



**REPUBLIC OF KENYA**

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

**CAUSE NO 867 OF 2017**

**JOSEPH MISERI ORIWO.....CLAIMANT**

**VS**

**BAFAGIH BAKERIES COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim documented by a Memorandum of Claim dated 17<sup>th</sup> November 2017 and filed in court on even date is for compensation for unlawful termination of employment and payment of terminal dues.

The Respondent filed a Response on 10<sup>th</sup> April 2017.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Manager, Oginga Randiki. Both parties further filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent on 10<sup>th</sup> April 2011 initially as a slicer/packager earning a daily wage of Kshs. 400 and later as a mixer earning a daily wage of Kshs. 500.

4. The Claimant claims to have worked for the Respondent until 18<sup>th</sup> October 2016 when his employment was terminated. He states that his troubles with the Respondent began in June 2016, when he and his colleagues decided to join the Bakery, Confectionery, Food Manufacturing and Allied Workers Union.

5. The Claimant avers that he together with 6 other employee leaders were unfairly targeted and discriminated against for leading other employees in joining the Union.

6. The Claimant stakes a claim for unlawful and unfair termination of employment and adds that the Respondent did not remit his National Social Security Fund (NSSF) dues for periods between April 2011 and June 2012 and January 2016 and September 2016.

7. The Claimant further claims that he was not paid his salary for days worked in October 2016. He adds that he was not paid his leave pay for the period he worked for the Respondent.

8. Efforts to resolve the dispute at the conciliation stage did not bear fruit, hence this claim which the Claimant sets out as follows:

- a) One month’s salary in lieu of notice.....Kshs. 10,400
- b) Leave allowance (10/4/2011 to 18/10/2016).....52,000
- c) House allowance (11/4/2011 to 18/10/2016).....104,520
- d) Public holidays (10/4/2011 to 18/10/2016: 55 holidays).....44,000
- e) Unremitted NSSF deductions (25 months).....10,000

f) Compensation for unfair termination.....124,800

g) Certificate of service

h) Costs plus interest

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

9. In its Response and Counterclaim dated 10<sup>th</sup> April 2018 and filed in court on the same date, the Respondent admits that the Claimant was its employee but states that the Claimant himself absconded duty.

10. The Respondent states that on 4<sup>th</sup> October 2016, the Claimant forged signatures of his colleagues in a recruitment form issued by Bakery, Confectionery, Food Manufacturing and Allied Workers Union (Kenya).

11. The Respondent further states that the employees whose signatures had been forged by the Claimant raised complaints and in a meeting held on 15<sup>th</sup> October 2016, the Claimant was offered an opportunity to exonerate himself.

12. The Respondent avers that the Claimant failed to furnish evidence to support his defence that he had acted with full authority from his colleagues. By letter dated 13<sup>th</sup> October 2016, the Claimant was given 21 days to gather more evidence in support of his defence and to make further representations.

13. The Respondent goes on to state that the Claimant refused to accept the aforesaid letter on the basis that he had been advised by the Secretary General of the Union not to receive any correspondence from the Respondent.

14. The Respondent asserts that the Claimant thereafter left the Respondent's office knowing that the disciplinary process had not been concluded, thereby deserting lawful duty.

15. In its Counterclaim, the Respondent avers that by deserting his lawful employment, the Claimant breached the terms of his employment contract. The Respondent therefore claims one (1) month's salary in lieu of notice from the Claimant.

### **Findings and Determination**

16. There are three (3) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

### **Unlawful Termination?**

17. In his testimony before the Court, the Claimant stated that the Respondent terminated his employment on account of the Claimant's activities with Bakery, Confectionery, Food Manufacturing and Allied Workers Union.

18. While denying the Claimant's averments, the Respondent states that the Claimant deserted duty after being asked to respond to allegations of forgery of his colleagues' signatures.

19. In his witness statement filed in court on 6<sup>th</sup> May 2019, the Respondent's Director, Oginga Randiki states that at a meeting held on 15<sup>th</sup> October 2016, the Claimant was offered an opportunity to exonerate himself from the allegations made against him.

20. Randiki told the Court that after the meeting of 15<sup>th</sup> October 2016, he issued the Claimant with letter dated 13<sup>th</sup> November 2016, allowing the Claimant 21 days to gather evidence in support of his defence. The Claimant however declined to receive the said letter, stating that he had been advised against it by the Union. The Respondent's witness accused the Claimant of desertion of duty by walking out of an active disciplinary process never to return.

21. The Claimant denied having received any letter from the Respondent and no such letter was placed before the Court. Moreover, if indeed the Claimant deserted duty, the Respondent was under a duty to reach out to him with a view to putting him on notice that because he had deserted duty, termination of his employment was a possibility.

22. In his final submissions filed on 5<sup>th</sup> July 2019, the Claimant referred the Court to its decision in **Rashid Juma Ramadhani v Ready Consultancy Company Limited [2018] eKLR** where relying on an earlier decision by my brother **Radido J** in **Philemon Kiprotich Kirui v Lesos Veterinary Supplies Ltd (cicada hotel) [2015] eKLR** I restated the foregoing procedure with regard to cases of desertion.

23. The Respondent's Director, who interestingly could not recall the exact date the Claimant deserted duty, testified that after the desertion, the Respondent did not take any action towards reaching out to the Claimant.

24. In the result, the allegations of desertion made against the Claimant were unproved and this being the Respondent's defence to the Claimant's claim that his employment was unlawfully terminated, the said claim remains unruffled.

25. I therefore find and hold that the Claimant has proved a case of unlawful termination of employment and he is entitled to compensation.

**Remedies**

26. On the heels of the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service accentuated by the Respondent's failure to observe due procedure in executing the termination.

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

28. In the absence of any leave records to show that the Claimant had exhausted his leave entitlement, the claim for leave pay succeeds and is allowed.

29. The Claimant also claims house allowance. He however told the Court that he was paid on the basis of a daily wage which he pegged at Kshs. 500 at the time of leaving employment. A daily wage is ordinarily inclusive of house allowance unless there is a claim for underpayment, which was not pursued in this case. The claim for house allowance is therefore disallowed.

30. The claim for public holidays was not proved and is dismissed.

31. With regard to the claim for unremitted NSSF dues, the only thing to say is that any such dues, which are statutory in nature, would be payable to NSSF and not to the Claimant.

**The Respondent's Counterclaim**

32. By its Counterclaim contained in its Response, the Respondent claims one (1) month's salary in lieu of notice from the Claimant.

33. The Counterclaim is premised on the assertion that the Claimant deserted duty without notice. Having found that the Claimant did not in fact desert duty, the Counterclaim fails and is dismissed.

**Final Orders**

34. Finally, I enter judgment in favour of the Claimant as follows:

a) 10 months' salary in compensation (500x30x10).....	Kshs. 150,000
b) 1 month's salary in lieu of notice (500x30).....	15,000
c) Leave pay for 5 years (500x21x5).....	52,500
d) Prorata leave for 6 months (500x1.75x6).....	<u>5,250</u>
<b>Total.....</b>	<b>222,750</b>

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

36. The Claimant is also entitled to a Certificate of Service plus costs of the case.

37. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF DECEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Tolo h/b Miss Kitoo for the Claimant

Mr. Wameyo for the Respondent