



**REPUBLIC OF KENYA**

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

**CAUSE NO 794 OF 2015**

**SAID KAMANZA BATI.....CLAIMANT**

**VS**

**SHIVA CARRIERS LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's claim brought by a Memorandum of Claim dated 23<sup>rd</sup> October 2015 and filed in court on even date is for unlawful termination of employment.
2. The Respondent filed a Response on 17<sup>th</sup> November 2015 but did not call any witness at the trial. The Claimant testified on his own behalf. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as an electrician on contractual basis. He adds that the Respondent unlawfully terminated his employment on 15<sup>th</sup> September 2015. He therefore claims the following:

- a) One month's salary in lieu of notice;
- b) Salary for 16 days worked prior to termination of employment;
- c) Dues for summary dismissal and/or unfair termination;
- d) Certificate of service;
- e) Costs plus interest.

**The Respondent's Case**

4. In its Response dated 16<sup>th</sup> November 2015 and filed in court on 17<sup>th</sup> November 2015, the Respondent states that the Claimant was not terminated or dismissed. Rather, it is the Claimant who absented himself and/or disappeared mysteriously from work and his whereabouts were unknown.
5. The Respondent states that it has suffered financial loss as a result of the Claimant's disappearance.

**Findings and Determination**

6. 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?**

7. The Claimant testified that on 14<sup>th</sup> September 2014, he was instructed to go and repair the Company’s motor vehicle that had broken down. He was unable to complete the assignment as he had forgotten to carry the required spare part. On reporting to work on 15<sup>th</sup> September 2014, the Claimant was notified by the Respondent’s Workshop Manager, Abzal that his employment had been terminated.

8. In its Response to the Claimant’s claim the Respondent states that it is the Claimant who deserted duty. Desertion is a grave administrative offence which renders an employee liable to dismissal. It must however be proved. It is now well settled that for an employer to prove desertion, there must be evidence of efforts made to reach out to the employee with a view to putting them on notice that termination on account of their desertion is being considered (see *Javan Kisoi Mulwa v S.A.A Interstate Traders (K) Ltd [2018] eKLR.*)

9. The Respondent did not call any evidence either to prove desertion or contradict the Claimant’s account of the circumstances leading to the termination. The Court found no reason to disbelieve the Claimant and therefore finds and holds that the Respondent indeed terminated the Claimant’s employment without justifiable cause as defined in Section 43 of the Employment Act, 2007 and in violation of due procedure as set out under Section 41 of the Act.

**Remedies**

10. In light of the foregoing, 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 and the Respondent’s conduct in the termination transaction.

11. I further award the Claimant one (1) month’s salary in lieu of notice as well as salary for 15 days worked in September 2015.

12. I therefore enter judgment in favour of the Claimant as follows:

a) 3 months’ salary in compensation.....	Kshs. 58,914
b) 1 month’s salary in lieu of notice.....	19,638
c) Salary for 15 days in September 2015.....	<u>9,819</u>
<b>Total.....</b>	<b>88,371</b>

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

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

15. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF JANUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mrs. Kariuki for the Claimant

Mr. Ngaine for the Respondent