



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 745 OF 2017**

**DAUDI MSAGHA.....CLAIMANT**

**VS**

**AUTO CONTINENTAL LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Daudi Msagha, the Claimant in this case was an employee of Auto Continental Limited. He brought this claim following the termination of his employment on 4<sup>th</sup> January 2016.
2. The claim is documented by a Memorandum of Claim dated 15<sup>th</sup> September 2017. The Respondent filed a Response on 12<sup>th</sup> October 2017 to which the Claimant responded on 13<sup>th</sup> March 2018.
3. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called its Managing Director, Arif Pasta. Both parties subsequently filed written submissions.

**The Claimant's Case**

4. The Claimant states that he was employed by the Respondent as a Truck Driver from 1<sup>st</sup> May 2011 until 4<sup>th</sup> January 2016, when his employment was terminated. He earned a monthly salary of Kshs. 24,783.
5. The Claimant claims that his employment was terminated verbally without lawful cause and in violation of due procedure. He states that he was not afforded an opportunity to defend himself.
6. The Claimant's claim is as follows:

- a. One month's salary in lieu of notice.....Kshs. 24,783
- b. Leave pay for 5 years.....69,392
- c. Service pay for 5 years @ 15 days' pay per year.....49,566
- d. 12 months' salary in compensation.....297,396
- e. Overtime for 5 years.....1,030,848
- f. Public holidays.....29,740
- g. Underpayment
- h. Off days

- i. Costs plus interest

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

7. In its Response dated 12<sup>th</sup> October 2017 and filed in court on even date, the Respondent admits having employed the Claimant as a Truck Driver at a monthly salary of Kshs. 25,217 effective 1<sup>st</sup> May 2011.
8. The Respondent states that the Claimant worked until 16<sup>th</sup> September 2015, when he absconded duty without notice. By the Respondent's letter of the same date which was copied to the Labour Office, the Claimant was cited for gross misconduct.
9. The Respondent states that the Kenya Long Distance Truck Drivers and Allied Workers Union intervened in the dispute and the Respondent agreed to retain the Claimant on condition that he would abide by the terms of the contract of service.
10. Thereafter, the Claimant applied for and proceeded on leave on 14<sup>th</sup> December 2015. The Claimant was expected to resume work on 4<sup>th</sup> January 2016 but he did not report back.
11. The Respondent's case therefore is that the Claimant absconded duty. The Respondent states that upon absconding duty the Claimant's dues were tabulated and a certificate of service issued.

### **Findings and Determination**

12. There are two (2) issues for determination in this case:
  - a. Whether the Claimant absconded duty or his employment was unlawfully terminated;
  - b. Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination or Desertion of Duty?**

13. The Claimant claims that the Respondent unlawfully terminated his employment. While denying this allegation, the Respondent states that it is the Claimant who deserted duty.
14. Desertion of duty is a serious offence which renders an employee liable to summary dismissal but it must be proved. And how does an employer prove desertion of duty? To answer this question, one must draw a distinction between absenteeism and desertion.
15. This distinction was well articulated in the South African case of *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* in the following terms:

**“.....desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand.....an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”**

16. It is therefore not enough for an employer to allege that an employee has deserted duty. Such an employer must demonstrate efforts made to reach the employee with the aim of putting them on notice that termination of employment on account of desertion is being considered (see *Dickson Matingi v Db Schenker Limited [2016] eKLR*).
17. In the instant case, no such effort was demonstrated before the Court and the allegation that the Claimant deserted duty was unsupported and unverifiable. The result is that the Respondent failed to dislodge the Claimant's claim for unlawful termination. The Claimant is therefore entitled to compensation on this score.

### **Remedies**

18. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service tempered with his employment record as presented by the Respondent. I have further considered the Respondent's conduct in the termination transaction.
19. I further award the Claimant one (1) month's salary in lieu of notice.
20. The Respondent did not produce any leave records to counter the claim for leave pay which therefore succeeds and is allowed.
21. The Claimant was a contributing member of the National Social Security Fund (NSSF) and he is therefore not entitled to service pay.
22. The claims for overtime, public holidays, underpayment and off days were not proved and are dismissed.

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

a. 6 months' salary in compensation.....	Kshs. 174,000
b. 1 month's salary in lieu of notice.....	29,000
c. Leave pay for 4 years (29,000/30x21x4).....	81,200
d. Prorata leave for 8 months (29,000/30x1.75x8).....	<u>13,533</u>
<b>Total.....</b>	<b>297,733</b>

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

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

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF DECEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ngonze for the Claimant

Mr. Otieno for the Respondent