



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**CAUSE NO 50 OF 2017**

**[FORMERLY MOMBASA ELRC CAUSE NO 160 OF 2017]**

**STEPHEN KARISA KIRAO.....CLAIMANT**

**VS**

**KILIFI PLANTATIONS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by a Statement of Claim dated 2<sup>nd</sup> March 2017 and filed in court on 3<sup>rd</sup> March 2017 is for compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Statement of Defence on 19<sup>th</sup> September 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Beatrice Anyango.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a sisal cutter at a monthly salary of Kshs. 5,500 effective February 2009. He adds that from 1<sup>st</sup> February 2015 he was employed as a tractor turn boy at a monthly salary of Kshs. 8,684.

4. The Claimant claims that he worked from 6.00 am until 6.00 pm and that he never went on leave.

5. On 2<sup>nd</sup> April 2016, the Claimant reported on duty as usual but was informed by the Human Resource Manager that his services were no longer required. The Claimant avers that he was not issued with any notice nor was he given an opportunity to be heard.

6. The Claimant now seeks the following:

- a. One month’s salary in lieu of notice.....Kshs. 8,684
- b. Salary for the month of March 2016.....8,684
- c. Leave pay for 6 years.....26,052
- d. Gratuity for 6 years.....26,052
- e. Compensation for unfair termination.....104,208
- f. Costs

**The Respondent’s Case**

7. In its Statement of Defence dated 19<sup>th</sup> September 2017 and filed in court on even date, the Respondent states that the Claimant was

employed as a tractor turn boy at a monthly salary of Kshs. 8,684 from the year 2009.

8. The Respondent denies the Claimant's claim that he was unlawfully terminated and states that the Claimant himself walked out of employment by absconding duty from 19<sup>th</sup> May 2016.

### 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 or Duty or Unlawful Termination?

10. In his testimony before the Court, the Claimant stated that his employment was terminated because he had refused to withdraw a work injury related claim he had instituted against the Respondent. The Respondent denies this averment and states that the Claimant himself deserted duty from 19<sup>th</sup> May 2016.

11. Desertion of duty is a serious administrative offence which renders an employee liable to summary dismissal. By definition, desertion connotes intention by the employee not to resume work. In the South African case of *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* the Court stated the following:

*"...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 to work 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."*

12. It is therefore not enough for an employer to simply state that an employee has deserted duty. There must be demonstrable efforts on the part of the employer to reach out to the employee accused of desertion.

13. The Respondent's Human Resource Manager testified that efforts to reach the Claimant bore no fruit but failed to demonstrate the nature and extent of these efforts. A notice to show cause was drawn but not served on the Claimant, ostensibly because he could not be found.

14. The Court was unconvinced that the Respondent made any real effort to reach the Claimant and therefore rejects the line of defence that the Claimant deserted duty. Consequently, the Court agrees with the Claimant that the Respondent terminated his employment without justifiable cause and in violation of due procedure.

### Remedies

15. Following the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service as well as the Respondent's conduct in effecting the termination. I further award the Claimant one (1) month's salary in lieu of notice.

16. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

17. The claim for salary for March 2016 was not proved and is dismissed. Similarly, no basis was laid for the claim for gratuity which also fails and is dismissed.

18. Finally, I enter judgment in favour of the Claimant as follows:

- a. 10 months' salary in compensation.....Kshs. 86,840
- b. 1 month's salary in lieu of notice.....8,684
- c. Leave pay for 6 years (8,684/30x21x6).....36,473
- Total.....131,997**

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

20. The Claimant will have the costs of the case.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF DECEMBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Omollo for the Claimant

Mr. Ole Kina for the Respondent