



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 152 OF 2016

RAMA CHELA JUMA.....CLAIMANT

VS

NJUCA CONSOLIDATED COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Rama Chela Juma against his former employer, Njuca Consolidated Company Limited. The claim is set out in a Memorandum of Claim dated 22nd February 2016 and filed in court on 24th February 2016.

2. The Respondent filed a Statement of Reply on 18th May 2016 but did not call any witnesses. 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 security guard on 3rd October 2011. He earned a daily rate of Kshs. 420 and was stationed at a construction site in Mariakani Weighbridge.

4. The Claimant worked for the Respondent until on 10th January 2016, when his employment was terminated. He states that the termination was unlawful and unfair. He therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 10,920
- b) Unpaid leave for 4 years.....35,280
- c) Public holidays for 4 years.....33,600
- d) Service pay for 4 years.....25,200
- e) Unfair termination.....131,040
- f) Certificate of service
- g) Costs plus interest

The Respondent's Case

5. In its Statement of Reply dated 17th May 2016 and filed in court on 18th May 2016, the Respondent admits having employed the Respondent as a casual labourer in the security section at its Mariakani Yard.

6. The Respondent denies terminating the Claimant's services on 10th January 2016, and adds that the Claimant deserted duty without any explanation or notice.

7. The Respondent states that prior to the Claimant deserting duty, there was rampant theft reported at the Mariakani Yard, where the Claimant was stationed. The Respondent further states that the Claimant was found by one of its officers, with a wire mesh outside the

Respondent's premises.

8. The Respondent avers that the Claimant was questioned by its officer regarding the wire mesh after which the Claimant collected his belongings and deserted duty, stating that he could not work with people who could not trust him.

The Respondent pleads that all efforts were made to locate the Claimant in a bid to get him to explain his desertion of duty, upon being allocated field duties, but the efforts were futile.

Findings and Determination

9. 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?

10. The Claimant testified that at the end of the day on 10th January 2016, he was told by the Respondent's Security Manager, one Mr. Kigen not to report to work the following day. The Claimant further testified that prior to this, another security guard had made allegations to the effect that he had seen the Claimant with a roll of wire mesh.

11. The Claimant was questioned by the night supervisor, Jared Oyamo whereby he denied the allegations. A joint inspection at the store and construction site accounted for all the wire mesh rolls.

12. On 16th January 2016, the Claimant was summoned to the Respondent's Chaani office where he found the Room Controller, one Kelvin who told him that the Security Manager had given instructions that the Claimant should not report to work. The Claimant's inquiries to the Security Manager did not elicit any response.

13. In its Statement of Reply, the Respondent states that the Claimant deserted duty after being questioned on allegations of sneaking out a wire mesh from the Respondent's premises.

14. Desertion of duty is a serious offence which renders an employee liable to summary dismissal. It must however be proved. In the final submissions filed in court on 5th April 2018, reference was made to the decision by my brother **Radido J** in **James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR** where it was 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.

15. 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. In its Statement of Reply, the Respondent alluded to some efforts made towards locating the Claimant to account for his desertion of duty. However, no evidence was led to clarify the exact nature and extent of these efforts.

16. In the circumstances, the Respondent's averment in this regard remain unsupported and unverified. Even assuming that the real reason for the termination of the Claimant's employment was theft of his employer's property, this would fall under the category of gross misconduct and the procedural fairness requirements of Section 41 of the Employment Act, 2007 would apply.

17. In the end, 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

18. In light of the foregoing findings, I award the Claimant six (6) 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.

19. 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 this claim. The claim for leave pay therefore succeeds and is allowed.

20. Regarding the claim for service pay, the Claimant told the Court that the Respondent remitted his National Social Security Fund (NSSF) dues for only five (5) months. It would appear therefore that the Respondent did not consider NSSF as a serious social security mechanism.

21. On this score, 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.

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

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

24. Ultimately, I enter judgment in favour of the Claimant in the following terms:

a) 6 months' salary in compensation.....Kshs. 65,520

b) 1 month's salary in lieu of notice.....10,920

c) Leave pay for 4 years (420x21x4).....35,280

d) Service pay for 4 years (420x15x4).....25,200

Total.....136,920

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

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

27. Orders accordingly.

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

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JUDGE

Appearance:

Miss Kitoo for the Claimant

Miss Kisingo for the Respondent