



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 681 OF 2017

JOSEPH MUDUDU KENGA.....CLAIMANT

VERSUS

NAS AIRPORT SERVICES LTD MOMBASA.....1ST RESPONDENT

MANPOWER NETWORKS LTD.....2ND RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 23rd August 2017 and filed in court on even date, the Claimant has sued the Respondents for unlawful termination of employment. The Respondents filed a joint Response on 31st October 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called George Okello and Edwin Shamalla Muga. The parties further filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondents as a Bar Supervisor/Head Waiter/ Maitre D’hotel at a monthly salary of Kshs. 28,000 effective 17th August 2015.

4. The Claimant further states that the terms of his employment were contained in a Collective Bargaining Agreement (CBA) between the Kenya Association of Hotelkeepers and Caterers and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA Workers) as well as in the Control Policies and Procedures for Managers/Supervisors issued to him on 10th February 2016.

5. The Claimant avers that he worked for a period of 2 years without a formal contract of employment. Additionally, he was not paid the agreed monthly salary of Kshs. 28,000 and was not paid over the period he was on leave. Moreover, the Respondents did not remit his National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) dues as required.

6. That Claimant pleads that on 30th July 2017, he was asked by the Security Manager to surrender his port identity pass as he had been suspended. He was not issued with a formal suspension or termination letter.

7. The Claimant’s case is that his employment was unlawfully and unfairly terminated without justifiable cause and in violation of due procedure. He therefore claims the following:

- a) 12 months’ salary in compensation.....Kshs. 339,622.44
- b) 1 month’s salary in lieu of notice.....36,386.89
- c) Unpaid salary arrears.....97,641.14
- d) Unpaid leave days for 2 years.....49,056.58
- e) Leave travelling allowance.....14,400.00

f) Compensation for footwear for 24 months.....	14,400.00
g) Service charge @ 10,000 per month.....	240,000.00
h) Unpaid public holidays for 2 years.....	15,239.47
i) Unpaid house allowance.....	194,040.48
j) Overtime.....	480,451.46
k) Unremitted NHIF dues.....	20,400.00
l) Unremitted NSSF dues.....	2,800.00
m) Night shift (275 days).....	74,836.68
n) Certificate of service	
o) Costs plus interest	

The Respondents' Case

8. Whereas the Respondents admit that the Claimant was their employee, they state that he was specifically and generally under the employment of the 2nd Respondent. The Respondents aver that the Claimant was employed as a Sales Associate on 17th August 2015.

9. In response to the Claimant's claim that his employment was unlawfully terminated, the Respondents state that it is the Claimant who absconded duty and when questioned, he was rude and evasive.

10. The Respondents aver that on 5th July 2017, the Claimant misconducted himself while on duty by irregularly voiding a bill and failing to do daily account reconciliation. When called upon to explain this and other issues including absenteeism, the Claimant became evasive and absented himself from work while investigations were ongoing.

11. The 2nd Respondent states that the 1st Respondent had no authority over issues of salary and could not therefore have confirmed the Claimant's salary at Kshs. 28,000. According to the 2nd Respondent, the Claimant's salary as Sales Associate was settled at Kshs. 25,000.

12. The 2nd Respondent denies being a member of the Kenya Association of Hotelkeepers and Caterers. The 2nd Respondent further denies that the Claimant was a member of KUDHEIHA Workers. The 2nd Respondent therefore states that it was not bound by any CBA.

Findings and Determination

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

- a) Whether the Claimant deserted duty or was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

14. In response to the Claimant's claim that his employment was unlawfully terminated, the Respondents state that the Claimant himself deserted duty after being called to account for irregular voiding of a bill and failure to do account reconciliation.

15. Desertion of duty is itself a serious administrative offence which renders an employee liable to dismissal. An employer alleging desertion must however prove it by demonstrating that efforts have been made to the deserting employee with a view to putting them on notice that termination of their employment on this account is being considered (see *James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR*).

16. Assuming that it is indeed true that the Claimant deserted duty, the Respondent ought to have made demonstrable efforts to reach out to him. At the very least, the Respondent should have issued the Claimant with a letter inviting him to show cause why he should not be dismissed on the ground of desertion of duty. In the absence of evidence of any such efforts by the Respondent, the allegation of desertion of duty remains unproved.

17. Further, the allegations of irregular bill voiding and failure to undertake account reconciliation could only be proved at an internal disciplinary meeting and there was no evidence that the Claimant was invited to any such meeting.

18. In the circumstances, the Court finds and holds that the Respondents terminated the Claimant's employment without justifiable cause

and in violation of due procedure. The Claimant is therefore entitled to compensation.

Remedies

19. Pursuant to the foregoing findings, 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 as well as the Respondents’ conduct in the termination transaction. I further award the Claimant one (1) month’s salary in lieu of notice.

20. The Claimant further claims house allowance. Section 31(1) and (2) of the Employment Act, 2007 provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

21. The Respondents produced a contract of service dated 27th September 2015 indicating that the Claimant was entitled to a monthly gross salary of Kshs. 25,000. It seems to me therefore that there was an express agreement that the Claimant’s salary was inclusive of house allowance. The claim thereon is therefore without basis and is dismissed.

22. The Claimant himself produced leave forms indicating that he had utilized his leave days. The claim for leave pay is therefore also without basis and is dismissed.

23. The claims for salary arrears, leave travelling allowance, compensation for footwear, service charge, unpaid public holidays, night shift and overtime were not proved and are also dismissed.

24. Regarding the claims for unremitted NHIF and NSSF dues, the only thing to say is that any such dues would be payable to the respective statutory bodies not to the Claimant.

25. In the end, I enter judgment in favour of the Claimant and against the 1st and 2nd Respondents jointly and severally as follows:

a) 6 months’ salary in compensation.....Kshs. 150,000

b) 1 month’s salary in lieu of notice.....25,000

Total.....175,000

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

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

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JANUARY 2019

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JUDGE

Appearance:

Joseph Mududu Kenga (the Claimant in person)

Miss Kedeki for the Respondents