

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 341 OF 2014

SAMUEL SAFARI KARISA.....CLAIMANT

VS

CHANGAMWE SERVICE STATION.....RESPONDENT

JUDGMENT

Introduction

1. The claim before the court is for declaration that the claimant's employment was unlawfully and wrongfully terminated by the respondent on 1.4.2014 and for payment of compensation and terminal dues. The respondent has denied liability and avers that it is the claimant who deserted work protesting a lawful transfer. The suit was heard *ex parte* on 10.2.2016 when the claimant merely adopted his written statement as his testimony but the respondent never attended.

Analysis and Determination

2. There is no dispute that the parties herein related as employee and employer respectively until 1.4.2014. The issues for determination are:-
 - a. Whether the said relationship was terminated by the claimant through desertion or by the respondent through unlawful and wrongful dismissal.
 - b. Whether the reliefs sought should be granted.

Desertion vs unlawful and wrongful dismissal

3. There is no dispute from the pleadings and the witness statements filed that the claimant was transferred from the respondents Changamwe station to the station square branch but he protested because he was required to sign another contract. That according to the claimant, he was already a permanent employee and could not sign a fresh contract without considering the past years worked since 1.5.2010. That after protesting the transfer under a new contract, the Director Mr. Noran abused him and threatened him and verbally dismissed him from work. That the claimant deems the said dismissal unlawful and wrongful because it was not preceded by a written notice or done after a fair hearing as prescribed under section 41 of the Employment Act (EA).
4. The respondent never attended the hearing but the court has considered the witness statement filed by Mr. Abdallah Rashid Abdallah dated and filed on 2.5.2015. According to Mr. Abdallah the claimant was serving a 12 months contract which was expiring on 30.4.2014 but before then, the claimant was transferred to the respondent's station square branch but he absconded duty and left the employment on his own volition from 1.4.2014. That the respondent wrote a letter to him on 22.4.2014 to explain his misconduct but the claimant never offered any response.
5. After carefully considering all the material placed before it, this court finds on a balance of probability that the claimant was never dismissed by the respondent. He is the one who voluntarily deserted work protesting a lawful transfer. Even if he was required to sign a new contract after the expiration of the one ending on 30.4.2014, there was nothing wrong because that is what he had agreed with the employer vide the contract of employment dated 30.4.2013. In the view of the court, the claimant was serving under a seasonal or fixed term contract of 12 months and not on

permanent basis as he alleges in the suit. The employer was therefore entitled to require him to sign a new contract of service after 30.4.2014. The claimant was therefore to blame for the termination of his employment contract before its due date.

Reliefs

6. In view of the foregoing finding, the court will not make declaration that the claimant's employment was unlawfully and wrongfully terminated by the respondent. Additionally, the prayer for pay in lieu of notice and compensation for unlawful dismissal are dismissed. The claim for over time is dismissed for lack of particulars and evidence. He will however get leave for the 11 months worked on pro rata basis at the rate of 1.75 days per completed month of service. Hence $19.25 \text{ leave days} \times \text{kshs.}12,000.00 / 30 = \mathbf{7,700.00}$ plus interest from date of termination. He will also be issued with a certificate of service plus one quarter of costs.

Dated, signed and delivered this 6th day of May 2016.

ONESMUS MAKAU

JUDGE