



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 414 OF 2015

JOSEPH IRUNGU MWANGI.....CLAIMANT

VERSUS

DEEP BLUE ENTERPRISES KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant’s claim brought by a Memorandum of Claim dated 17th March 2015 and filed in court on 18th March 2015 is for compensation for unlawful termination of employment and payment of terminal dues. The Respondent responded to the claim by a Reply dated 8th April 2015 to which the Claimant responded on 23rd October 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and then called John Mwangi Njoki. The Respondent called its Director, Esther Muoria.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 1st April 2008, in the position of Caretaker, earning a monthly salary of Kshs. 12,000. He was not issued with a written employment contract.

4. The Claimant worked for the Respondent until 18th March 2014, when his employment was terminated. He avers that the termination of his employment was without justifiable cause and in violation of due procedure.

5. The Claimant now claims the following:

- a) 12 months’ salary for 7 years for lost earnings.....Kshs. 1,008,000
- b) Unpaid overtime.....67,200
- c) Service pay for 7 years.....84,000
- d) Unpaid leave for 7 years.....42,000
- e) 1 month’s salary in lieu of notice12,000
- f) Costs plus interest

The Respondent’s Case

6. In its Reply dated 8th April 2015 and filed in court on 9th April 2015, the Respondent states that the Claimant was its employee, earning a monthly salary of Kshs. 10,500. The Respondent adds that the Claimant was an accounting clerk, charged with the responsibility of collecting rent receipts as well as money for electricity and water from tenants.

7. The Respondent avers that the Claimant deserted duty without any notice or explanation. The Respondent further avers that the Claimant left with money paid to him for settlement of electricity and water bills.

8. It is the Respondent's case that the Claimant's desertion resulted to automatic termination of his employment.

9. The Respondent submits that the Claimant was lawfully summarily dismissed for gross misconduct under Section 44(4)(a) and (e) of the Employment Act. The Respondent further submits that it computed all the Claimant's lawful terminal dues before this cause was unnecessarily filed in court.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant has proved a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

11 The Claimant claims that the Respondent terminated his employment without any justifiable cause and in violation of due process. The Respondent denies this claim and states that it is the Claimant who deserted duty. The Respondent's Director, Esther Muoria testified that after the death of her husband, Charles Muoria in June 2013, she found it impossible to continue working with employees employed by her late husband because they were uncooperative.

12. Regarding the Claimant, Esther Muoria told the Court that he disappeared in February 2014, taking with him money for utility bills he had collected from tenants. She added that she tried calling him to account for the money but he did not respond. She therefore decided to get somebody else to do the Claimant's job. She did not report the issue to the Police because she had no time to do so.

13. The Respondent's case is that the Claimant simply deserted duty. Desertion is a serious administrative offence which renders an employee liable to summary dismissal but like all other grounds, it must be proved. By definition, desertion connotes an intention on the part of the employee not to return to work. It is therefore distinguishable from absence without leave (see *Seablo v Belgravia Hotel (1997) 6BLLR 829 (CCMA)*).

14. As held in *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Dickson Matingi v Db Schenker Limited [2016] eKLR*, an employer alleging desertion against an employee must show efforts made to reach out to the employee with the aim of putting them on notice that termination on this ground is under consideration.

15. In the instant case, the Respondent did not demonstrate having made any such efforts and the ground of desertion is not available to it. At any rate, the Respondent's Director, Esther Muoria was categorical that she could not work with employees hired by her late husband. It seems to me therefore that she had every intention to get rid of these employees, including the Claimant.

16. Esther Muoria however failed to show any valid reason for termination of the Claimant's employment, as required under Section 43 of the Employment Act. Moreover, she failed to adhere to the mandatory procedural fairness requirements set under Section 41 of the Act. As a result, the Court finds the Respondent guilty of unlawful and unfair termination of the Claimant's employment.

Remedies

17. Pursuant to the foregoing findings, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service and the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

18. In the absence of any leave records to show that the Claimant had exhausted his annual leave, the claim thereon succeeds and is allowed. In the same vein, there was no evidence that the Claimant was a contributing member of the National Social Security Fund or any other pension scheme. He is therefore entitled to service pay.

19. The claim for overtime compensation was not proved and is dismissed.

20. Before tabulating the cumulative award, I need to deal with the issue of the monthly salary applicable to the Claimant, which was contested. The Claimant pleaded the figure of Kshs.12,000 but the Respondent gave the figure of Kshs.10,500. As an employer, the Respondent was under an obligation to document the terms of the Claimant's employment, a responsibility it failed to discharge.

21. In the circumstances, the Court invokes Section 10(7) of the Employment Act and adopts the figure of Kshs.12,000 pleaded by the Claimant as his monthly salary for purposes of this claim.

22. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 96,000
- b) 1 month's salary in lieu of notice.....12,000

c) Leave pay for 6 years (12,000/30x21x6).....50,400

d) Service pay for 6 years (12,000/30x15x6).....36,000

Total.....194,400

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

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

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Kinuthia for the Claimant

Mr. Kamau for the Respondent