



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CASE NO. 369 OF 2017**

*(Before Hon. Justice Mathews N. Nduma)*

**CHARLES OTIENO OKAKA.....CLAIMANT**

**VERSUS**

**NDUGU TRANSPORT COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant was employed as a cashier by the respondent in the year 2007. He worked continuously for a period of 9 years up to July 2016 when the employment was terminated by the respondent. The claimant earned a monthly salary of Kshs. 11,000.
2. On 23<sup>rd</sup> July 2016, the claimant was not feeling well and did not report to work. He attended Atya Max Clinic, Kisumu hospital for treatment. The claimant was treated and was recommended for 5 days off duty. The claimant sent a message to his manager namely Mr. Albert and Mr. Balnaj reporting the matter.
3. On 27<sup>th</sup> July 2013, the claimant reported back to work and upon arrival he was asked by Mr. Balnaj why he was away from work for some days. The claimant explained and was sent home to bring hospital documents. The claimant complied but he was sent home without July salary and other terminal benefits.
4. The claimant prays for maximum compensation for unlawful dismissal and payment of terminal benefits including:
  - (i) Service gratuity for 9 years.
  - (ii) Unpaid leave and leave allowance.
  - (iii) Three months salary in lieu of notice.
5. Claimant testified that he had a good record at work and had no warning letters from the respondent for the entire 9 years. The claimant prays to be awarded accordingly.
6. RW1 Albert Aketch Atieno testified that he was the transport manager of the respondent. He testified that the claimant was employed by the respondent for 4 years and 4 months and not 9 years. That the respondent paid NSSF for the claimant for the entire period.
7. That the claimant had several verbal and written warnings between April 2014 and 14<sup>th</sup> July 2016. That the claimant absconded duty severally in May 2015, July 2015, October 2015, November 2015, January 2016, February 2016, April 2016, May 2016, June 2016 and July 2016.
8. That when the claimant absconded duty from 28<sup>th</sup> July 2016 he was given a letter dated 12<sup>th</sup> August 2016, requesting him to show cause why he should not be summarily dismissed for absconding duty and taking away company documents. That the claimant failed to respond to the letter or return the documents.
9. The claimant was invited to a disciplinary hearing by a letter dated 15<sup>th</sup> August 2016 to attend on 20<sup>th</sup> August 2016. The claimant failed to attend the hearing. The claimant was summarily dismissed. That the dismissal was lawful. That the claimant is only entitled to prorata leave for the year 2016. That the claimant absconded duty and is not entitled to payment in lieu of notice. That the claim for payment of

gratuity has no basis since NSSF was paid for the claimant for the 4 years and 4 months worked. That the suit be dismissed with costs.

### **Determination**

10. The issues for determination are:

(a) Whether the summary dismissal of the claimant was for a valid reason and followed a fair procedure.

(b) Whether the claimant is entitled to the reliefs sought.

11. The court shall deal with issues (a) and (b) together. The claimant testified that he worked for the respondent for a period of 9 years whereas the RW1 testified that the claimant only served for a period of 4 years and 4 months.

12. The claimant did not adduce any documentary evidence or other evidence to show that he was employed by the respondent in the year 2007. The NSSF records produced by the respondent show that the claimant was registered as an employee of the respondent on 1<sup>st</sup> March 2012 until 31<sup>st</sup> July 2016. From the NSSF statement, NSSF due were paid for the period 2012 up to July 2016.

13. The claimant has failed to prove that he worked for the respondent from the year 2007 as alleged or at all.

14 The claimant failed to produce any documentary evidence that he was granted off duty at Atya Max medical clinic Kisumu hospital as alleged or at all. The claimant failed to demonstrate that he had any justification to be absent from work from 23<sup>rd</sup> July 2016 up to 27<sup>th</sup> July 2016 when he reported back and was asked to produce medical documents to justify his absence which he failed to do.

15, The court is satisfied that the claimant had a record of absenteeism at work and was issued several warnings contrary to his testimony before court.

16. The claimant was not a truthful witness and the court believes the testimony by RW1 that indeed the claimant absented himself from work without justification regularly including during the material period between 23<sup>rd</sup> to 27<sup>th</sup> July 2016.

17. The court is satisfied that the claimant absconded work without justification which is a valid reason to summarily dismiss him from employment.

18. The claim by the claimant that he was summarily dismissed unlawfully lacks merit and is dismissed.

19. The claimant is not entitled to payment in lieu of notice since he failed to respond to the notice to show cause and to present himself at the disciplinary hearing. The summary dismissal was justified and the claim for notice pay is dismissed. The respondent only conceded payment in respect of prorata leave earned up to 23<sup>rd</sup> July 2016. The court awards the claimant Kshs. 6,000 in lieu of prorata leave days earned in the year 2016. The rest of the claim is dismissed for want of proof.

20. In the final analysis, the suit by the claimant lacks merit and is dismissed except an award of Kshs. 6,000 in lieu of prorata leave days earned in the year 2016. Each party to bear their own costs of the suit.

**Judgment Dated, Signed and delivered this 4<sup>th</sup> day of December, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

M/S Kapoya for Claimant

Mr. Odego for Respondent

Chrispo – Court Clerk