



**REPUBLIC OF KENYA**

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

**CAUSE NO 113 OF 2018**

**KENNETH KISINGO WANGOMBA.....CLAIMANT**

**VS**

**JOCHAM HOSPITAL LTD MOMBASA.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Kenneth Kisingo Wangomba, the Claimant in this case worked for the Respondent in the position of Security Guard. He brought this claim following the termination of his employment in October 2017.
2. The claim is contained in a Memorandum of Claim dated 5<sup>th</sup> March 2018 and filed in court on 6<sup>th</sup> March 2018. The Respondent filed a Statement of Response on 12<sup>th</sup> April 2018 to which the Claimant responded on 11<sup>th</sup> May 2018.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called two witnesses; Christine Obuya Nyaoke, the Security Officer and Fidelis Mwikali Munyoki, the Human Resource Manager. After the *viva voce* hearing, the parties filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he worked continuously for the Respondent, without leave, from 13<sup>th</sup> February 2013 until October 2017. He earned a daily rate of Kshs. 600 and was not issued with a written contract of employment.
5. The Claimant claims that on 26<sup>th</sup> October 2017, the Respondent accused him of stealing copper wire. The Claimant’s bag was inspected by one Mr. Abuti, and the accusations found to be false. The Claimant was thus allowed to leave. On 27<sup>th</sup> October 2017, the Claimant did not report to work as it was his day off.
6. Upon reporting for duty on 28<sup>th</sup> October 2017, the Claimant was instructed to write a report and return home and wait for a call. He states that he was never called. Upon making inquiries, the Claimant was notified that his employment had been terminated.
7. The Claimant’s claim is for unlawful and unfair termination of employment. He claims that he was not given an opportunity to be heard and was not paid his terminal dues.
8. The Claimant now seeks the following:

- a) Salary in lieu of notice.....Kshs. 18,000
- b) Leave pay for 5 years.....63,000
- c) Service pay for 5 years.....45,000
- d) 12 months’ salary in compensation.....216,000
- e) Unpaid off days for 5 years.....144,000
- f) Unpaid overtime for 5 years.....540,000

g) Costs plus interest

### **The Respondent's Case**

9. In its Statement of Response dated 10<sup>th</sup> April 2018 and filed in court on 12<sup>th</sup> April 2018, the Respondent states that the Claimant was a casual employee working under contract and paid fortnightly.

10. The Respondent further states that the Claimant was taken in as a casual labourer/locum from April 2016. The Respondent adds that the Claimant discharged his duties based on intermittent seasonal contracts running for 3 months.

11. The Respondent avers that on 25<sup>th</sup> October 2017, the Claimant was among the security officers manning the hospital premises. In the course of the shift, one of the other security officers noted that the Claimant had disappeared for about 4 hours.

12. The Claimant's absence raised suspicion among his colleagues on duty who conducted an impromptu patrol of the hospital premises. The Respondent claims that the security officers came across a vandalised air conditioner near the hospital incinerator. The matter was reported to the Respondent's officers and at Nyali Police Station.

13. The Respondent avers that an inspection of the Claimant's bag revealed copper wires matching description of the missing parts of the vandalised air conditioner. The Respondent accuses the Claimant of absconding duty after the incident, turning up on 28<sup>th</sup> October 2017 and absconding again thereafter.

14. While denying terminating the Claimant's employment, the Respondent states that the Claimant left when a report had been lodged at the police station and internal mechanisms of dispute resolution were being set up by the employer.

15. The Respondent's case is that the termination occurred at the instance of the Claimant who left his place of work while investigations on accusations of theft were underway.

16. Further, the Respondent claims that the Claimant was not a permanent employee and thus termination proceedings were wholly inapplicable in the circumstances.

### **Findings and Determination**

17. 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?**

18. The Claimant alleges that the Respondent terminated his employment without justifiable cause and in violation of due procedure. In its defence, the Respondent states that it is the Claimant himself who deserted duty.

19. It is now well settled in law that an employer's word that an employee has deserted duty is not adequate proof of such an allegation. An employer who advances this line of defence must do more by demonstrating that efforts were made to reach out to the employee alleged to have deserted duty. The reason for this requirement is simple; that not every absence from duty amounts to desertion.

20. Indeed, a key ingredient of desertion is a demonstrable intention on the part of the employee not to return to work. In the final submissions filed on behalf of the Claimant, reference was made to the decision in *James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR* where by my brother **Radido J** confirmed this basic principle.

21. While the Respondent pleads desertion of duty against the Claimant, its witnesses told a different story in court.

22. The Head of Security, Christine Obuya Nyaoke testified that the Claimant was given off duty pending investigations into an incident of 27<sup>th</sup> October 2017, in which the Claimant was suspected of having stolen his employer's property.

23. Nyaoke further testified that in January 2018, the Claimant showed up to check on the status of his employment. The Claimant was informed that investigations were still ongoing and was instructed to stay away.

24. The Human Resource Manager, Fidelis Mwikali Munyoki told a different tale; that the Claimant was put on verbal suspension effective 27<sup>th</sup> October 2017 and 2 days later on 29<sup>th</sup> October 2017, his employment was terminated also verbally.

25. Munyoki confirmed that the termination of the Claimant's employment was triggered by the incident of 27<sup>th</sup> October 2017, in which the Claimant was suspected of having stolen the Respondent's property.

26. I do not need to say more; the long and short of it is that the Respondent's line of defence is a feeble cover up of an unlawful and unfair

termination of employment. I say so for two reasons; one, the real reason for the termination was never communicated to the Claimant as required under Section 43 of the Employment Act and two, the Claimant was not afforded an opportunity to respond to any specific administrative charges as provided under Section 41 of the Act.

27. As a result, the only finding to make is that the Claimant has proved a case of unlawful and unfair termination of employment against the Respondent and he is entitled to compensation.

**Remedies**

28. I therefore award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service plus the Respondent's conduct in effecting the termination.

29. I further award the Claimant one (1) month's salary in lieu of notice.

30. The Respondent did not provide any leave records to demonstrate that the Claimant was granted annual leave. The claim for leave pay therefore succeeds.

31. Similarly, the Respondent did not adduce evidence to show that the Claimant was a contributing member of the National Social Security Fund (NSSF). He is therefore entitled to service pay.

32. The claims for unpaid off days and overtime were not proved and are dismissed.

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

a) 8 months' salary in compensation.....	Kshs. 144,000
b) 1 month's salary in lieu of notice.....	18,000
c) Leave pay for 4 years (18,000/30x21x4).....	50,400
d) Prorata leave for 8 months (18,000/30x1.75x8).....	8,400
e) Service pay for 4 completed years (18,000/30x15x4).....	<u>36,000</u>
<b>Total.....</b>	<b>256,800</b>

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

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

36. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mrs. Kimuli h/b Mr. Nyongesa for the Claimant

Mrs. Umara for the Respondent