



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 879 of 2016

CONSOLIDATED WITH CAUSE NO 880 OF 2016

NYANJE RICHARD SAID.....1ST CLAIMANT

CHAI NGALA DZOMBO.....2ND CLAIMANT

VS

MARINE POWER HOUSE LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This consolidated claim is brought by Nyanje Richard Said as the 1st Claimant and Chai Ngala Dzombo as the 2nd Claimant. The claims are contained in separate Memoranda of Claim dated 16th November 2016 and filed in court on even date. The Respondent filed separate Replies on 8th December 2016 to which the Claimants responded on 26th January 2017.

2. When the matter came up for hearing the Claimants testified on their own behalf and the Respondent called its Directors, Claudia Torriani and Alessandro Torriani. Both parties also filed written submissions.

The Claimants' Case

3. The 1st Claimant, Nyanje Richard Said states that he was employed by the Respondent as a fisherman from 21st February 2013 until 14th August 2016 when his employment was terminated.

4. He claims that the termination of his employment was unlawful and unfair. He seeks the following:

- a) One month's salary in lieu of notice.....Kshs. 26,405
- b) Leave for 3 years.....79,215
- c) NSSF dues for 13 months deducted but not remitted.....5,200
- d) Public holidays (February 2013-August 2016).....71,092
- e) 12 months' salary in compensation.....316,860

5. The 2nd Claimant, Chai Ngala Dzombo states that he was employed by the Respondent also as a fisherman from 16th July 2014 until 14th August 2016 when his employment was terminated.

6. He avers that the termination of his employment was unlawful and unfair. He seeks the following:

- a) One month's salary in lieu of notice.....Kshs. 21,405.00
- b) Leave for 2 years.....42,810.00

- c) Public holidays (July 2013-August 2016).....24,578.60
- d) 12 months' salary in compensation.....256,860.00

The Respondent's Case

7. In its Reply to the 1st Claimant's claim, the Respondent admits having employed him on 1st April 2014 as a boat crew. He was paid a consolidated monthly salary of Kshs. 20,000 which was later increased to Kshs. 26,405
8. The Respondent states that upon realizing that the 2nd Claimant, Chai Ngala Dzombo had left the Respondent's employment, the 1st Claimant also left employment on 15th August 2016, in purported solidarity with the 2nd Claimant.
9. The Respondent states that owing to the fact that the 1st Claimant deserted duty, he cannot lay a claim for unfair termination of employment. The Respondent adds that the 1st Claimant is not entitled to any terminal benefits. With specific response to the claim for leave pay, the Respondent states that the 1st Claimant is only entitled to Kshs. 1,170.52.
10. The Respondent admits having employed the 2nd Claimant, Chai Ngala Dzombo on 1st January 2015 also as a boat crew. The 2nd Claimant earned a consolidated monthly salary of Kshs. 21,405.
11. The Respondent states that on 14th August 2016, the 2nd Claimant was instructed by the Respondent's Director Claudia Torriani to prepare a guest room, an assignment he failed to perform satisfactorily.
12. Upon being told to do his work properly and to the required standards, the 2nd Claimant dared the Director to sack him. The 1st Claimant thereafter left and did not report back to work.
13. The Respondent states that owing to the fact that the 2nd Claimant deserted duty, he cannot lay a claim for unfair termination of employment. The Respondent adds that the 2nd Claimant is not entitled to any terminal benefits.

Findings and Determination

14. There are two (2) 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.

Desertion of Duty or Unlawful Termination?

15. The Claimants state that their employment was terminated verbally without justifiable cause and in violation of due procedure. The Respondent's defence is that the Claimants themselves deserted duty.
16. Desertion of duty is a serious offence which renders an employee liable to dismissal. An employer relying on this ground must however demonstrate that the subject employee has left employment with no intention to return. This was the holding by my brother, **Radido J** in *Philomena Kiprotich Kirui & another v Lessos Veterinary Supplies Ltd [2016] eKLR*.
17. Further, in James *Ashiemi Namayi v Menengai Oil Refineries Limited [2016] eKLR* the learned Judge held that an employer fronting the ground of desertion as a ground for termination of employment must demonstrate attempts made to reach out to the deserting employee.
18. The Respondent's Directors, Claudia Torriani and Alessandro Torriani told the Court that they had the Claimants' contacts but did not reach out to them. It is therefore evident that the Respondent did not satisfy the procedural requirements applicable in cases of desertion. This defence is therefore not available to the Respondent and the Court finds and holds that the termination of the Claimants' employment was unlawful and unfair and they are entitled to compensation.

Remedies

19. Pursuant to the foregoing findings I award each of the Claimants five (5) months' salary in compensation. In arriving at this award I have taken into account the Claimants' length of service alongside the Respondent's conduct in effecting the termination. I further award the Claimants one (1) month's salary in lieu of notice.
20. In response to the claims for leave pay, the Respondent produced a Muster Roll showing the Claimants' leave records. The Respondent's 1st witness, Claudia Torriani took the Court through a detailed account of the movement of the Claimants' leave entitlement.
21. According to the Muster Roll, the 1st Claimant, Nyanje Richard Said had a leave balance of 27 days and the 2nd Claimant, Chai Ngala Dzombo had a leave balance of 13 days to their credit at the time of leaving employment. The claims for leave pay therefore succeed to this extent only. In determining this limb of the Claimants' Claim the Court disregarded the Respondent's attempt to trade off leave days for off

days as these are separate and distinct entitlements.

22. The claims for public holidays and unremitted NSSF dues were not proved and are dismissed.

23. Finally I enter judgment in favour of the Claimants as follows:

1st Claimant: Nyanje Richard Said

a) 5 months' salary in compensation.....	Kshs. 132,025
b) One month's salary in lieu of notice.....	26,405
c) Leave pay for 27 days (26,405/30x27).....	<u>23,764</u>
Total.....	182,194

2nd Claimant: Chai Ngala Dzombo

a) 5 months' salary in compensation.....	Kshs. 107,025
b) One month's salary in lieu of notice.....	21,405
c) Leave pay for 13 days (21,405/30x13).....	<u>9,276</u>
Total.....	137,706

24. These amounts will attract interest at court rates from the date of judgment until payment in full.

25. The Claimants will have the costs of the case

DATED SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mr. Tolo for the Claimants

Miss Obura for the Respondent