



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2324 OF 2012

CHARLES KIKOVO MUTUA.....CLAIMANT

VERSUS

PRO-MOTOR WORKS.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 26th October 2012 and filed in court on 16th November 2012, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent's Reply to the claim is contained in a Statement of Response dated 14th December 2012.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Director, Charan Thethy and the Claimant's former colleague, Geoffrey Gaitho Ng'ang'a.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Mechanic in April 2006. He earned a monthly salary of Kshs. 11,000.

4. The Claimant claims that his employment was unlawfully terminated in September 2011, stating that he was not given any reason for the termination and was not given an opportunity to be heard. He therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 11,000
- b) Service pay for 5 years.....27,500
- c) Leave pay.....38,430
- d) 12 months' salary in compensation.....132,000
- e) Certificate of service
- f) Costs plus interest

The Respondent's Case

5. In its Statement of Response dated 14th December 2012, the Respondent denies terminating the Claimant's employment and states that it is the Claimant himself who absented himself from work at his own will, without notice. The Respondent further states that after absenting himself from work, the Claimant went ahead to seek employment from a neighbouring garage where he was employed.

6. It is the Respondent's case that having himself terminated his services, the Claimant is not entitled to any benefits, including notice pay.

Regarding the claim for leave pay, the Respondent states that during his employment, the Claimant took all his leave days.

7. In its Statement of Response, the Respondent made a counterclaim against the Claimant in the sum of Kshs. 30,336 which was however abandoned during the trial.

Findings and Determination

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

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

The Termination

9. In response to the Claimant's claim for unfair termination, the Respondent pleads that it is the Claimant himself who absented himself from duty. In his testimony before the Court, the Respondent's Director, Charan Thethy accused the Claimant of deserting his employment to take up another employment with a neighbouring garage.

10. Desertion of duty is a valid ground for termination of employment which, like all other grounds, must be tested within the parameters of Section 41 of the Employment Act, 2007. In its pleadings and evidence adduced before the Court, the Respondent appears to use the terms 'absence without leave' and 'desertion of duty' interchangeably.

11. The two terms are however significantly different. In the South African case of *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* with which I fully associate myself, the following distinction was made:

“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.”

12. Local jurisprudence on this issue is to the effect that an employer who relies on desertion as a ground for termination of employment is required to show efforts made towards summoning the affected employee, to show cause why their employment should not be terminated on this ground (see *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR*).

13. The Respondent's witnesses told the Court that the Claimant left employment to join a neighbouring garage known as *Jas Motors*. It is therefore evident that the Claimant was within reach and nothing prevented the Respondent from serving him with notice that termination of his employment on account of desertion of duty was on the offing. Having failed to follow this procedure, the Respondent cannot use desertion of duty by the Claimant to counter his claim for unlawful termination.

14. The result is that the Claimant's assertion that he was unlawfully and unfairly terminated remains un-assailed and he is therefore entitled to compensation.

Remedies

15. In light of this, I award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

16. In the absence of any evidence that the Claimant was a contributing member of the National Social Security Fund (NSSF), the claim for service pay succeeds and is allowed.

17. The Claimant did not provide any particulars on the claim for leave pay. I will therefore only allow prorata leave pay for 2011 in the sum of Kshs. 6,664 as admitted by the Respondent.

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

a) 8 months' salary in compensation.....	Kshs. 88,000
b) 1 month's salary in lieu notice.....	11,000
c) Service pay for 5 years (11,000/30x15x5).....	27,500
d) Prorata leave pay for 2011.....	<u>6,664</u>
Total.....	133,164

19) This amount will attract interest from the date of delivery of judgment until payment in full.

20) The Claimant will have the costs of the case.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JULY 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Miss Opiyo for the Claimant

Miss Mburu for the Respondent