



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 391 OF 2017**

**PETER TINGA KALU ..... 1<sup>ST</sup> CLAIMANT**

**PETER MWAKUNI ..... 2<sup>ND</sup> CLAIMANT**

**VS**

**YUNTRA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 12<sup>th</sup> May 2017 and amended on 5<sup>th</sup> September 2017, the Claimants have sued the Respondent for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Response on 19<sup>th</sup> October 2017.
2. When the matter came up for hearing, the Claimants testified on their own behalf and the Respondents called its Yard Manager, Tahmur Kassam. Both parties filed written submissions.

**The Claimants' Case**

3. The Claimants state that they were engaged by the Respondent on diverse dates. The 1<sup>st</sup> Claimant was employed as a driver on 15<sup>th</sup> May 2013. He earned a monthly salary of Kshs. 20,000. The 2<sup>nd</sup> Claimant was employed as a welder in August 2013 at a monthly salary of Kshs. 12,000.
4. The Claimants state that they were not issued with written contracts of employment nor pay slips.
5. The 1<sup>st</sup> Claimant claims that he worked until 8<sup>th</sup> November 2016 when his employment was terminated. The 2<sup>nd</sup> Claimant was terminated on 4<sup>th</sup> March 2017. The Claimants aver that they were not given valid reasons for the termination of their employment. They were simply told that their services were no longer required. They add that the termination of their employment was in violation of fair procedure as set out in the Employment Act, 2007.
6. The 2<sup>nd</sup> Claimant states that he was not paid his salary for part of the year 2015. He claims salary arrears amounting to Kshs. 50,000.
7. The Claimants' claims are as follows:

1<sup>st</sup> Claimant

- a) One month's salary in lieu of notice.....Kshs. 20,000
- b) Salary arrears (October 2016).....5,000
- c) Severance pay.....30,000
- d) Leave days for 3 years.....42,000
- e) 12 months' salary in compensation.....240,000

## 2<sup>nd</sup> Claimant

- a) One month's salary in lieu of notice.....Kshs. 12,000
- b) Salary arrears (2015).....50,000
- c) Salary arrears (February 2017).....9,000
- d) Severance pay.....30,000
- e) Leave days for 3 years.....25,200
- f) 12 months' salary in compensation.....144,000

8. The Claimants also ask for certificates of service, costs plus interest.

### **The Respondent's Case**

9. In its Response dated 18<sup>th</sup> October 2017 and filed in court on 19<sup>th</sup> October 2017, the Respondent admits having employed the 1<sup>st</sup> Claimant from 15<sup>th</sup> May 2013 to 8<sup>th</sup> November 2016. The Respondent states that the 1<sup>st</sup> Claimant made a last trip from Kampala and parked the motor vehicle assigned to him on 7<sup>th</sup> November 2016. Upon being recalled, the 1<sup>st</sup> Claimant kept giving excuses that he was far and other times that his wife was unwell. The Respondent explains that after every trip a driver would rest until the next cargo was identified for transport.

10. The Respondent avers that the 1<sup>st</sup> Claimant's salary for November 2016 was paid via Mpesa on 21<sup>st</sup> November 2016 and 23<sup>rd</sup> December 2016. In January 2017, the Respondent discovered that the 1<sup>st</sup> Claimant had been employed by another company by the name, Shiva Carriers Limited from November 2016.

11. The Respondent states that the only thing it owes the 1<sup>st</sup> Claimant is a certificate of service. By way of counterclaim, the Respondent claims the following from the 1<sup>st</sup> Claimant:

- a) Refund of half of November salary paid and not earned;
- b) Refund of December salary;
- c) One month's pay in lieu of notice.

12. Regarding the 2<sup>nd</sup> Claimant, the Respondent states that he was employed as a general welder between August 2013 and 10<sup>th</sup> April 2017. He earned a monthly salary of Kshs. 12,000. The Respondent adds that the 2<sup>nd</sup> Claimant was authorized to proceed on annual leave on 7<sup>th</sup> March 2017 but absconded work from 11<sup>th</sup> March 2017. A week after, the 2<sup>nd</sup> Claimant was spotted working with a construction company next door to the Respondent. The Respondent states that the 2<sup>nd</sup> Claimant did not report to work after 10<sup>th</sup> April 2017.

13. The Respondent further states that the 2<sup>nd</sup> Claimant was paid his half salary for the month of March 2017. He did not give notice of intention to cease working and he did not seek a certificate of service.

14. The Respondent denies the Claimants' entire claim.

### **Findings and Determination**

15. There are three (3) issues for determination in this case:

- a) Whether the Claimants deserted duty or were unlawfully terminated;
- b) Whether the Claimants are entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the 1<sup>st</sup> Claimant.

### **Desertion of Duty or Unlawful Termination?**

16. While denying the Claimants' claim for unlawful termination, the Respondent states that it is the Claimants who deserted work. Desertion is a serious offence which renders an employee liable to summary dismissal. The caveat is that like all other grounds, it must be proved.

17. The Respondent's Yard Manager, Tahmur Kassam told the Court that the 1<sup>st</sup> Claimant, who worked as a driver made his final trip on 8<sup>th</sup> November 2016 upon which he was told to park the motor vehicle and wait to be called back. Kassam insisted that the 1<sup>st</sup> Claimant was

called back by the Respondent's Director, one Zamir but he declined to report back to work. It was later discovered that the 1<sup>st</sup> Claimant was working for another company known as Shiva Carriers Limited.

18. Regarding the 2<sup>nd</sup> Claimant, Kassam told the Court that he was given a one month leave effective 7<sup>th</sup> March 2017 and was to resume duty on 10<sup>th</sup> April 2017. The witness added that the 2<sup>nd</sup> Claimant absconded work from 11<sup>th</sup> March 2017 and after a week he was spotted working for a neighbouring construction company.

19. The law is now well settled as to the burden placed on an employer to prove desertion of duty as a defence to a claim for unfair termination. 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. An employer asserting desertion must therefore demonstrate intention on the part of the employee not to return to work. For the employer to do so, they need to show attempts made to reach out to the employee (see *James Ashiemi Namayi v Menengai Oil Refineries [2016] eKLR* and *Dickson Matingi v DbSchenker Limited [2016] eKLR*).

20. In the case before me, the allegations of desertion were not backed by evidence. With regard to the 1<sup>st</sup> Claimant all the Court was told is that he declined to report back to work. The 2<sup>nd</sup> Claimant is said to have deserted work while on leave. In a nutshell, the charge of desertion was not proved. As a result, the Court has arrived at the conclusion that the Respondent unlawfully and unfairly terminated the Claimants' employment. The Claimants are therefore entitled to compensation.

### **Remedies Available to the Claimants**

21. In light of the foregoing findings, I award each of the Claimants six (6) 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 process. I further award each Claimant one (1) months' salary in lieu of notice.

22. The Claimants did not adduce any evidence in support of the claims for salary arrears which are in the nature of special damages. On this limb therefore, I will only allow the sum of Kshs. 3,000 in favour of the 2<sup>nd</sup> Claimant as admitted by the Respondent.

23. The Respondent did not avail any leave records to show that the Claimants had exhausted their leave entitlements. The claims for leave pay therefore succeed and are allowed.

24. No basis was laid for the claims for severance pay which therefore fail and are dismissed.

### **The Respondent's Counterclaim**

25. In its counterclaim, the Respondent claims the following from the 1<sup>st</sup> Claimant:

- a) Refund of half of November salary paid and not earned;
- b) Refund of December salary;
- c) One month's pay in lieu of notice.

26. In support of the claims for salary paid and not earned, the Respondent produced copies of un-received petty cash vouchers. These vouchers cannot be conclusive evidence to support this part of the counterclaim which is in the nature of special damages.

27. In view of my finding regarding the Respondent's averment of desertion, the claim for one month's pay in lieu of notice cannot stand.

28. In the end, I enter judgment in favour of the Claimants as follows:

#### **1<sup>st</sup> Claimant: Peter Tinga Kalu**

a) 6 months' salary in compensation.....	Kshs. 120,000
b) One month's salary in lieu of notice.....	Kshs. 20,000
c) Leave pay for 3 years (20,000/30x21x3) .....	42,000
d) Prorata leave for 5 months (20,000/30x1.75x5).....	<u>5,833</u>
<b>Total.....</b>	<b>187,833</b>

#### **2<sup>nd</sup> Claimant: Peter Kai Mwakuni**

a) 6 months' salary in compensation.....	Kshs. 72,000
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b) One month's salary in lieu of notice.....	12,000
c) Salary arrears.....	3,000
d) Leave pay for 3 years (12,000/30x21x3) .....	25,200
e) Prorata leave for 6 months (12,000/30x1.75x6).....	<u>4,200</u>
<b>Total.....</b>	<b>116,400</b>

29. The award amounts will attract interest at court rates from the date of judgment until payment in full.

30. The Claimants are also entitled to certificates of services plus costs of the case.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Kitoo for the Claimants

Mr. Akanga for the Respondent