



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 51 OF 2018

ABDI OSMAN JUBAT ABDI.....CLAIMANT

VERSUS

BASHAEB BROTHERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed his Statement of Claim on 29th January 2018, seeking compensation for unfair termination and payment of terminal dues. The Respondent filed a Response on 2nd March 2018.

2. When the matter came up for hearing, the Claimant testified on his own behalf and thereafter called his former colleague, Gesiyon Omar Mohamud. The Respondent called its Director, Najib Omar Bashaer. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard from 23rd March 2016 until 29th November 2017, when his employment was terminated. At the time of termination, he earned a monthly salary of Kshs. 14,585.

4. The Claimant avers that the termination of his employment was unlawful and unfair in that there was no justifiable cause for it and he was not availed an opportunity to defend himself. He therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 14,585
- b) House allowance for 23 months.....111,320
- c) Gratuity for 2 years.....14,400
- d) Leave pay for 2 years.....20,160
- e) Leave travelling allowance for 2 years.....6,720
- f) Public holidays and Sundays worked.....61,440
- g) Overtime worked.....168,000
- h) 12 months' salary in compensation.....175,020
- i) Certificate of service
- j) Costs plus interest

The Respondent's Case

5. In its Response dated 28th February 2018 and filed in court on 2nd March 2018, the Respondent admits having employed the Respondent on 19th March 2016 at a monthly salary of Kshs. 14,088 which was increased to Kshs. 16,585 from 19th May 2017.

6. The Respondent denies terminating the Claimant's employment and states that the Claimant himself absconded duty on 30th November 2017 upon receiving his salary.

7. In response to the claim for house allowance, the Respondent states that the Claimant's salary was inclusive of house allowance. The Respondent adds that the Claimant took his leave for the first one year worked from 30th October 2017 until 22nd November 2017. The leave for the second year was due on 19th March 2018. The Respondent further states that the Claimant was paid his travelling allowance in full.

8. The Respondent avers that the Claimant worked as a security guard on 12 hour shifts over 6 days a week. The Respondent therefore denies the claim for public holidays and Sundays.

9. The Respondent maintains that the Claimant acted on breach of his employment contract and counterclaims the sum of Kshs. 15,901 in lieu of notice.

Findings and Determination

10. There are three (3) 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;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

Desertion of Duty or Unlawful Termination?

11. The Respondent states that the Claimant deserted duty on 30th November 2017 after receiving his salary. On his part, the Claimant states that his employment was terminated verbally on 29th November 2017 on allegations of reporting to work late.

12. Desertion of duty is a serious administrative offence which renders an employee liable to summary dismissal but it must be proved. A critical ingredient of desertion is demonstrable intention on the part of the employee not to return to work. As held in the South African decision in *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the intention not to resume work is what distinguishes desertion from unauthorised absence from work.

13. According to the Respondent, the Claimant left his place of work on 30th November 2017 and 5 days later on 5th December 2017, the Respondent wrote to the County Labour Officer in Mombasa reporting the absence and seeking advice on the way forward. On 6th December 2017, the County Labour Officer responded to the Respondent as follows:

“Dear Sir,

RE: ABDI OSMAN JUBAT ABDI

Your letter dated 5th December 2017 refers.

The conduct of the above named person who is your employee warrants summary dismissal pursuant to Section 44(3)(4)(a) of the Employment Act, 2007 as you have mentioned in your letter that he absented himself from his place of work without permission.

Should you need further advice on labour matters please do not hesitate to contact this office.

Yours faithfully,

(Signed)

C.I. Opalakadi

FOR: COUNTY LABOUR OFFICER

MOMBASA COUNTY”

14. Neither the Respondent's letter nor the response by the County Labour Officer makes any mention of desertion of duty. It is therefore evident that what the Respondent was dealing with was absenteeism and not desertion of duty. At any rate, the Respondent did not take any further action to summon the Claimant to respond to a charge of absenteeism or even desertion.

15. In the final submissions filed on behalf of the Claimant on 18th February 2018, reference was made to the decision in *James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR* where my brother **Radido J** reiterated that an employer alleging desertion of duty by an employee must show efforts made to reach out to the employee to establish their whereabouts. No such efforts were made in this case and the defence of desertion is not available to the Respondent.

16. That said, the Court adopts the Claimant's plea that his employment was terminated without justifiable cause and in violation of due procedure. He is therefore entitled to compensation.

Remedies

17. Arising from the foregoing findings, I award the Claimant five (5) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in handling the Claimant's case. I further award the Claimant one (1) month's salary in lieu of notice.

18. According to salary vouchers produced by the Respondent, the Claimant was paid house allowance. The claim thereon is therefore without basis and is dismissed.

19. On the claim for leave pay, the Respondent filed letter dated 30th October 2017 by which the Claimant was granted 21 days' leave running from 30th October 2017 until 22nd November 2017. The claims for leave pay and travelling allowance are therefore also without basis and are dismissed.

20. No basis was laid for the claim for gratuity and the claims for public holidays, Sundays and overtime were not proved.

The Respondent's Counterclaim

21. In light of the finding that the assertion by the Respondent that the Claimant deserted duty was not proved, the Respondent's counterclaim for notice pay fails and is dismissed.

Final Orders

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

a) 5 months' salary in compensation.....Kshs. 82,925

b) 1 month's salary in lieu of notice.....16,585

Total.....99,510

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

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

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF APRIL 2019

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JUDGE

Appearance:

Mrs. Kimuli for the Claimant

Mr. Omwenga for the Respondent