



**REPUBLIC OF KENYA**

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

**CAUSE NO 168 OF 2017**

**SWALAHDIN ABOUD MOHAMED.....CLAIMANT**

**VS**

**TAHMEED COACH LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 21<sup>st</sup> February 2017 and filed in court on 3<sup>rd</sup> March 2017, the Claimant seeks compensation for unfair termination of employment as well as payment of terminal dues. The Respondent filed a Reply on 22<sup>nd</sup> May 2017.
2. The matter came up for hearing on 24<sup>th</sup> October 2018, with the Claimant testifying on his own behalf and the Respondent calling its Manager, Seif Ali Mohamed.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a conductor sometime in the year 2006. He rose through the ranks to the position of Manager, Malindi Branch Office. At the time of leaving employment on 30<sup>th</sup> January 2017, the Claimant earned a monthly salary of Kshs. 21,700.
4. The Claimant states that his employment was terminated after he inquired about his delayed salary in the month of December 2016. The Claimant avers that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) Salary for the month of January 2017.....Kshs. 21,700
- b) One month's salary in lieu of notice.....21,700
- c) Leave pay for 10 years.....175,269
- d) Unpaid public holidays.....164,800
- e) 12 months' salary in compensation.....260,400
- f) Costs plus interest

**The Respondent's Case**

5. In its Reply dated 22<sup>nd</sup> May 2017 and filed in court on even date, the Respondent admits having employed the Claimant but denies that he held the position of Manager, Malindi Branch.
6. The Respondent states that the Claimant was employed as a Maintenance Inspector and was charged with supervision of buses at Malindi Branch. In December 2016, the Claimant was transferred from Malindi to Bondeni Branch, Mombasa where he was assigned the role of Motor Vehicle Inspector. His salary and benefits remained unchanged.
7. The Respondent avers that the Claimant failed to take up the transfer offer and wilfully deserted his employment without notice.

## 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 response to the Claimant's assertion that his employment was unlawfully terminated, the Respondent states that the Claimant himself deserted duty after failing to take up a transfer from Malindi to Bondeni, Mombasa.

10. Desertion of duty is a serious administrative offence which renders an employee liable to dismissal. It must however be proved. In this regard, the Court was referred to the decision by my brother **Abuodha J** in *Godfrey Anjere v Unique Suppliers Limited [2015] eKLR* where it was held that an employer who alleges desertion on the part of an employee is required to show steps taken to notify the employee that termination of employment on this account is under consideration.

11. The Court did not find any effort made by the Respondent to reach out to the Claimant, if indeed he had deserted duty. At any rate, the Respondent's Manager, Seif Ali Mohamed told the Court that the Claimant had been demoted from the position of Manager to Conductor. Mohamed could not tell if the Claimant had prior notice of his demotion and there was certainly no due process in effecting the demotion.

12. What emerges is this; that by transferring the Claimant from Malindi to Mombasa under a new job designation, the Respondent unilaterally altered the Claimant's terms of employment without notice. This flew in the face of Sections 10(5) and 13(1) of the Employment Act, 2007 which require an employer to consult and formally notify an employee of any changes in the terms of employment.

13. In *James Ang'awa Atanda and 10 others v Judicial Service Commission [2017] eKLR* my brother **Radido J** termed unilateral variation of employment an unfair labour practice under Article 41(1) of the Constitution of Kenya, 2010. From the evidence on record, the job assigned to the Claimant in Mombasa was diametrically different from the one he performed while in Malindi. The fact that the salary did not change did not alter this fact.

14. The Respondent was therefore under a duty to consult and formally notify the Claimant of the significant changes in his terms of his employment. Having failed to do so, and further having failed to prove desertion of duty by the Claimant, the Respondent is consequently guilty of unfair termination and the Court so finds and holds.

## Remedies

15. Pursuant to the foregoing findings, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service with the Respondent coupled with the Respondent's conduct in bringing the Claimant's employment to an end. I further award the Claimant one (1) month's salary in lieu of notice plus salary for the month of January 2017.

16. The Respondent did not produce any leave records to show that the Claimant took his annual leave as required under Section 74(1)(f) of the Employment Act. The claim for leave pay therefore succeeds and is allowed.

17. The claim for public holidays was not proved and is dismissed.

18. Finally, I enter judgment in favour of the Claimant as follows:

- a) 12 months' salary in compensation.....Kshs. 260,400
  - b) 1 month's salary in lieu of notice.....21,700
  - c) Salary for January 2017.....21,700
  - d) Leave pay for 10 years (21,700/30x21x10).....151,900
- Total.....455,700**

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

20. The Claimant will have the costs of the case.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Osore for the Claimant

Miss Zamza for the Respondent