



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1069 OF 2014**

**PETER MUANGE MWANGANGI.....CLAIMANT**

**VS**

**FAISAL CONSTRUCTION KENYA  
LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 26<sup>th</sup> June 2013 and filed in Court on even date, the Claimant sued the Respondent for unlawful termination of employment and failure to pay terminal dues.

2. The Respondent filed a Memorandum of Reply and Counterclaim on 2<sup>nd</sup> April 2015 to which the Claimant responded on 28<sup>th</sup> May 2015. By consent of the parties, the matter proceeded by way of written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as a Site Agent at a monthly salary of Kshs. 15,000 effective 17<sup>th</sup> June 2009. In 2012, his salary was increased to Kshs. 23,000.

4. On 17<sup>th</sup> January 2013, while the Claimant was on a routine refurbishment work at the Cooperative Bank in Marsabit, the Respondent's Managing Director, Jamal Ghafoor chaired a staff meeting at which he accused the Claimant of being the mastermind behind an attempted theft at the Cooperative Bank in Umoja, Nairobi on 26<sup>th</sup> December 2012.

5. On the strength of these allegations, the Claimant was ordered to leave the premises and not to report to work henceforth. The Claimant proceeded to Nairobi and waited for communication from the Respondent.

6. On 24<sup>th</sup> January 2013, the Claimant wrote to the Respondent's Managing Director asking for an update on investigations regarding the allegations made against him. Upon receiving no response, the Claimant wrote a reminder on 7<sup>th</sup> February 2013 which also did not elicit a response from the Respondent.

7. On 21<sup>st</sup> March 2013, the Claimant reported a dispute to the Minister for Labour. A Conciliator was appointed but the Respondent did not attend the conciliation meetings. The Respondent also ignored the Conciliator's recommendations.

8. It is the Claimant's case that the termination of his employment was unlawful as he was not issued with a termination letter and was not given an opportunity to defend himself. Overall, the Respondent breached the law on termination of employment.

9. The Claimant seeks the following reliefs:

- a) A declaration that the termination of his employment was unlawful
- b) One month's salary in lieu of notice.....Kshs. 23,000.00
- c) Accrued leave for 3 years.....59,446.20
- d) Prorata leave for 7 months.....9,908.00
- e) House allowance.....130,500.00
- f) Service/severance pay for 3 years.....42,480.00
- g) Bus fare from Marsabit to Nairobi.....4,000.00
- h) Accommodation for 2 days in Marsabit.....2,000.00
- i) Costs plus interest

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

10. In its Memorandum of Reply and Counterclaim dated 30<sup>th</sup> March 2015 and filed in Court on 2<sup>nd</sup> April 2015, the Respondent states that the Claimant's basic salary remained at Kshs. 15,000 and was never increased as claimed by the Claimant. The Respondent however added Kshs. 8,000 as house allowance making a gross pay of Kshs. 23,000.

11. The Respondent states that on 26<sup>th</sup> December 2012, there was theft at the Cooperative Bank, Umoja and initial investigations revealed an inside job and conspiracy between an outsider and some of the Respondent's employees.

12. The Respondent further states that the Claimant absconded duty during investigations in a bid to avoid being interrogated. The Respondent denies that its Managing Director, Jamal Ghafoor chaired a meeting during which he directly accused the Claimant of being the mastermind of the theft.

13. The initial report only exposed that some employees were involved and further investigations were necessary to ascertain which employees were involved but the Claimant absconded his employment before he could be interrogated.

14. Regarding the Claimant's employment record, the Respondent states that he had been summoned severally due to poor performance of his duties. The Claimant was given room to improve but instead, he deserted duty.

15. The Respondent denies having received any invitations to attend conciliation meetings and is therefore a stranger to any conciliation proceedings.

16. The Respondent further states that the Claimant's claim is misplaced for the following reasons:

- a) The Claimant is not entitled to one month's salary in notice pay as he deserted his employment and could not be traced;
- b) The Claimant took his leave days and was compensated for those not taken. He is therefore not

entitled to leave pay;

c) The Claimant's salary of Kshs. 23,000 was made up of Kshs. 15,000 basic salary and 8,000 house allowance and the claim for house allowance is therefore misplaced;

d) In December 2012, the Respondent advanced the Claimant monies being service pay. In any event, the Claimant deserted his duties;

e) The Claimant was not wrongfully terminated as alleged;

f) The claims for fare and accommodation are untenable.

17. In Counterclaim the Respondent states that it has suffered loss and damage as a result of the Claimant's desertion.

### **Findings and Determination**

18. There are 3 issues for determination in this case:

a) Whether the Claimant deserted duty or was unlawfully terminated;

b) Whether the Respondent has proved its Counterclaim against the Claimant;

c) Whether the Claimant is entitled to the remedies sought.

### **Desertion of Duty or Unlawful Termination**

19. While the Claimant states that he was unlawfully terminated, the Respondent maintains that he deserted duty to evade ongoing investigations into theft that had occurred at one of the Respondent's construction sites.

20. As stated in the South African Case of *Seablo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* desertion is not the same as absence without leave. It follows therefore that for an employer to successfully assert that an employee has deserted duty, efforts made towards tracing the whereabouts of the employee must be demonstrated (see *Stanley Omwoyo v BOM Nakuru YMCA Secondary School [2015] eKLR* and *James Okeyo v Maskant Flowers Limited [2015] EKLR*).

21. Apart from an unsupported claim that the Claimant walked away after which he could not be reached on phone, there was no evidence of any real efforts made towards tracing his whereabouts or even summoning him to report to work.

22. Moreover, the Claimant produced two letters written by him on 24<sup>th</sup> January 2013 and 7<sup>th</sup> February 2013 to Jamal Ghaffoor in which he inquired about the investigations into the theft at the Cooperative Bank at Umoja.

23. Taking all the documentary evidence into account, the Court rejects the Respondent's line of defence that the Claimant deserted duty and adopts the Claimant's version that he was terminated verbally.

24. In the submissions filed on behalf of the Respondent, a lot of effort was made towards demonstrating that the Claimant was not only a poor performer but also guilty of misconduct. However, there was no evidence that any charges of either poor performance or misconduct were ever put to the Claimant for his response. These submissions therefore remain untested and unsupported allegations with no evidentiary value.

25. Ultimately the Court finds that the Respondent terminated the Claimant's employment without a valid reason as required under Section 43 of the Employment Act and that in effecting the termination, the

Respondent ignored the mandatory procedure set out under Section 41 of the Act.

## **Remedies**

26. From the foregoing findings, the Court has reached the conclusion that the termination of the Claimant's employment was substantively and procedurally unfair and I award him six (6) months' salary in compensation. In making this award I have taken into account the Claimant's length of service and the Respondent's conduct in the termination process. I also award the Claimant one month's salary in lieu of notice.

27. With regard to the claim for leave pay, it was incumbent upon the Respondent to produce records to show that the Claimant had either taken his leave or was compensated for it. In the absence of any such records, this limb of the claim succeeds and is allowed.

28. There was contention between the parties as to whether the Claimant was paid house allowance. The Claimant however stated that from 2012, his salary was increased to Kshs. 23,000. On its part, the Respondent stated that part of this figure, being Kshs. 8,000, was house allowance. The Court found the Respondent's explanation credible.

29. At any rate, a claim for house allowance before 2012 would have been statute barred under the latter part of Section 90 of the Employment Act which requires claims for continuing wrong to be brought within 12 months. The claim for house allowance therefore fails and is dismissed.

30. In his pleadings, the Claimant claimed both service pay and severance pay under the same head. On this account, the Court formed the opinion that the Claimant was on a fishing expedition and this claim must also fail.

31. The claims for bus fare from and accommodation in Marsabit were not proved and are dismissed.

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

- a) 6 months' salary in compensation.....Kshs. 138,000
- b) 1 month's salary in lieu of notice.....23,000
- c) Leave pay for 3 years (23,000/30x21x3).....48,300
- d) Prorata leave pay for 7 months (23,000/30x1.75x7)..... 9,392
- Total.....218,692**

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

34. The Claimant will have the costs of this case.

35. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2016**

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms. Muhanda for the Claimant

Ms. Njuguna for the Respondent