



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 426 OF 2017

LAZARUS MASIKA MAYENDE.....CLAIMANT

VS

MULOIL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim brought by a Memorandum of Claim dated 31st May 2017 and filed in court on the same date is for unlawful termination of employment. The Respondent's defence is contained in a Response dated 2nd May 2018 and filed in court on 4th May 2018.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Group Human Resource Manager, Daniel Muasa. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a cook from 5th February 2015 until 3rd April 2017 when his employment was terminated. He earned a monthly salary of Kshs.16,588. The Claimant states that he and his colleague were simply told by a junior clerk, known as Ali that their services were no longer required.

4. The Claimant avers that the decision to terminate his employment was unlawful and unfair. He further avers that during his employment with the Respondent, he was not allowed to take annual leave. He worked overtime without compensation.

5. The Claimant's claim is as follows:

- a) 2 months' salary in lieu of notice.....Kshs. 33,176
- b) Salary for March 2017.....16,588
- c) Leave pay for 2 years.....33,176
- d) Overtime for 23 months.....190,762
- e) Unexpired contract term (5 months and 14 days).....91,018
- f) 12 months' salary in compensation.....199,056
- g) Certificate of service
- h) Costs plus interest

The Respondent's Case

6. In its Response to the Claimant's claim, the Respondent admits that the Claimant was its employee. The Respondent states that on 4th April 2017, the Claimant physically assaulted his colleague, Ali Abdulrahman at work, thus causing him bodily injuries.

7. The case was reported at Changamwe Police Station vide OB/24/4/4/2017. Subsequently, the Claimant disappeared for fear of being arrested. Efforts to reach him did not bear any fruit. The Respondent therefore sent a letter dated 6th April 2017, to the Claimant's last known postal address summoning him to appear before a Disciplinary Committee on 13th April 2017. The Claimant did not respond and did not appear before the Disciplinary Committee as required.

8. The Respondent denies that the Claimant worked overtime and states that he took his annual leave as it fell due.

Findings and Determination

9. 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?

10. The Respondent states that the Claimant deserted duty from 4th April 2017, after assaulting his colleague, Ali Abdulrahman. The Respondent adds that on 6th April 2017, a letter was sent by registered post, to the Claimant's last known address, being P.O. Box 349 Bungoma. The letter was as follows:

“Dear Lazarus

RE: NOTICE OF DISMISSAL FOR ABSENCE WITHOUT LEAVE (AWL)

The above matter refers.

On 4th April 2017 at about 8.15 am, without leave, permission or other lawful cause, you left work and absented yourself and have remained absent up to this date. You have also not bothered to communicate your whereabouts to your immediate supervisor or the undersigned. Efforts to contact you have also been fruitless since you have not been answering your phone.

This is to inform you that absence from work without leave, permission or other lawful cause is a serious employment offence that is punishable by summary dismissal.

Take notice that should you not report to the undersigned on 13th April 2017 at 8.00 am you will be treated as having deserted duty and you will be summarily dismissed for desertion.

Yours faithfully

For: Muloil Ltd

(Signed)

G. Dhami

Project Manager”

11. The Claimant denied receiving this letter as it was sent to an unknown address. On its part, the Respondent did not offer any proof that P.O. Box 349 Bungoma was indeed the Claimant's last known address.

12. Moreover, the letter, which served as notice of dismissal on account of desertion of duty was dispatched barely two days after the alleged desertion. In the persuasive South African decision in **Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** it was held:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand...an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”

13. Even assuming that the Claimant had indeed left his place of work on 4th April 2017, without permission, I do not think an absence of two days was enough to cause his employer to form the opinion that he had deserted duty. In his witness statement dated 5th May 2018, the Respondent's Group Human Resource Manager, Daniel Muasa states that frantic but unsuccessful efforts were made to contact the Claimant through his mobile phone. Muasa confirmed that it was not him who made the calls; they were made by the Project Manager, Gopal Ali.

14. The Court was unable to understand why the Respondent did not call the Project Manager as a witness to clarify to the Court the nature

and extent of efforts made to reach the Claimant. Additionally, the Respondent did not bother to call Abdulrahman, the victim of the assault that is said to have caused the Claimant to desert duty.

15. Overall, the Court finds and holds that the Respondent failed to prove the ground of desertion of duty against the Claimant. The ensuing dismissal was therefore wrongful and the Claimant is entitled to compensation.

Remedies

16. Flowing from the foregoing findings, I award the Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as documented by his letter of appointment dated 14th September 2015. I have also considered the Respondent's conduct in effecting the dismissal.

17. Additionally, I award the Claimant one (1) month's salary in lieu of notice as well as salary for March 2017. In the absence of leave records to prove that the Claimant took his annual leave, the claim for leave pay succeeds and is allowed.

18. The claim for overtime compensation was not proved and no basis was laid for the claim for payment on account of the unexpired contract term. These claims therefore fail and are dismissed.

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

| | |
|---|----------------|
| a) 4 month's salary in compensation..... | Kshs. 66,352 |
| b) 1 month's salary in lieu of notice..... | 16,588 |
| c) Leave pay for 1 year (16,588/30x21)..... | 11,612 |
| d) Prorata leave for 6 months (16,588/30x1.75x6)..... | <u>5,806</u> |
| Total..... | 100,358 |

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

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

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2019

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JUDGE

Appearance:

Mr. Kalimbo for the Claimant

Mr. Masore h/b Mr. Diro for the Respondent