



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 20 OF 2017

KENGA CHEUPE.....CLAIMANT

VS

CHINA JIANGXI INTERNATIONAL KENYA LIMITED....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Kenga Cheupe against his former employer, China Jiangxi International Kenya Limited. The claim is contained in a Memorandum of Claim dated 5th July 2017 and filed in court on 7th July 2017.

2. The Respondent filed a Memorandum of Reply and Counterclaim on 28th August 2017 to which the Claimant responded on 3rd January 2018. The Respondent did not call any witnesses in spite of due opportunity to do so. 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 mason from 2nd June 2014 until 6th January 2017. He adds that he initially worked as a casual but his employment status changed to term contract. He earned a daily rate of Kshs. 650. He was not issued with a written employment contract.

4. The Claimant claims that he was not allowed a rest day nor annual leave. He further claims that the Respondent did not remit all his National Social Security Fund (NSSF) dues.

5. On 6th January 2017 the Claimant reported for duty as usual but was refused entry into the Respondent's premises. He was informed by his supervisor that his employment had been terminated.

6. The Claimant's case is that the termination of his employment was unlawful and unfair. In particular, the Claimant states that there was no valid reason for the termination and he was not offered an opportunity to be heard. Additionally, he was not paid his terminal dues and was not issued with a certificate of service.

7. The Claimant seeks the following remedies:

- a) One month's salary in lieu of notice.....Kshs. 16,900
- b) Accumulated leave for 2 years & 6 months.....35,490
- c) 12 months' salary in compensation.....202,800
- d) An order directing the Respondent to remit unremitted NSSF dues for 4 months (June to September 2014)
- e) Certificate of service
- f) Costs plus interest

The Respondent's Case

8. In its Memorandum of Response dated 28th August 2017 and filed in court on even date, the Respondent states that the Claimant was a casual employee performing general duties and earning a daily rate of Kshs.650.

9. The Respondent pleads that the Claimant was allowed one off day per week and was compensated for any overtime worked. Regarding the claim for leave pay, the Respondent states that by the nature of his work, the Claimant was not entitled to leave pay. The Respondent denies that it failed to remit the Claimant's NSSF contributions.

10. The Respondent denies the claim for unlawful and unfair termination and states that it is in fact the Claimant who deserted his duties soon after the Christmas holidays in December 2016.

11. By way of counterclaim, the Respondent claims from the Claimant the sum of Kshs. 19,500 being the equivalent of one month's salary in lieu of notice.

Findings and Determination

12. There are four (4) issues for determination in this case:

- a) The nature and status of the Claimant's employment
- b) Whether the Claimant deserted duty or was unlawfully terminated;
- c) Whether the Claimant is entitled to the remedies sought;
- d) Whether the Respondent has made out a proper counterclaim against the Respondent.

Nature and Status of the Claimant's Employment

13. In its Memorandum of Response, the Respondent states that the Claimant was a casual employee earning a daily rate. In the same Response however, the Respondent states that the Claimant was allowed one off day after every six days of work.

14. The law requires the employer to reduce the terms of employment of its employees into writing. By its own admission, the Respondent did not issue the Claimant with a written contract of employment. Further, the Respondent did not bother to produce any records to show that the Claimant was indeed a casual employee.

15. In this regard, the Court invokes Section 10(7) of the Employment Act, 2007 and thereby adopts the Claimant's averment that as at the time he left the Respondent's employment, he was a regular employee on term contract.

Desertion of Duty or Unlawful Termination of Employment

16. While denying the Claimant's claim for unlawful termination, the Respondent states that the Claimant himself deserted duty in December 2016. Desertion of duty is a serious administrative offence which renders an employee liable to summary dismissal. However, like all other grounds, it must be proved. Not every absence from duty is desertion. In the South African case of *Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the Court made the following distinction:

".....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 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."

17. It is therefore not enough for an employer to simply state that an employee has deserted duty. The rule of thumb is that an employer who alleges that an employee has deserted duty must show efforts made to trace the whereabouts of the employee. Further, an employer who contemplates dismissal on this ground must issue notice to the employee to that effect (see *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR* and *Dickson Matingi v Db Schenker Limited [2016] eKLR*)

18. In the case now before me, no such effort was made. Consequently, the ground of desertion cannot stand and is rejected. The Respondent did not call any evidence to counter the Claimant's testimony that he was terminated without justifiable cause and without due notice.

19. The Court was referred to the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012] eKLR* where **Odunga J** restated the well settled principle that pleadings that are not supported by evidence are mere statements. In the absence of any evidence to back the Respondent's pleadings as to the circumstances leading to the Claimant's exit from its employment, the said pleadings remain mere statements without more.

20. That said, the Court found no trace of any attempt to comply with the law on termination of employment as stated in Sections 41 and 43 of the Employment Act, 2007. The result is a finding that the Respondent is guilty of terminating the Claimant's employment unlawfully and unfairly and the Claimant is entitled to compensation.

Remedies

21. In light of the foregoing, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of employment 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.

22. In its Memorandum of Response, the Respondent concedes that the Claimant was not allowed annual leave ostensibly because he was a casual employee. In light of my finding on this limb, the claim for leave pay must succeed.

23. The claim for unremitted NSSF dues was not proved and is dismissed.

The Respondent's Counterclaim

24. In view of the finding that the accusation of desertion of duty made against the Claimant was not supported by evidence, the Respondent's counterclaim fails and is dismissed.

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

a) 6 months' salary in compensation.....	Kshs. 117,000
b) 1 month's salary in lieu of notice.....	19,500
c) Leave pay for 2 years (19,500/30x21x2).....	27,300
d) Prorata leave for 6 months (19,500/30x1.75x6).....	6,825
Total.....	170,625

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

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

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF SEPTEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mrs. Kariuki for the Claimant

Mr. Kithinji for the Respondent