



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 154 OF 2016**

**CHIGUBA ZUMA CHIGUBA.....CLAIMANT**

**VS**

**NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Chiguba Zuma Chiguba was an employee of NjUCA Consolidated Company Limited. He brought this claim following the termination of his employment on 9<sup>th</sup> December 2015. The claim is documented by a Memorandum of Claim dated 22<sup>nd</sup> February 2016 and filed in court on 24<sup>th</sup> February 2016.
2. The Respondent filed a Statement of Reply on 18<sup>th</sup> May 2016 but did not call any witness at the hearing. The Claimant testified on his own behalf. Both parties filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a night security guard earning a daily rate of Kshs. 420, effective January 2010. He was deployed at a construction site at Mariakani Weighbridge.
4. The Claimant pleads that his employment was terminated on 9<sup>th</sup> December 2015, without any justifiable cause and in violation of due process. He claims the following:

- a. 1 month’s salary in lieu of notice.....Kshs. 10,920
- b. Unpaid leave for 5 years.....44,100
- c. Public holidays for 5 years.....42,000
- d. Service pay for 5 years.....31,500
- e. Unfair termination.....131,040
- f. Certificate of service
- g Costs plus interest

**The Respondent’s Case**

5. In its Statement of Reply dated 17<sup>th</sup> May 2016 and filed in court on 18<sup>th</sup> May 2016, the Respondent admits having employed the Respondent as a casual labourer in the security section at its Mariakani Yard. The Respondent however denies terminating the Claimant’s services on 9<sup>th</sup> December 2015, as stated in the Memorandum of Claim.
6. The Respondent’s case is that the Claimant deserted duty without any explanation or notice. The Respondent states that prior to the

Claimant deserting duty, there was rampant theft that was reported at the Mariakani Yard, prompting a rotation and/or reassignment of employees to different work stations in a bid to curb the theft. It was at this time when the Claimant deserted duty only for him to resurface with this claim.

### Findings and Determination

7. 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?

8. The Claimant told the Court that his employment was terminated after he reported an attempted theft at his assignment site. In its Reply, the Respondent admits that there had been incidents of theft at the site but states that the Claimant deserted duty on the heels of reassignment of duty.

9. Desertion of duty is a serious offence which may attract summary dismissal. It must however be proved. The Court was referred to the decision in *James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR* where my brother, **Radido J** held that an employer relying on desertion as a ground for termination of employment, must demonstrate attempts made to reach out to the employee, to establish their whereabouts. This is the legal position as I understand it. It is therefore not enough for an employer to simply state that an employee has deserted duty.

10. In the instant case, the Respondent did not show any attempts made to reach out to the Claimant with a view to establishing why he had not reported to work. In light of this, the Court rejects the Respondent's line of defence and thereby adopts the Claimant's testimony that his employment was unlawfully and unfairly terminated.

### Remedies

11. Pursuant to the foregoing findings, 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 coupled with the Respondent's conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice.

12. The Claimant testified that during his entire period of service, he did not go on leave and the Respondent did not produce any leave records to counter the claim for leave pay. This claim therefore succeeds and is allowed.

13. Regarding the claim for service pay, I have this to say; according to the provisional statement from the National Social Security Fund (NSSF) produced by the Claimant, the Respondent did not make regular remittances to the Claimant's account.

14. It seems to me therefore that the Respondent did not consider NSSF as a serious social security mechanism. In determining this limb of the claim, I am persuaded by the decision by my brother, **Rika J** in *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR* where he held that basic membership to NSSF, that is not accompanied by regular remittances by the employer, does not disentitle an employee from accessing service pay under Section 35(5) of the Employment Act, 2007.

15. In the circumstances of this case, where the Respondent chose not to make regular payments to the Claimant's account, the claim for service pay must succeed.

16. The claim for public holidays was not proved and is dismissed.

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

a. 8 months' salary in compensation.....	Kshs. 87,360
b. 1 month's salary in lieu of notice.....	10,920
c. Leave pay for 5 years (420x21x5).....	44,100
d. Service pay for 5 years (420x15x5).....	<u>31,500</u>
<b>Total.....</b>	<b>173,880</b>

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

19. The Claimant is also entitled to a certificate of service and costs of the case.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 12<sup>TH</sup> DAY OF JULY 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Kitoo for the Claimant

Miss Kisingo for the Respondent