



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 243 OF 2017**

**BONIFACE NKUBI KARAGANIA.....CLAIMANT**

**VERSUS**

**PROTECTIVE CUSTODY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent asserting that he was unlawfully and unfairly dismissed from his employment with the Respondent. He averred that he was employed as a guard in January 2014 earning Kshs. 7,500/- a month. He averred that in October 2016 his employment was illegally terminated by the Respondent's manager. The Claimant averred that prior the verbal dismissal the Respondent did not prove any alleged misconduct or serve his with a notice to show cause. The Claimant averred that as a result of the matters aforesaid the subsequent summary dismissal was unlawful and unfair. He thus sought compensation for his unlawful dismissal, one month's salary as notice – Kshs. 7,500/-, unpaid leave for 2014 and 2015 – Kshs. 15,000/- as well as costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant was not dismissed. It averred that because of the uncooperative nature of the Claimant it was not possible to work with him. The Respondent averred that he was assigned to work as a security guard at NSSF offices in Nyeri town and the Respondent received a complaint that the Claimant stole or was closely involved in the theft of a laptop and some window panes within the premises of NSSF. The Respondent averred that subsequent to the said complaint it decided to reassign the Claimant to an alternative station in order to maintain the confidence of their clients and therefore he was transferred to Skuta Base Transreceiver Station for Telkom Kenya. The Respondent averred that the Claimant declined to report to his new station despite being notified. The Respondent averred that the Claimant colluded with other security guards to desert duty by surrendering their uniforms and was asked through his advocates upon making demand to reapply for his position because he had been regarded as a deserter but still showed no interest. The Respondent averred that the suit was therefore not merited and ought to be dismissed for being an abuse of the court process.

3. The Claimant testified that he was a security guard with the Respondent and was presently a farmer after his dismissal in October 2016. He stated that he was dismissed by Dominic the supervisor. He testified that Dominic had the authority to dismiss though he was not given a dismissal letter. He denied being a deserter and the accusation of involvement in theft at NSSF. He stated he was not transferred to Telkom office at Skuta. He testified that he returned the uniform when Dominic asked for it though he confirmed he was not forced to return the uniform. He testified that he was told to return the uniform by the supervisor and that the Respondent never called him. The Respondent did not call any witness and relied on the defence filed.

4. The Claimant submitted that the desertion of duty can be a ground for termination but before the decision is arrived at an employee is entitled to the legal safeguard under Section 41(2) of the Employment Act. He submitted that an employer has a legal burden under Section 43 of the Employment Act to demonstrate that there were valid reasons for the termination of the employment. The Claimant submitted that in this case the defence closed its case without calling a witness or documentary evidence to confirm that the Claimant deserted work after being redeployed to the Skuta Base. The Claimant submitted that the foregoing was clear the Respondent did not prove that there was a ground for dismissal or that the Claimant absconded from duty. The Claimant submitted that from the above he is entitled to 12 months' salaries being compensation for unfair and illegal termination from employment. The Claimant submitted that he was also entitled to the 2 months' pay in lieu of leave and the one month's salary in lieu of notice.

5. The Respondent submitted that the issues for determination were

- a. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful
- b. Whether the Claimant is entitled to the relief sought
- c. Who should bear the costs of the suit

The Respondent submitted that on the first issue, desertion of duty occurred when an employee stays away from work for a longer period but with the clear intention not to continue with employment with this intention being evident from the employee's conduct or communication. The Respondent cited the case of **SABC v CCMA and Others (2002) 8 BLLR 693 (LAC)** where it was held that "It is not desertion when an employee who is absent from work intends to work. Desertion necessarily entails the employee's intention no longer to return to work. The employer would have to establish this intention in a fair process". The Respondent also cited the case of **SACWU v DYASI (2007) 7D LLR 731 (LAL)** where the court held that "Desertion on the other hand, requires an employee to infer an intention on the part of the employees, as a result of such employee's conduct, that the employee has no intention to return to work". The Respondent submitted that the intent to discontinue employment must be shown by clear proof that it was deliberate and unjustified. The Respondent submitted that abandonment is a matter of intention and cannot be presumed from certain equivocal acts. The Respondent submitted that it cannot be argued that the fact that an employee 'simply disappeared' from their work, they are guilty of abandonment. The Respondent submitted that the absence must be accompanied by overt acts pointing to the fact that the employee simply does not want to work anymore and the burden of proof for the unjustified refusal to go to work rests on the employer. The Respondent submitted that the law does not enumerate what specific overt acts can be considered as strong evidence of the intention to sever the employee-employer relationship. The Respondent submitted that the termination of the Claimant's employment in this case is justifiable according to Section 44(3) of the Employment Act. The Respondent submitted that the Claimant declined to report to the new station by simply failing to show up despite being given sufficient notice to do the same. It was submitted that surrendering his uniform and other work paraphernalia was an indication that he had no intention to report back to work. The Respondent submitted that even after being asked to reapply for the position because he had been regarded as a deserter, he still showed no interest. The Respondent submitted that from the foregoing the Claimant was not entitled to the relief sought and that though it did not dismiss the Claimant his conduct amounted to gross misconduct which under Section 44(3) of the Employment Act justifies summary dismissal. The Respondent submitted that this was not an instance of unfair and illegal termination.

6. The Claimant was accused of desertion and whereas this is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal, the Respondent failed to produce any evidence that the Claimant deserted duty. It was only averred in the Respondent's defence which remained mere allegations as the correspondence alluded to by the Respondent demonstrating the absence of intention to resume work was not produced in evidence. Desertion necessarily entails the employee's intention no longer to return to work. The employer would have to establish this intention in a fair process. Desertion requires an employee to infer an intention on the part of the employees, as a result of such employee's conduct, that the employee simply has no intention to return to work. The intent to discontinue employment must be shown by clear proof that it was deliberate and unjustified and because abandonment is a matter of intention and cannot merely be presumed from certain equivocal acts, it must be demonstrated. It cannot be argued that the fact that an employee *simply disappeared* from their workplace, they are guilty of abandonment. The absence must be accompanied by overt acts pointing to the fact that the employee simply does not want to work anymore and the burden of proof for the unjustified refusal to go to work rests on the employer. There was no better way of discharging this burden than showing the Claimant returned his uniform and failed to return to work at the new station. No evidence was tendered that the Claimant was indeed transferred to the Skuta Telkom Base. In my considered view, having failed to establish there was desertion the Respondent is bound to meet the reliefs sought. As a keeper of the employment records in terms of Section 74 of the Employment Act, the leave entitlement of the Claimant was not disputed. He claimed 2 months and the Respondent did not controvert this was untrue. The Claimant produced evidence that he was paid Kshs. 7,100/- on some months but generally received Kshs. 6,530/- on most months. This suggests his pay was indeed Kshs. 7,500/- a month and there were deductions in certain months leaving his balance as indicated on the bank statements he produced in evidence as proof of payment. No itemized pay statement was produced but the evidence on the bank deposits by the Respondent was unequivocal proof of the monthly pay. The Claimant is therefore entitled to the following relief as he proved his case on a balance of probabilities: -

- i. One month's salary in lieu of notice – Kshs. 7,500/-
- ii. Two month's salary in lieu of leave not taken – Kshs. 15,000/-
- iii. 3 month's salary compensation for the unfair dismissal from employment – Kshs. 22,500/-
- iv. Costs of the suit.

It is so ordered.

**Dated and delivered at Nyeri this 17<sup>th</sup> day of December 2019**

**Nzioki wa Makau**

**JUDGE**