



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO 855 OF 2014**

**URBANUS MULI MAKENZI.....CLAIMANT**

**VERSUS**

**DPL FESTIVE LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. What is before the Court is the Claimant’s claim brought by Memorandum of Claim dated 22<sup>nd</sup> May 2014. The Respondent’s defence is contained in a Statement of Response dated 27<sup>th</sup> November 2014.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Lillian Oyata.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a bread packer on 3<sup>rd</sup> January 2008. He was issued with a letter of appointment on 13<sup>th</sup> March 2013. The Claimant worked for the Respondent until 14<sup>th</sup> June 2013 when his employment was terminated on allegations of desertion of duty.
4. The Claimant maintains that the termination was unlawful as he was not given an opportunity to respond to the allegations levelled against him and he was not paid his terminal dues. He therefore claims the following:

- a. A declaration that the termination of his employment was unlawful
- b. One months’ salary in lieu of notice.....Kshs. 13,856
- c. Unpaid salary for 8 days (1.6.13-8.6.13).....3,695
- d. Leave pay for 4.5 years.....43,659
- e. Unremitted PAYE for 4.5 years.....20,358
- f. Service pay for 4.5 years.....31,176

- g. Unremitted NSSF for 4.5 years.....10,800
- h. Unremitted NHIF for 4.5 years.....15,120
- i. 12 months' salary in compensation.....166,272
- j. Costs plus interest

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

5. In its Statement of Response filed dated 27<sup>th</sup> November 2014 and filed in Court on even date the Respondent states that the Claimant was employed on permanent basis on 30<sup>th</sup> April 2012. The Respondent avers that it was an express term of the Claimant's employment that absence from duty without leave or other lawful cause would be a ground for summary dismissal.

6. In this regard, the Respondent states that on 9<sup>th</sup> July 2013, without leave or other lawful cause, the Claimant deserted duty and remained absent until 30<sup>th</sup> July 2013 when he turned up at the Respondent's offices with a letter from the District Labour Office, Industrial Area claiming dues for unlawful termination of employment.

7. Prior to the letter by the District Labour Officer, the Respondent had by letter dated 22<sup>nd</sup> July 2013 notified the Claimant's Union of his desertion. In its response to the District Labour Officer, the Respondent reiterated that the Claimant had deserted duty.

8. The Respondent challenges the jurisdiction of this Court to entertain the Claimant's claim on the ground that the conciliation mechanism set out under the Labour Relations Act has not been exhausted.

### **Findings and Determination**

9. There are two 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 of Duty or Unlawful Termination?**

10. The Respondent states that the Claimant deserted duty and thus rendered himself liable to summary dismissal. On his part, the Claimant testified that he was away from work for three (3) days from 8<sup>th</sup> June 2013 because he had a sick child. He claims to have sent word to his supervisor through his colleague. The Respondent denied receiving any such information from the Claimant and produced a desertion notification to the Claimant's Union dated 22<sup>nd</sup> July 2013.

11. The Court was unable to understand why the Claimant chose not to communicate about his absence directly to his supervisor. Having absented himself from work for 3 consecutive days, the Claimant was duty bound to formally explain his absence to his employer. He failed to do so and the Respondent was well within the law to issue a desertion notice to the Claimant's Union. The claim for unlawful termination is therefore without basis and is dismissed. The same fate befalls the claim for notice pay.

### **Other Claims**

12. The Respondent did not adduce any evidence in response to the claims for leave pay and service pay. I therefore allow these claims for the documented period of the Claimant's employment.

13. The Claimant admitted having received his salary for June 2013. This claim is therefore without basis

and is dismissed. Regarding the claims for unremitted PAYE, NSSF and NHIF dues, the only thing to say is that these dues are not payable to employees but to the respective statutory bodies. The only remedy available to an employee is service pay in lieu of unremitted NSSF dues.

14. Ultimately I enter judgment in favour of the Claimant as follows:

a. Leave pay for 1 year (13,856/30x21).....9,700

b. Service pay for 1 year (13,856/30x15).....6,928

**Total.....16,628**

15. This amount will attract interest at court rates from the date of filing suit until payment in full.

16. Each party will bear their own costs.

17. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mwang'ombe for the Claimant

Mr. Muturi for the Respondent