



**REPUBLIC OF KENYA**

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

**CAUSE NO 599 OF 2016**

**RASHID MWADIGA MWANG'OMBE.....CLAIMANT**

**VS**

**PN MASHRU LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Rashid Mwadiga Mwang'ombe against his former employer, P.N. Mashru Limited. The claim is contained in a Memorandum of Claim dated 11<sup>th</sup> August 2016 and filed in court on even date. The Respondent filed a Response on 2<sup>nd</sup> December 2016.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Mary Kyalo. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 15<sup>th</sup> March 2016. He adds that on 16<sup>th</sup> May 2016, he was told not to report to work until further notice. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 32,927.

4. The Claimant's case is that the termination of his employment was unlawful and unfair in that he was not given any reason for the termination nor was he heard in his defence.

5. The Claimant therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 32,927
- b) Salary for May 2016.....32,927
- c) 12 months' salary in compensation.....395,127
- d) Certificate of service
- e) Costs plus interest

**The Respondent's Case**

6. In its Response dated 30<sup>th</sup> November 2016 and filed in court on 2<sup>nd</sup> December 2016, the Respondent denies terminating the Claimant's employment and accuses the Claimant of deserting duty.

7. The Respondent avers that despite efforts made to reach him to make him go back to work, the Claimant ignored, neglected and/or refused to go to work.

**Findings and Determination**

8. 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?**

9. In opposing the Claimant’s claim that his employment was unlawfully terminated, the Respondent states that it is the Claimant himself who deserted duty. In this regard, the Respondent’s Human Resource Officer, Mary Kyalo told the Court that the Claimant failed to report to work from 18<sup>th</sup> May 2016 after failing to submit a report on an incident involving one of the Respondent’s motor vehicles.

10. Desertion of duty is a valid ground for termination of employment but like all other grounds, it must be proved. It is therefore not enough for an employer to aver that an employee has deserted duty. Jurisprudence emerging from this Court (variously constituted) is to the effect that an employer who alleges that an employee has absconded or deserted duty must demonstrate efforts made towards finding the employee and putting them on notice that termination on account of desertion is under consideration (see *Godfrey Anjere v Unique Suppliers Limited [2015] eKLR* and *David Nyanjui Mburu v Sunmatt Limited [2017] eKLR*).

11. The Respondent’s Human Resource Officer, Mary Kyalo made the general statement that efforts were made to reach the Claimant but there was no proof to back this statement. At any rate, Kyalo confirmed that she herself did not call the Claimant.

12. That said, the Court finds and holds that the ground of desertion was not proved and is therefore not available to the Respondent. The Court therefore adopts the Claimant’s testimony that his employment was terminated without justifiable cause and in violation of due procedure.

**Remedies**

13. Pursuant to the foregoing findings, I award the Claimant three (3) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service plus the Respondent’s conduct in the termination transaction. I further award the Claimant one (1) month’s salary in lieu of notice.

14. From the evidence on record, the Claimant was paid salary for the days worked in May 2016. The claim thereon is therefore without basis and is dismissed.

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

- a) 3 months’ salary in compensation.....Kshs. 120,000
- b) 1 month’s salary in lieu of notice.....40,000
- Total.....160,000**

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

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

18. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Simiyu for the Claimant

Mr. Ngaine for the Respondent