



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 302 OF 2014**

**JAMES ASHIEMBI NAMAYI.....CLAIMANT**

**V**

**MENENGAI OIL REFINERIES LTD.....RESPONDENT**

**JUDGMENT**

1. James Ashiemi Namayi (Claimant) was employed by Menengai Oil Refineries Ltd (Respondent) on 1 October 1996 as a loader in the stores.
2. On 10 July 2014, he commenced legal action against the Respondent alleging unfair termination of employment and underpayments. He made some 3 distinct heads of claim (pay in lieu of notice, underpayments and compensation).
3. The Respondent filed a Response on 28 October 2014 asserting that the Claimant's employment had not been unfairly terminated but had rather deserted duty and thus dismissed himself.
4. The Cause was heard on 22 April 2015 and 22 July 2015. After close of the hearing, the parties filed written submissions.
5. The Court has considered the pleadings, evidence and submissions and identified the issues as, *whether the dismissal of the Claimant because of desertion was unfair, whether the Claimant was underpaid and appropriate remedies/orders.*

**Whether dismissal due to desertion was unfair**

6. The Claimant's case was that he sought for and was granted verbal permission by his supervisor, a Mr. Mohamed to be away to attend to an ill relative from 24 December 2013 to 4 January 2014, but when he reported back, he worked for about half an hour and was then sent to see the Respondent's Human Resources Officer who in turn issued him with a dismissal letter dated 30 December 2013 for desertion.
7. The Claimant denied that he deserted work and stated that from the next day he was denied entry into the work place. He contended that he was not given notice of dismissal and was not granted an opportunity to be heard and therefore the dismissal was unfair.
8. The Respondent's Human Resources Assistant was called to testify. The Respondent's case as advanced through the witness is that he received a communication dated 23 December 2013 from the Claimant's boss, Mr. Mohamed informing him that the Claimant had failed to report to work without

permission and that his attempts to get the Claimant through his neighbours/colleagues were futile until he was located on 27 December 2013, drunk.

9. According to the witness, the Claimant was requested to report to work but he did not and therefore a letter was done to the local Labour Officer informing the office that the Claimant had been dismissed for desertion.

10. The witness further testified that the Claimant only appeared during the second week of January 2014 alleging that he had been sick, but he could not produce any medical notes to that effect.

11. The witness produced the muster roll which indicated that the Claimant was last at work on 17 December 2013. In the view of the witness, the Claimant unfairly terminated his services.

12. This Court has severally been confronted by cases where employers allege an employee deserted duty and therefore a hearing could not be conducted or was impractical.

13. Such a scenario has replicated itself here and the Respondent has made out a similar case and in its submissions cited the Labour Court of South Africa decision, *MEC: Department of Education Gauteng v J Msweli & Ors*, Case No. JR 2145/2008.

14. This is not the first time though that the Respondent has sought to rely on the South African authority.

15. The decision, in my view cannot advance the Respondent's case because the decision turned on the peculiar statutory framework obtaining in South Africa in respect of a particular cadre of employees (public officers).

16. The particular statutory provision in South Africa was/is section 17(5)(a) of the Public Service Act which provides that

An officer, other than a member of the services or an educator or a member of the Agency or the service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

17. Section 17(5)(b) of the Act is also relevant and it is to the effect that

If an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer in the public service in his or her former or any other post or position.

18. The South African Labour Court was emphatic in its decision that under the cited provisions of the statute, the discharge or dismissal was by operation of the law (see para. 40 - reference was made to the decision in *Jammin Retail (Pty) Ltd v Mokwane & Ors* (2010) 31 ILJ 1420), and not action/conduct of the employee, and that when the public officer turned up later, he could show cause for reinstatement, which cause the employer was under an obligation to consider.

19. What is clear from the case cited by the Respondent is that a hearing was required where an officer deemed as having deserted appeared.

20. The decision which might have advanced the Respondent's case is *SABC v CCMA & Ors* (2001) 22 ILJ 487.

21. But even in this decision, the Court did not rule out the holding of a hearing where an employee had deserted and in this respect, I seek forgiveness for quoting in extenso the relevant paragraphs

In the instance of an employee who remains away from the workplace and whose whereabouts are not known and who is out of reach of the employer, it is plainly impractical to impose upon an employer the obligation to convene a disciplinary enquiry before reaching the conclusion that the fact of desertion has occurred and in consequence of which it is entitled in response thereto to elect to terminate the contract..... Whether or not an employer should convene a disciplinary enquiry before taking a decision to dismiss, is dependent on the relevant circumstances, and the practicality of so doing. The grievant was within reach of the applicant.... In my view, when the grievant failed to respond positively to the letter of 4 December, the applicant should have furnished him with a notice to appear at a determined date and time to show cause why he should not be dismissed by reason of his persistent desertion of his post.

22. The jurisprudence from the Labour Court in South Africa in the SABC case appears to be consistent with the developing jurisprudence within our domestic jurisdiction.

23. In *Stanley Omwoyo Onchweri v BOM Nakuru YMCA Secondary School* (2015) eKLR I observed that

The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary. But that is enough observation for now.

24. I also discussed at some length the question of desertion in *James Okeyo v Maskant Flowers Ltd* (2015) eKLR ( parties desirous of a more elaborate discussion of desertion should look for the decision) where I also referred to comparative jurisprudence and observed that

In this sense, the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.

Where an employer alleges desertion, it must prove the ingredients of desertion. A primary ingredient of desertion to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract).

Establishing the intention not to return to work will depend on the facts as presented in evidence.

25. In my view, depending on the peculiar circumstances of each case, a hearing ought to be conducted where an employer alleges desertion before the employment relationship can be deemed to have been determined fairly.

26. In the case at hand, the Claimant's testimony which was not challenged was that he reported to work on 4 January 2014, and he worked for about half an hour before he was sent to the Human Resources office and was handed over the dismissal letter which had been addressed to the Labour Office.

27. A hearing was in the circumstances capable of being conducted.

28. The Respondent should have conducted a hearing on the day it handed a copy of the dismissal letter to the Claimant. Because this was not done, the decision to dismiss having been taken on 30 December 2013, I reach the conclusion that the dismissal was procedurally unfair.

29. But what is desertion in employment law.

30. The ingredients of what constitutes desertion was the subject of examination in the South African case of *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA). One of the essential elements was stated as evidence that an employee has no intention to return to work.

31. It was stated therein, and I endorse the same as legally sound even within our jurisdiction that, 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, the AWOL employee is absent with the intention of resuming his or her employment.

32. 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.

33. The Respondent in the case at hand did not demonstrate that the Claimant had no intention to return to work or that it made reasonable attempts to reach out to the Claimant to explain his absence.

34. This conclusion is hinged on the fact that the name or identity of employee(s) who was allegedly sent to the Claimant by the Respondent was not disclosed. Even the estate or neighbourhood where he was sent remained unidentified.

35. In the end the Claimant appeared at the work place on 4 January 2014 only to find he had been dismissed on 30 December 2013.

36. The trajectory of this case would have changed had these details been disclosed, or had the employee who was sent been called to testify or the failure to call him been explained, or had a hearing been conducted on 4 January 2014.

### **Underpayments**

37. The Claimant's pleaded case was that he was engaged as a loader in the stores department and that the position was similar to that of a turn boy.

38. During testimony he only made fleeting reference to this head of claim. He did not even explain his daily tasks and responsibilities.

39. With the dearth of material in this regard, the Court is unable to determine whether the Claimant was underpaid.

### **Appropriate remedies**

#### ***1 month pay in lieu of notice***

40. With the conclusion that the Respondent did not comply with the requirements of procedural fairness, the Court finds the Claimant is entitled to 1 month pay in lieu of notice.

41. The Claimant's last proved basic wage was Kshs 8,628/- at time of separation (pay slip for July 2012).

### **Compensation**

42. This is a discretionary remedy. The factors the Court ought to consider have been outlined in the statute.

43. The Claimant served the Respondent for about 17 years. The Court has considered the same and also the circumstances surrounding the separation and would award the equivalent of 5 months gross (gross wage of Kshs 9,922/-) wages as compensation.

### **Conclusion and Orders**

44. The Court finds and holds that the Respondent did not prove that the Claimant deserted work, or that it complied with the requirements of procedural fairness before deeming the Claimant as having deserted, and hence its action was procedurally unfair and awards the Claimant

a. 1 month pay in lieu of notice	Kshs 8,628/-
b. 5 months wages compensation	Kshs 49,610/-
<b>TOTAL</b>	<b>Kshs 58,238/-</b>

45. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 22<sup>nd</sup> day of January 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Kawira instructed by Korongo & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon