April 2017.....25,195.80
- c. Leave pay for 3 years, 8 months & 10 days.....53,609.22
- d. Underpayment.....54,461.47
- e. Severance pay.....37,793.70
- f. 12 months' salary in compensation.....151,174.80
- g. Certificate of Service
- h. Costs plus interest

The Respondent's Case

- 10. The Respondent states its defence to the Claimant's claim in a Memorandum of Response dated and filed in court on 4th November 2019.
- 11. By its Response, the Respondent counters the Claimant's entire claim and puts him to strict proof.
- 12. In particular, the Respondent denies being contracted by any third party company to supply staff and states that it merely disburses monies received from the employer to the employees with salary disbursement being part of the labour management function.
- 13. The Respondent states that it has always paid National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) to the benefit of the Claimant.

Findings and Determination

- 14. From the pleadings and submissions filed by the parties, two (2) issues emerge for determination by the Court:
 - a. Whether the Claimant has proved a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

- 15. The Claimant told the Court that on 7th April 2017, his supervisor, Sospeter Otieno informed all the Respondent's employees who had been deployed to work at Vivo Energy that the contract between the Respondent and Vivo had been terminated and as such, all the employees, including the Claimant should not to report to work from 14th April 2017.
- 16. In denying this claim, the Respondent states that it is the Claimant who deserted duty. Desertion is a serious administrative offence that places the deserting employee within the storm of summary dismissal.

17. However, it is not enough for an employer to simply state that an employee has deserted duty. In the final submissions filed on behalf of the Claimant on 22nd October 2020, reference was made to the decision in *Sarafina Wanyonyi v Lessos Veterinary Suppliers Ltd [2016] eKLR* where my brother, **Radido J** affirmed that an employer avowing that an employee has deserted duty must demonstrate efforts made to reach out to the deserting employee with a view to establishing their whereabouts and the reason for their absence from work.

18. The Respondent did not adduce any evidence to bolster its allegation that the Claimant deserted duty. The Court therefore rejects this line of defence and consequently finds that the Respondent terminated the Claimant's employment without valid reason and in violation of due procedure.

Remedies

19. In the result, I award the Claimant eight (8) month's salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the Claimant's employment.

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

21. The Respondent did not provide leave records to show that the Claimant had utilised his annual leave days. The claim for leave pay therefore succeeds and is allowed.

22. The claims for salary arrears and underpayment were not proved and are dismissed.

23. No basis was laid for the claim for severance pay which also fails and is dismissed.

24. In the ultimate, I enter judgment in favour of the Claimant as follows:

a. 8 month's salary in compensation.....	Kshs. 83,200
b. 1 month's salary in lieu of notice.....	10,400
c. Leave pay for 3 years (10,400/30x21x3).....	<u>21,840</u>
Total.....	115,440

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

26. The Claimant is also entitled to a Certificate of Service plus the costs of the case.

27. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF DECEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mboku for the Claimant

No appearance for the Respondent