



**REPUBLIC OF KENYA**

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

**CAUSE NO 76 OF 2017**

**GERALD MAKU MWANGI.....CLAIMANT**

**VS**

**NJUCA CONSOLIDATED CO. LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Memorandum of Claim dated 27<sup>th</sup> January 2017 and filed in court on even date, the Claimant seeks compensation for unfair termination of employment and payment of terminal dues. The Respondent filed a Response on 20<sup>th</sup> April 2017.
2. The matter came up for hearing on 5<sup>th</sup> February 2018 when the Claimant testified on his own behalf. The Respondent chose not to call any witnesses. Both parties filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent from May 2012 until August 2016, in the position of General Foreman/Site Manager. He earned a salary of Kshs. 54,000.
4. The Claimant further states that on 22<sup>nd</sup> September 2015, as he was working on one of the Company’s projects, being the construction of a water drainage line in Kisauni area at Bamburi-Mtamboni junction, he was involved in an accident and suffered a fracture on the right thigh.
5. The Claimant avers that after the said accident, the Respondent terminated his employment without any justifiable cause and in violation of due procedure. He further avers that he did not go on leave except in the year 2015, when he was injured.
6. The Claimant deems the termination of his employment unlawful and unfair and therefore claims the following:
  - a) 3 months’ salary in lieu of notice.....Kshs. 162,000
  - b) 12 months’ salary in compensation for unfair termination.....648,000
  - c) Leave pay for 3 years.....162,000
  - d) Costs plus interest

**The Respondent’s Case**

7. In its Statement of Response dated 20<sup>th</sup> April 2017 and filed in court on even date, the Respondent admits having employed the Claimant as a Foreman but denies terminating his employment.
8. The Respondent states that on 22<sup>nd</sup> September 2015, the Claimant got injured while digging a trench, something that was not in his line of duty as a Foreman. The Respondent avers that it catered for the Claimant’s medical expenses out of good will.
9. Further, the Claimant was retained in employment even after the injury which he sustained as a result of his own negligence by failing to stick to his line of duty as a Foreman. Additionally, the Respondent continued paying the Claimant salary regardless of the fact that he was

not reporting to work on account of the injury.

10. In the month of August 2016, the Claimant was asked to provide a medical certificate to ascertain his condition which he failed to do but instead filed the present claim.

11. It is the Respondent's case that the Claimant absconded duty after being asked to provide a medical certificate.

12. Regarding the Claimant's salary, the Respondent avers that the Claimant earned a monthly basic salary of Kshs. 45,000 plus a house allowance of Kshs. 6,500 making a total of Kshs. 51,500.

### **Findings and Determination**

13. 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?**

14. The Claimant claims that his employment was unfairly terminated after he sustained injuries in a work related accident. While admitting the occurrence of the accident, the Respondent states that the Claimant was injured while on a frolic of his own. Nevertheless, the Respondent not only met the Claimant's medical expenses but also paid his salary during the recuperation period. The Respondent contends that the Claimant deserted duty after being asked to submit a medical report.

15. The Claimant told the Court that he was admitted in hospital from the date of the accident, being 22<sup>nd</sup> September 2015 until 27<sup>th</sup> September 2015. Thereafter, he took leave until 12<sup>th</sup> February 2016, by which date he had not fully recovered. He was therefore told by the Project Manager, Mwangi Kingara to continue recuperating at home.

16. By his letter dated 1<sup>st</sup> August 2016, the Claimant notified the Respondent that he had fully recovered and was therefore ready to resume work. He did not get a response. The Claimant further testified that upon making further inquiries, he was informed that his employment had been terminated way back in February 2016.

17. The Respondent did not call any evidence to counter the Claimant's testimony. What is more, the Respondent continued paying the Claimant's salary until July 2016. If indeed the Claimant's employment had been terminated in February 2016, why then did the Respondent continue paying his monthly salary for a further five months? The Respondent made no effort to answer this question and the Court therefore finds that as at the time the Claimant indicated his willingness and ability to resume work, he was still an employee of the Respondent.

18. Regarding the Respondent's allegation that the Claimant deserted duty after being asked to submit a medical report, the only thing I will say is that the Claimant was entitled to a prior notice that termination of his employment on account of desertion was being considered. This is because not every absence from duty amounts to desertion.

19. In the South African case of *Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the Court stated the following:

***"...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."***

20. It is therefore not enough for an employer to state that an employee has deserted duty. This Court (variously constituted) has held that an employer asserting desertion of an employee must demonstrate attempts made to reach the employee. At the very least, the employee must be put on notice that termination of employment on account of desertion is being considered (see *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Tirus Kariuki Mungai v Postal Corporation of Kenya [2016] eKLR*)

21. In the absence of any evidence of efforts made to notify the Claimant of the impending termination of his employment, the Court holds the Respondent guilty of substantive and unfair termination.

### **Remedies**

22. Flowing from the foregoing, I award the Claimant eight (8) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

23. Regarding the claim for leave pay, the Court notes that the Claimant's leave application form dated 16<sup>th</sup> January 2016 did not reflect any accrued leave balance. The claim is therefore without basis and is dismissed.

24. Before pronouncing the final award, I need to dispense with the issue of the Claimant's salary which is disputed. The Claimant gives the figure of Kshs. 54,000 as his monthly salary. On its part, the Respondent gives the figure of Kshs. 51,500.

25. Section 9(2) of the Employment Act, 2007 places the responsibility of documenting the employment relationship on the employer. In this case, the Claimant's employment was not documented and in line with Section 10(7) of the Act, the Court adopts his testimony regarding his applicable monthly salary.

26. In the end, I enter judgment in favour of the Claimant in the following terms:

a) 8 months' salary in compensation.....Kshs. 432,000

b) 1 month's salary in lieu of notice.....54,000

**Total.....486,000**

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

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

29. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF MAY 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Mwainzi for the Claimant

Miss Kisingu for the Respondent