

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 51 OF 2017

JOSEPH KIVATI NDIKU..... CLAIMANT

VERSUS

LAUREN INTERNATIONAL FLOWERS.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 20th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 24.02.2017 through Mwaura Kamau & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages of Kshs.580, 374.90 being Kshs.60, 628.70 underpayment, Kshs.81, 853.20 underpayment, house allowance Kshs. 18, 853.20 plus Kshs. 21, 997.90, pay for off days Kshs.64, 015.30 plus Kshs.78, 215.04, Kshs.17, 109.50 in lieu of annual leave, Kshs.16, 003.80 plus Kshs.17, 924.20 for public holidays, overtime Kshs.84, 084.00 plus Kshs.102, 614.40, unpaid salary Kshs.5, 703.10, service gratuity Kshs.12, 221.00.
- b. Interest.
- c. Costs plus interest on costs.

The claimant's case is that the respondent employed him from 25.05.2014 to 07.05.2016 as a security guard. Further on 07.05.2016 the claimant reported to work as usual and the claimant's supervisor terminated the claimant's employment on account of an alleged break-in and theft at the premises the claimant had been assigned to guard. At termination, the claimant stated that he had a clean record of service of 2 years. The claimant prayed for terminal dues as per the memorandum of claim.

The response to the memorandum of claim was filed on 21.04.2017 through Murage Juma & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent admitted that it employed the claimant from April 2014 but he was absent from duty effective 01.04.2016 without cause or notice and never returned to work.

The claimant alleges that he was terminated from employment whereas the respondent says that the claimant was not terminated but he deserted. Desertion of duty by an employee would amount to misconduct and the court holds that the same would be subject to disciplinary process by way of a notice and a hearing as per section 41 of the Employment Act, 2007. In the present case, the claimant has not prayed for a finding that his termination was unfair or that he should be compensated in view of the alleged termination. Accordingly, the court will not delve in to the issue of whether the termination was unfair. Nevertheless, the claimant admitted that he signed a check in register and from end of March 2016 the register as filed in court showed that he had not checked in at work. Thus the court returns that the claimant's last day at work was on 31.03.2016 as per the respondent's account. In any event, the claimant testified that he did not know the date he was told to leave job. Accordingly, the court returns that the claimant did not know the date of termination and his account was incredible.

The only pending issue for determination is whether the claimant is entitled to the remedies by way of

terminal dues and as prayed for. The court makes findings as follows:

- a. The claimant was a member of NSSF as per the pay slips on record. The claimant failed to file relevant NSSF statement to show the alleged failure by the respondent to remit the NSSF. As per section 35(6) of the Employment Act, 2007 the court returns that the claimant is not entitled to gratuity as claimed and prayed for.
- b. The payslips on record showed that the claimant was paid overtime and the claimant did not provide evidence and submissions to justify the prayers for underpayment, pay on holidays and indeed all other prayers.
- c. The respondent filed records on leave due and taken. The claimant's prayer on pay in lieu of annual leave will therefore fail.

In conclusion, the claimant's suit is hereby dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Wednesday, 20th December, 2017.**

BYRAM ONGAYA

JUDGE