



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 250 OF 2017

MISHECK MUTHAURA GITONGA.....CLAIMANT

VERSUS

AAA GROWERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant asserts that he was employed by the Respondent as a guard in June 2011 earning some Kshs. 5,250/- a month. He avers that he was dismissed on 20<sup>th</sup> November 2014 without notice or payment of his dues. At the time he earned Kshs. 7,250/-. The Claimant sought the payment of dues for public holidays, underpayments, house allowance and severance pay. He also sought payment of compensation for the dismissal and costs of the suit. He attached copies of a statement from the National Social Security Fund (NSSF), a recommendation letter dated 4<sup>th</sup> December 2014 and the demand letter dated 19<sup>th</sup> January 2015.

2. The Respondent filed a defence in which it avers that the salary at the time the Claimant absconded from duty was Kshs. 6,500/-. The Respondent averred that the Claimant did not report to work from 9<sup>th</sup> November 2014 and never communicated with the Respondent till the filing of the suit. The Respondent averred that the Claimant absconded from work after being unable to service a SACCO loan advanced to him by the Respondent. The Respondent asserts that the Claimant is not entitled to any of the claims he makes as he did not specify the amounts due. The Respondent denied issuing the Claimant the recommendation letter dated 4<sup>th</sup> December 2014 and that it had reported the suspected forgery of the document to Naro Moru Police Station under OB No. 20/5/10/2017. It sought the dismissal of the suit.

3. The Claimant testified that he was dismissed unfairly and sought the November 2014 salary and his other benefits. He stated that he worked every day and on he sought leave on 8<sup>th</sup> November 2014. He used to get 2 days off each week and he sought 2 weeks leave. He testified that he went for 21 days leave and was working on the week he was dismissed. He stated that he was not given a dismissal letter but got a recommendation letter signed by Japhet and that the manager at the time was Fineas Muruguru. He said that he never used to get any house allowance and that he received a payslip that showed the payments. He stated that the security manager said he would not work with the Claimant and the farm manager told the Claimant to go after 3 months. He said that he never went back.

4. The Respondent relied on its documents and also filed submissions. In the submissions filed, the Respondent argues that the court should not have denied hearing the witness for the Respondent Mr. Japhet Mbaabu who had sat through the trial and that the court should instead have noted the fact and evaluated his evidence accordingly. The Respondent submitted that the Claimant did not adduce any evidence to prove the alleged monthly salary. The Respondent submitted that the evidence of the Claimant regarding the recommendation letter was dubious and asserts that the pay given to the Claimant was consolidated. The Respondent asserts that the Claimant gave three different dates for his termination in his pleadings and testimony and that in view of the contradictions the claim was made of contradictions and falsehoods. The Respondent argued that the Claimant was not entitled to any of the reliefs sought and that relying on the case of **George Onyango Akuti v G4S Security Services Limited [2013] eKLR** the Claimant was not entitled to an award under Section 49 of the Employment Act. On the aspect of public holidays, the Respondent asserts that the Claimant failed to particularise the claims that fell under that head. The case of **Hassan Ali v Fomat Superstore Limited [2017] eKLR** was called into aid for this argument. Reliance was placed on the case of **Joseph Sani Orina v Hipora Business Solutions (EA) Limited [2017] eKLR** for the proposition that since the pay was consolidated the claim for house allowance was untenable as the consolidated pay combined both basic and house allowance. The case of **John Rioba Maug v Riley Falcon Security Services Limited [2017] eKLR** was cited to assert that severance pay was not payable as the employee had not been declared redundant.

5. This claim is based on falsehoods as correctly pointed out by the Respondent. The Claimant was not clear on what day he was allegedly dismissed. He stated in his testimony that he was told by the farm manager to return after 3 months but he never went back. He absconded from work. He was evasive as to who signed the letter of recommendation which was disowned by the Respondent. From a cursory glance at the stamps used by the Respondent on the Claimant's payslips reflected against the one provided by the Claimant in his 'recommendation' letter, the inescapable conclusion one can make is that the document he gave as a recommendation letter was forged. In my view the Claimant's actions amount to an attempt to defraud the court and will be sanctioned by the dismissal of the suit with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 15<sup>th</sup> day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a  
true copy of the Original

**Deputy Registrar**