



**REPUBLIC OF KENYA**

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

**CAUSE NO 630 OF 2017**

**MWANGI ODHIAMBO DANCUN.....CLAIMANT**

**VERSUS**

**CREST SECURITY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 31<sup>st</sup> July 2017 and filed in court on 3<sup>rd</sup> August 2017, the Claimant has sued the Respondent for unlawful termination of employment.
2. The Respondent filed a Memorandum of Response on 6<sup>th</sup> November 2017.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource and Administration Manager, James Chege Nyangweso as well as Area Commander (Central Division), Gilbert Morara Nyaburi. Both parties also filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent as a Dog Handler from 28<sup>th</sup> January 2017 until 28<sup>th</sup> March 2017. He earned a monthly salary of Kshs. 14,421.
5. On 28<sup>th</sup> March 2017, the Claimant was summoned by Ms. Manal Yusuf who issued him with a dismissal letter, citing desertion of duty. The Claimant claims that he was on sick off during the time he was alleged to have deserted duty.
6. The Claimant’s case is that his dismissal was unlawful and unfair, as there was no valid reason for it and he was not afforded an opportunity to defend himself. Additionally, the Claimant avers that he was not paid his terminal dues.
7. The Claimant therefore claims the following:
  - a) One month’s salary in lieu of notice.....Kshs. 14,421
  - b) Salary for the month of March 2017.....14,421
  - c) 12 months’ salary in compensation.....149,052
  - d) Certificate of service
  - e) Costs plus interest

**The Respondent’s Case**

8. In its Statement of Response dated 1<sup>st</sup> November 2017 and filed in court on 6<sup>th</sup> November 2017, the Respondent admits that the Claimant was its employee but adds that his monthly salary was Kshs. 12,221.
9. The Respondent states that the Claimant was caught sleeping while on duty. The Respondent adds that the Claimant absented himself

from work for 21 days and that he failed to follow instructions from his supervisors, for which he was warned.

10. The Respondent states that the Claimant was summoned by Ms Manal and interrogated. He was given a chance to defend himself with regard to his absence from work for 21 days. The Respondent avers that the Claimant failed to justify himself and was therefore summarily dismissed for gross misconduct.

11. The Respondent adds that the Claimant had been instructed to go for training after admitting that he had missed some sessions to which he responded that he did not see the need for the training.

### **Findings and Determination**

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

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

13. On 7<sup>th</sup> March 2017, the Respondent wrote to the Claimant as follows:

*"Dear Mwangi,*

#### **RE: TRAINING**

*You were deployed on 28<sup>th</sup> January 2017 on contractual terms of employment and deployed at Grain Bulk shift, currently you are deployed at Jayesh Construction residence. Your client has been complaining of you sleeping on duty on several occasions. You were warned by Area Commander to desist from that behavior but you did not do as expected of you. On 3<sup>rd</sup> March 2017 the client again called your Area Commander to report to him about you sleeping on duty. You were summoned by your supervisor to the office the following day but you never availed yourself. When your Area Commander visited your assignment and asked why you did not report to the office you said that you were never told to do so.*

*You admitted that you do not know the chain of command since you did not complete the whole training syllabus since you were sick during that time. This has hindered your performance. Due to this reason, the management has decided that you should go back to training so as to be at for one week (sic) W.E.F 13<sup>th</sup> March 2017. Also be warned that sleeping on duty is a risk both to your life and that of the client's property and this warrants an initiation of disciplinary action against you. Let this be the last warning served to you for the same.*

*Yours faithfully*

**CREST SECURITY SERVICES LTD**

*(Signed)*

**for NANCY BOSIRE**

**ADMINISTRATION OFFICER"**

14. The Claimant was subsequently issued with a dismissal letter dated 28<sup>th</sup> March 2017 stating:

*"Dear Mwangi,*

#### **RE: SUMMARY DISMISSAL**

*On 7<sup>th</sup> March 2017, you instructed (sic) to go back to training since you had not completed the full course. This was after receiving complaints from the client that you are fond of sleeping while on duty. You did not go for the course and never communicated to the office why you failed to do so.*

*You appeared at the office on 28<sup>th</sup> March 2017 and claimed that you were sick. You could not explain to the disciplinary panel why you deserted since 7<sup>th</sup> March 2017. You also added that you did not see the need for the training.*

*The above amount to gross misconduct warranting strict disciplinary action. You are therefore summarily dismissed. You will be expected to return all company uniform issued to you prior to deployment. You will be paid all your dues up to your last working date. You will return all company uniform issued to you prior deployment (sic) and will be paid all your dues up to the last working day.*

Yours faithfully,

CREST SECURITY SERVICES.

(Signed)

MANAAL YUSUF.

**ADMINISTRATION OFFICER.”**

15. The dismissal letter accuses the Claimant of desertion of duty. This is a serious offence which renders an employee liable to summary dismissal. Like all such grounds however, it must be proved at the shop floor.

16. Not every absence from duty amounts to desertion. Indeed, as held by the South African Labour Court in *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the distinctive feature in desertion is a demonstrable intention on the part of the employee not to return to work.

17. The Claimant told the Court that during the time he was said to have absented himself from duty, he was on sick off. In support of his case, he produced sick off sheets.

18. The Respondent’s Human Resource and Administration Manager, James Chege Nyangweso referred to a disciplinary meeting held on 28<sup>th</sup> March 2017, the same day that the Claimant came back to work and the same day he was dismissed.

19. Nyangweso admitted that the Claimant had no prior notice that he was required to answer to any charges on 28<sup>th</sup> March 2017. It is therefore evident that the Claimant was not subjected to the procedural fairness requirements set out under Section 41 of the Employment Act. Had this been availed, his absence would have been explained.

20. What is clear is that the Respondent has failed to establish a case of desertion against the Claimant. In the converse, the Claimant’s claim that his dismissal was wrongful has not been dislodged. As a result, I find and hold that the Claimant is entitled to compensation.

#### **Remedies**

21. Flowing from the foregoing findings, I award the Claimant three (3) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s short stint in employment as well as the Respondent’s conduct in effecting the dismissal.

22. I further award the Claimant one (1) month’s salary in lieu of notice as well as salary for the month of March 2017.

23. In the final analysis, I enter judgment in favour of the Claimant as follows:

a) 3 months’ salary in compensation.....	Kshs.36,663
b) 1 month’s salary in lieu of notice.....	12,221
c) Salary for March 2017.....	<u>12,221</u>
<b>Total.....</b>	<b>61,105</b>

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

25. The Claimant is also entitled to a certificate of service plus costs of the case.

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

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mboku for the Claimant

Mr. Asige for the Respondent