



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 83 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> May, 2019)**

**MOSES OTONDI SIGU.....CLAIMANT**

**VERSUS**

**ROYAL GARMENTS INDUSTRIES EPZ LIMITED...RESPONDENT**

**JUDGEMENT**

1. The Claimant filed his Memorandum of Claim on 29<sup>th</sup> January 2014 alleging that his dismissal by the Respondent was in contrary to the provisions of the law. He therefore seeks the following reliefs:-

*a) A declaration that the Respondent's decision to dismiss the Claimant was unlawful and unfair and that the Claimant is entitled to payment of his terminal dues and compensatory damages.*

*b) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totaling Kshs.160,532.00.*

*c) Interest on (b) above from the date of filing suit until payment in full.*

*d) Costs of this suit plus interest thereon.*

2. The Respondent in its Memorandum of Reply alleged that the Claimant had absconded work and is therefore not entitled to any terminal benefits.

**Claimant's case**

3. The Claimant, CW1, testified that he was employed by the Respondent as a Machine Operator since September 2011 and was terminated in 2013. He testified that he used to work on a one year renewable contract. However, he was dismissed on 11<sup>th</sup> September 2013.

4. He testified that he was previously been injured while on duty and it is then that he sued the Respondent. However, when his advocate served the Respondent with the Court summons in the injury case, the Human Resource Officer summoned him and sacked him. He testified that he was not issued with a termination notice nor a certificate of service. In addition, that he was not paid his September 2013 salary.

**Respondent's case**

5. Samuel Otieno, RW1, the Respondent's Human Resource Manager testified on behalf of the Respondent. He adopted his Witness Statement filed on 5<sup>th</sup> October 2017 as his evidence in chief. According to him, the Claimant absconded duty from 12<sup>th</sup> September 2013 to 7<sup>th</sup> October 2013 when he returned to the Respondent's premises demanding his dues for the month of September 2013, which he was paid.

6. In cross-examination, he admitted that the Claimant was on a one year contract from 2<sup>nd</sup> January 2013. He however testified that the Claimant did not complete his contract and that this was his first contract.

7. He further testified that he was not aware that the Claimant had worked for the Respondent from September 2011. He testified that the Claimant's last day of service was 26<sup>th</sup> June 2013 and that he returned to work on 11<sup>th</sup> September 2013.

8. He also testified that he asked the Claimant where he had been and he responded that he was sick but he did not produce any document on his illness. He testified that he was not aware of the Claimant's health problems but he was aware that the Claimant was injured on 26<sup>th</sup> June 2013.

9. He testified that on 11<sup>th</sup> September 2013 the Claimant sought to attend to a personal matter and was given a gate pass. He testified that he was not aware that Wellington Atanasi had summarily dismissed the Claimant. He testified that he did not have any evidence that the Claimant was a non-performer. He testified that no notice to show cause that was served upon the Claimant. He testified that he never took any action against the Claimant for absconding duty.

10. He testified that the Claimant was paid a salary for the 14 days worked in September 2013 at a sum of Kshs. 7,520. He however testified that though the Claimant was usually paid in cash he did not produce any payroll.

11. In re-examination, he testified that the attendance register annexed to the application indicated that the Claimant worked for 14 days.

#### **Claimant's submissions**

12. The Claimant submitted that despite the Respondent being served with the pleadings in 2014 the Respondent did not call Wellington Atanasi to rebut the facts of the case as pleaded and testified by the Claimant. He further submitted that though the law sets out the procedure in instances of desertion of duty, the Respondent did not call the Claimant nor did they refer his case to the labour office.

#### **Respondent's submissions**

13. The Respondent submitted that it was the onus of the Claimant to duly inform the employer about his illness and to provide material evidence to buttress the same. The Respondent cited the case of **Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya [2014] eKLR**.

14. It further submitted that it discharged its obligation to reach out to the Claimant about his unreasonable cause of action. The Respondent relied on the decision in **Joseph Njoroge Kiama v Summer Ltd [2014] eKLR**.

15. It submitted that absence from work without permission entitles an employer to summarily dismiss an employee as provided under Section 44 (4) of the Employment Act. It relied on the decision in the **Joseph Njoroge Kiama** case where the Court held:-

*“...the Claimant absconded duties and his services became summarily terminated by operation of law on the 21<sup>st</sup> September 2011 when he demanded payment of his terminal dues thereby evincing his intention not to return to the Respondent's employment...”*

16. It submitted that the Claimant has not satisfied the threshold required under Section 47 (5) of the Employment Act to warrant a claim of unfair dismissal and relied on the case of **Daniel Mueke v Bhogals Auto World [2014] eKLR**.

17. It submitted that the Claimant ought to have been served with a 30 days notice prior to his desertion and intention to repudiate the employment contract instead, the Claimant opted to disappear from work. It therefore submitted that the prayer for notice pay should fail.

18. It submitted that the Claimant was paid his September 2013 salary amounting to Kshs. 7,520 as evidenced in the payslips produced by Respondent hence the claim for salary for the month of September 2013 should fail.

19. It further submitted that the Claimant's termination was by operation of law and is therefore not entitled to damages. It submitted that the Claimant's certificate of service was ready for collection at its offices. With regard to costs, the Respondent urged the Court to award it costs as it had established that the Memorandum of Claim cannot stand on its own legal limbs.

20. I have examined all the evidence and submissions of the parties. The issues for this Court's determination are as follows:-

1. *“Whether the Claimant was dismissed by the Respondent or he absconded duty.*

2. *If he was dismissed whether the dismissal was fair and justified.*

3. *Whether the Claimant is entitled to the remedies sought”.*

#### **1<sup>st</sup> issue**

21. The Claimant told Court that he was involved in a small accident while on duty. He then sued the Respondent for injury. It is then that he was dismissed.

22. The Respondent on their part aver that the Claimant absconded duty and they were under no obligation to look for him.

23. The RW1 when cross-examined by Counsel for the Claimant however indicated that he was aware that the Claimant had been injured on 29.6.2013 and that he had left work on 29.6.2013 and came back on 11.9.2013 without any medical records.

24. RW1 also stated that on 11.9.2013 the Claimant asked to go home early to attend to a person problem and was given a gate pass to that effect.

25. From this evidence, the Claimant was injured on 29.6.2013 but was not dismissed at that point. He seems to have come back to work hence the gate pass issued to him on 11.9.2013 and payment of salary for September 2013. The contention that he absconded duty in June 2013 is unfounded.

26. The Respondent further contend that the Respondent requested to take an early retirement on 11.9.2013 as per their submissions. There was no evidence placed before this Court to prove this contention.

27. The contention by the Respondent that Claimant absconded duty does not exonerate the Respondent from their responsibility to issue a show cause letter to him. There is also no evidence that they subjected him to due process for absconding duty.

28. It is therefore my finding that the contention that the Claimant absconded duty is not backed with evidence and I find that the Claimant was dismissed as he had submitted.

#### 2<sup>nd</sup> issue

29. On whether the dismissal was lawful and justified, the position in the law is that a dismissal is valid if there are valid reasons and due process has been followed. The Respondent have not demonstrated any of these aspects as provided for under Section 43 and 41 of Employment Act 2007. I therefore return a verdict that the Claimant's dismissal was unfair and unjustified.

#### 3<sup>rd</sup> issue

30. On remedies, the Claimant sought to be paid his terminal benefits and damages amounting to 160,532/=-.

31. Having considered all the evidence and submissions and the circumstances under which the Claimant was dismissed, I award him as follows:-

*1. 1 month salary in lieu of notice = 11,862/=-.*

*2. Salary for 16 days worked between 25<sup>th</sup> August and 11<sup>th</sup> September 2013 =  $16/30 \times 11,862 = 6,326/=$*

*3. 8 months' salary as compensation for unlawful and unfair dismissal =  $8 \times 11,862 = 94,896/=$*

*Total = 113,084/=*

*4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

**Dated and delivered in open Court this 23<sup>rd</sup> day of May, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Makokha holding brief Namada for Claimant – Present

No appearance for Respondent