



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**CAUSE NO 54 OF 2017**

**[FORMERLY MOMBASA ELRC CAUSE NO 869 OF 2016]**

**OBADIAH KEBABE GISORE.....CLAIMANT**

**VS**

**REA VIPINGO PLANTATIONS LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Statement of Claim dated 21<sup>st</sup> October 2016 and filed in court on 14<sup>th</sup> November 2016, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Response on 20<sup>th</sup> June 2017.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Jane Omudidi.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 6<sup>th</sup> May 2014, as a Brush Room Operator. He earned a monthly salary of Kshs. 8,806.72. He claims that he was not paid house allowance.
4. On 6<sup>th</sup> July 2015, the Claimant was injured in the left eye while at work. He claims to have sustained another injury on his index finger on 11<sup>th</sup> July 2015.
5. The Claimant further states that on 13<sup>th</sup> July 2015, he was summoned by the Human Resource Manager to sign a leave form indicating that he was not at work when he sustained the injury.
6. On the same day, the Claimant was informed by the Assistant Personnel that a letter had been received from his Advocate. The Assistant Personnel asked the Claimant to withdraw a work injury claim he had filed against the Respondent. The Claimant declined and he was informed that he would be dismissed.
7. The Claimant reported his grievance to the Production Manager, one Mr. Obong'o but got no assistance. Thereafter, the Claimant was not assigned any work.
8. The Claimant's case is that his employment was unlawfully and unfairly terminated. He therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 8,909
- b) Salary for 12 days worked in July 2015.....4,112
- c) 5 months' salary for unexpired contractual term.....44,550
- d) 12 months' salary in compensation.....106,919
- e) Costs

**The Respondent's Case**

9. In its Memorandum of Response dated 19<sup>th</sup> June 2017 and filed in court on 20<sup>th</sup> June 2017, the Respondent states that the Claimant was employed on a one-year contract beginning from 2<sup>nd</sup> January 2015 to 31<sup>st</sup> December 2015.

10. On 6<sup>th</sup> June 2015, while on duty, the Claimant sustained an injury which was noted and handled at the Respondent's clinic. The injury was also reported to the Director for Occupational Safety and Health as well as the Respondent's insurer.

11. On 13<sup>th</sup> July 2015, the Claimant reported to work and alleged that he had sustained another injury on 11<sup>th</sup> July 2015, which injury, unlike the previous one, was not reported.

12. The Respondent claims that on 14<sup>th</sup> July 2015, the Claimant absconded duty prompting the Respondent to issue him with a show cause letter dated 19<sup>th</sup> July 2015, which letter was sent to the Claimant via registered mail.

13. The Respondent avers that the Claimant did not respond to the show cause letter and he was therefore dismissed on 20<sup>th</sup> August 2015.

### **Findings and Determination**

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

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

15. The Claimant's dismissal was communicated by letter dated 20<sup>th</sup> August 2015 stating as follows:

*"Dear Obadiah*

**RE: ABSCONDING DUTY.**

*Reference is made to our letter dated 19<sup>th</sup> July 2015 on the above-mentioned subject and we have not received any replies to date.*

*We therefore have no option but to dismiss you forthwith from our employment records.*

*Yours Sincerely,*

*(Signed*

***R.W.L. Clarke***

***Estate Manager***"

16. Prior to the dismissal letter, the Claimant had been issued with a letter dated 19<sup>th</sup> July 2015, asking him to inform the management of his whereabouts within two weeks, failing which he would be deemed to have deserted duty.

17. In his witness statement dated 21<sup>st</sup> October 2016 and filed in court on 14<sup>th</sup> November 2016, the Claimant states that on 11<sup>th</sup> July 2015, he was pricked by a thorn on his index finger, was taken to Rea Vipingo but did not receive any treatment. The Claimant did not explain why he was not treated for the injury sustained on 11<sup>th</sup> July 2015.

18. Although the Claimant claims to have reported the accident to his supervisor, one Evans, there was no documentary evidence to attest to his assertion in this regard. The Respondent's Human Resource Manager, Jane Omudidi told the Court that no such accident was reported to the Respondent. This accords with the fact that the accident was not documented as per obtaining procedure.

19. The Claimant admitted having received the Respondent's letter dated 19<sup>th</sup> July 2015, asking him to inform the management of his whereabouts within two weeks. He told the Court that after receiving this letter, he went to the Respondent's office on 21<sup>st</sup> July 2015 where he spoke to the Production Manager, Mr. Obong'o. Again, the Claimant's word was not backed by any independent evidence.

20. What is clear is that the Claimant did not respond to the Respondent's letter of 19<sup>th</sup> July 2015, which he states was read to him by the Union Representative, one Francis. The Court did not buy the explanation that the Claimant did not know what he was required to do because he was illiterate. Even assuming that the Claimant was indeed illiterate, he ought to have sought assistance either from his Union Representative or an officer of the Respondent, in order to understand what his employer required of him.

21. Overall, the Court finds and holds that the Claimant knowingly failed to respond to his employer's letter and thus locked himself out of the disciplinary process initiated against him.

22. This Court has in the past held that an employee who deliberately locks himself out disciplinary proceedings cannot come and complain to the Court that their employment was unfairly terminated (see *Mary Wagikuyu Komu v The Kenya Hospital Association T/A The Nairobi Hospital [2016] eKLR* and *David Njeka v Lavarge Dry Cleaners Limited [2013] eKLR*)

23. In the absence of any response to the Respondent's letter dated 19<sup>th</sup> July 2015, which the Claimant admits having received, the Respondent was entitled to issue the subsequent dismissal letter dated 20<sup>th</sup> August 2015.

24. In the circumstances, the Claimant's claims for compensation for wrongful dismissal, notice pay and salary for the unexpired contract term are without merit and are dismissed.

25. From the evidence on record, the Claimant was paid salary for 12 days worked in July 2015. The claim thereon is therefore without basis.

26. In the end, the Claimant's entire claim fails and is dismissed.

27. Each party will bear their own costs.

28. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF OCTOBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Onyango for the Claimant

Miss Opolo for the Respondent