



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE NO 158 OF 2017

STEPHEN ODEKE OMUKADE.....CLAIMANT
VS
LAVINGTON SECURITY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Stephen Odeke Omukade, the Claimant in this case was an employee of Lavington Security Limited. He brought this claim seeking compensation for unfair termination of employment. The claim is documented by a Statement of Claim dated 2nd March 2017 and filed in court on 3rd March 2017. The Respondent filed a Defence on 23rd May 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Coast Branch Manager, Edwin Kipkemboi Tomno and Supervisor, Francis Okumu. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard at a monthly salary of Kshs. 11,000 effective 1st October 2015. As at June 2016, the Claimant was deployed at Kenyatta University. The Claimant states that upon reporting for duty on 26th May 2016, he was informed by the Respondent's Manager, one Ken to meet him at the Mombasa Law Courts. He was later notified that his services had been terminated. He now claims the following:

- a) One month's salary in lieu of notice.....Kshs. 11,000
- b) Gratuity for 9 months.....13,750
- c) Leave pay for 1 year.....19,250
- d) Compensation for unfair termination.....140,250
- e) Costs

The Respondent's Case

4. In its Defence dated 22nd May 2017 and filed in court on 23rd May 2017, the Respondent admits that the Claimant was its employee from October 2015. His last assignment was at Kenyatta University.

5. The Respondent denies terminating the Claimant's employment and states that the Claimant deserted duty on 26th May 2016. The Respondent adds that the Claimant was duly paid his salary for the days worked.

Findings and Determination

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

Desertion of Duty or Unlawful Termination?

7. The Respondent accuses the Claimant of desertion of duty, thus leading to his dismissal. On his part, the Claimant states that he reported to the Respondent's Supervisor at Mombasa Law Courts but was not assigned duties. Instead, he was advised to go home and wait to be called but he was never called back.

8. The Respondent produced a letter dated 3rd June 2016, which the Claimant denied having received. By this letter, the Respondent summarily dismissed the Claimant on account of desertion of duty. Even assuming that this letter was actually served on the Claimant, the right procedure was not followed.

9. It is now well settled that an employer alleging desertion against an employee must demonstrate the efforts made to trace the deserting employee. At the very least, the employer is required to issue notice to the employee that termination of employment on account of desertion of employment is being considered (see *Evans Ochieng v Njimia Pharmaceuticals* [2016] eKLR).

10. In this case, the Respondent did not issue any notice to the Claimant. What is more, the Respondent's witnesses were not even sure of the date from which the Claimant was deemed to have deserted duty. The Respondent's line of defence is therefore rejected with the resultant

finding that the Claimant's employment was unlawfully and unfairly terminated.

Remedies

11. Pursuant to the foregoing findings, I award the Claimant three (3) months' salary in compensation. In making this award, I have considered the Claimant's length of service and the Respondent's conduct in effecting the termination of his employment.

12. I further award the Claimant one (1) month's salary in lieu of notice as well as prorata leave for the period of service.

13. Having served for less than a year, the Claimant is not entitled to service gratuity.

14. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 3 months' salary in compensation.....	Kshs. 39,000
b) 1 month's salary in lieu of notice.....	13,000
Total.....	52,000

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

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

17. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Onyango for the Claimant

Edwin Tomno (Branch Manager) for the Respondent