



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 671 OF 2016

FABIANO ODINGA WANDERA CLAIMANT

VS

SHIVA MOMBASA LIMITED RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim filed in court on 14th September 2016, the Claimant has sued the Respondent for unlawful and unfair termination of employment. The Respondent filed a Statement of Reply on 20th June 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Director, Rohit Bhagani and Manager, Jabir Kiminza. Both parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in February 2012, as a turner/machine operator. He initially earned a daily rate of Kshs. 400 which was paid weekly. He was later paid a monthly salary of Kshs. 18,697.

4. The Claimant avers that his employment was terminated verbally by the Respondent's Director, Rohit V. Bhagani on 3rd June 2015. The Claimant subsequently received a letter dated 10th November 2015 under the reference '*Payment in Lieu of 2015 Annual Leave*'.

5. On 14th October 2015, the Claimant lodged a trade dispute with the Ministry of Labour but there was no response from the Respondent. The Claimant maintains that the termination of his employment was unlawful and unfair. He claims the following:

- a) Notice pay.....Kshs. 18,697
- b) Salary for breach of contract (remainder of 7 months).....130,879
- c) 12 months' salary in compensation.....224,3764
- d) Leave for 2012.....12,000
- e) Unremitted NSSF 2012.....2,400
- f) Gratuity allowance for 3 years.....48,777
- g) Certificate of service
- h) Costs

The Respondent's Case

6. In its Statement of Reply dated 20th June 2017 and filed in court on even date, the Respondent admits that the Claimant was employed as a machine operator but denies the employment period pleaded in the Memorandum of Claim.

7. The Respondent states that the Claimant was employed on a fixed term contract running from 1st January 2015 until 31st December 2015. The Respondent further states that on 26th May 2015, the Claimant sought and was granted permission by his superiors to resume duty late after lunch so as to attend to his sick spouse. The Claimant did not however report back to work until 16th June 2015.

8. Having absented himself from work for a period of 21 days, the Claimant was required to give a written explanation of his absence before he could resume duty. The Claimant left on 16th June 2015 and did not return.

9. On 24th August 2015, the Respondent received a letter from the County Labour Officer, Mombasa on an undisclosed labour complaint by the Claimant. The Respondent responded and a meeting took place at the Labour Office on 29th October 2015. Upon hearing the Claimant and the Respondent, the County Labour Officer determined that the only dues owing to the Claimant were with regard to prorata leave days accumulated from January 2015 to May 2015 which the Respondent computed and paid to the Claimant. In acceptance of the said dues, the Claimant signed a letter dated 10th November 2015 confirming that he had no further claims against the Respondent.

10. It is the Respondent's case that it is the Claimant who absconded duty in breach of his contract of employment.

Findings and Determination

11. 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

12. The Claimant states that his employment was terminated verbally by the Respondent's Director, Rohit V. Bhagani on 3rd June 2015. On its part, the Respondent states that the Claimant deserted duty from 16th June 2015 after being issued with a show cause letter to explain his absence from work from 26th May 2015.

13. Desertion of duty is a serious administrative offence but it must be proved. As stated in the South African case of *Seablo v Belgravia Hotel (1997) 6 BLLR829 (CCMA)* desertion of duty is not the same as absence from duty. The defining feature of desertion is a clear intention by the employee not to return to work.

14. This Court has held severally that for an employer to successfully plead desertion as a defence to a claim for unfair termination, they must demonstrate attempts made to reach out to the affected employee (see *James Ashiemi Namayi v Menengai Oil Refineries [2016] eKLR* and *Dickson Matingi v DbSchenker Limited [2016] eKLR*).

15. It is common cause that the Claimant sought and was granted permission to attend to his sick wife. What is in issue is what transpired thereafter. The Claimant told the Court that he was away for five (5) days attending to his sick wife and when he came back on 3rd June 2015, his employment was terminated. The Claimant denied receiving the show cause letter dated 16th June 2015 submitted by the Respondent and there was no evidence that it was actually served on him.

16. It seems to me therefore that the Respondent failed to prove the ingredients of desertion against the Claimant. The result is that the Court adopts the Claimant's testimony that his employment was unlawfully and unfairly terminated. Consequently, the Court finds and holds that the Claimant is entitled to compensation.

Remedies

17. With the foregoing findings in view, I award the Claimant seven (7) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's cumulative length of service as well as the Respondent's conduct in effecting the termination. Additionally, I award the Claimant one (1) month's salary in lieu of notice.

18. The Claimant produced copies of his employment contracts for 2013, 2014 and 2015. Clause 4 of these contracts provides for specific figures in gratuity. There was no evidence that these dues were paid to the Claimant and the claim thereon therefore succeeds in full for 2013 and 2014 and on prorata basis for the completed period of service in 2015.

19. The Court found no basis for the claim for breach of contract based on the remainder of contract which therefore fails and is dismissed. Regarding the claim for leave pay for 2012, the only thing to say is that any such claim would be statute barred by dint of the provisions of Section 90 of the Employment Act which dictates that claims for continuing injury must be brought within 12 months of cessation thereof. Any unremitted National Social Security Fund (NSSF) dues would be due to NSSF and not to the Claimant.

20. In the end, I enter judgment in favour of the Claimant as follows:

- a) 7 months' salary in compensation.....Kshs. 130,879
- b) 1 month's salary in lieu of notice.....18,697

c) Gratuity for 2013.....	13,548
d) Gratuity for 2014.....	14,780
e) Gratuity for 5 months worked in 2015 (16,259/12x5).....	<u>6,775</u>
Total.....	184,679

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

22. The Claimant is also entitled to a certificate of service plus costs of the case

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER 2018

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JUDGE

Appearance:

Mr. Anaya for the Claimant

Mr. Mathare for the Respondent