



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 784 OF 2017

ELIJAH MKANDO MUMBA.....CLAIMANT

VS

CORRUGATED SHEETS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Elijah Mkandi Mumba, the Claimant in this case was an employee of Corrugated Sheets Limited, the Respondent herein. Mumba has sued for compensation for unlawful termination of employment and payment of terminal dues.
2. The claim is contained in a Memorandum of Claim dated 28th September 2017 and filed in court on the same date. The Respondent filed a Statement of Response on 13th February 2018.
3. At the trial both parties called *viva voce* evidence, the Claimant testifying on his own behalf and the Respondent calling its Supervisor, Joshua Mutuku Munguti. The parties also filed written submissions.

The Claimant’s Case

4. The Claimant avers that he was employed by the Respondent on 4th January 2016, as a Gas Cutter earning a daily wage of Kshs. 327 as at the time of termination.
5. The Claimant claims that on 9th September 2016, he was injured at his place of work upon which he sought legal assistance from an Advocate so that he could be compensated. He contends that this led to the termination of his employment on 14th October 2016.
6. The Claimant’s case is that his employment was terminated without justifiable cause and in violation of due procedure. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 10,954
- b) Underpayment for 9 months.....10,009
- c) Prorata leave pay.....7,368
- d) 12 months’ salary in compensation.....131,448
- e) Costs plus interest

The Respondent’s Case

7. In its Statement of Response dated 12th February 2018 and filed in court on 13th February 2018, the Respondent states that the Claimant was engaged as a casual worker.
8. The Respondent admits that the Claimant was injured at work. The Respondent adds that it covered the Claimant’s treatment expenses and thereafter referred the matter to its insurers for compensation.

9. The Respondent denies terminating the Claimant's employment on 14th October 2016 and states that the Claimant himself absconded duty from 19th September 2016. The Respondent claims to have reported the matter to the relevant union.

10. Regarding the claim for leave pay, the Respondent states that the Claimant had not yet qualified for annual leave as stipulated by law. The Respondent adds that the Claimant was paid all his terminal dues for the days worked.

Findings and Determination

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

- a) Whether the Claimant deserted duty or had his employment unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

12. The Respondent's defence to the Claimant's claim that his employment was unlawfully terminated is that the Claimant himself deserted duty.

13. In his decision in *Gibson Namasake v Linksoft Group Ltd [2018] eKLR* my brother, **Radido J** reiterated the requirement that an employer asserting desertion against an employee ought to demonstrate efforts made to reach out to that employee so as to put them on notice that termination of employment on this ground is being considered.

14. This principle is grounded on the fact desertion or repudiation of an employment contract is not a self-executing act which automatically brings an employment relationship to an end.

15. It is therefore not adequate for an employer to say that an employee has deserted duty. The employer must demonstrate to the Court its own actions and the Claimant's response, the result of which causes the Respondent to conclude that the employee has deserted duty.

16. The Respondent's witness testified that nobody within the Respondent's establishment followed up the Claimant after he stopped reporting to work. In fact, the witness could not remember the exact date when the Claimant left employment.

17. Arising from the foregoing, I find and hold that the Respondent's line of defence that the Claimant deserted duty is not supported by any evidence. The said defence is therefore rejected with the corollary finding that the Respondent unlawfully and unfairly terminated the Claimant's employment for collateral reasons.

Remedies

18. In light of the above findings, the Claimant is entitled to compensation. I therefore award him six (6) months' salary in compensation. This award is informed by my finding that the Respondent terminated the Claimant's employment for collateral reasons in violation of the law.

19. I further award the Claimant one (1) month's salary in lieu of notice and prorata leave pay for the period served.

20. No basis was laid for the claim for underpayment which therefore fails and is dismissed.

21. In the ultimate, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 58,860
- b) 1 month's salary in lieu of notice.....9,810
- c) Prorata leave pay for 9 months (327x1.75x9).....5,150
- Total.....73,820**

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

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

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER 2019

LINNET NDOLO

JUDGE

Appearance:

Miss Okeyo for the Claimant

Miss Mango for the Respondent