



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.464 OF 2015**

**ONDIMU MICHAEL NYANGOTO.....CLAIMANT**

**VS**

**MOMBASA TAMASHA DISTRIBUTORS COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for compensation and terminal dues arising from the alleged unfair termination of the claimant's employment contract by the respondent on 4.5.2015. The respondent has denied that she unfairly dismissed the claimant from employment as alleged by the claimant and avers that it is the claimant who terminated his services without notice when he absconded duty from 13.4.2015.

2. The suit was heard on 18.2.2016 when the claimant testified as Cw1 while the respondent called her Stock Controller Mr. David Shinali and the claimant's nephew Mr. Richard Nyang'au as Rw1 and 2 respectively. Thereafter both parties filed written submissions.

**Analysis and Determination**

3. There is no dispute that the claimant was employed by the respondent on 30.3.2014 as a Turnboy for a monthly salary of kshs.12,500. There is further no dispute that on 30.3.2015 the claimant was injured by the door of motor vehicle Registration KBN 410N while loading it. There is also no dispute that he was given permission to go to the hospital after which he was given 3 days sick off. The issue for determination as agreed between the parties is whether the claimant was wrongfully and unfairly terminated on 4.5.2015 or he absconded work from 13.4.2015. Depending on the answer to the foregoing question, the court must also determine whether the reliefs sought should issue.

**Resignation or unfair and wrongful termination**

4. The claimant stated that after treatment on 30.3.2015 he was given 3 off days and reported back to work on 4.4.2015. That on the same day, he sought extension of the sick off and the Director told him to stay home and return to work after he got healed. That on 24.4.2015 he went back to the hospital and the doctor advised him to rest for a further 3 days. That when he went to see the respondent regarding the extended sick off and instead of being allowed the 3 days off, he was allowed 8 days.

5. Cw1 alleged that he reported back on 4.5.2015 and worked as usual but at the end of the day he was paid ksh.970 as his wages for the day and upon inquiry he was told that he was serving on casual basis

that day. On the following day, he was barred from entering the work place by the guards and that is when he learned that his employment had long been terminated. He contends that the termination was unfair because no prior notice had been served on him and no reason was cited for his termination.

6. Rw1 stated that Cw1 reported that he was injured while on duty on 30.3.2015 and the Director gave him permission to go to the hospital. That after treatment the claimant returned to the office and reported that he had been given 3 days off and the Director allowed him the 3 days off although he brought no medical documents. That on 4.4.2015 the claimant reported back to the office but requested for a further 3 off days and Rw1 gave him 8 off days on condition that when he returns, he must bring evidence that he went to the hospital for treatment. The claimant never reported back to work on 13.4.2015 as required or thereafter and he never availed any evidence to prove that he was treated in any hospital.

7. Rw1 therefore denied that Cw1 was dismissed and averred that it was the claimant who terminated his employment without notice by absconding from work from 13.4.2015 when he was required to report back to work after 8 days off.

8. Rw2 is a nephew to the claimant and works for the respondent at the Stadium Branch. On 30.3.2015 Cw1 went to the Stadium branch and asked him for ksh.200 to go to the hospital because he was unwell. That he gave Cw1 the money and directed him to go to the hospital. That after a few days he called Cw1 but he told him that he was at Kisii after being given 8 leave days. Rw1 requested him to bring his (Rw1) children to Mombasa and the claimant did so. He however could not confirm whether or not Cw1 used the ksh.200 to go to the hospital on 30.3.2015.

9. I have carefully considered the evidence by the two sides. It is obvious that the claimant has not produced any evidence in writing to prove that on 4.4.2015, the respondents' Director gave him permission to stay at home until he fully recovered from the injury. All his evidence on that matter is in the forum of oral allegations which he has the burden of proving the truth in them. In my considered opinion, the claimant has not proved on a balance of probability that he was permitted by the Director of the respondent to stay away until he fully recovered. He has also not proved that he reported back to work on 24.4.2015 and Rw2 gave him 8 more off days to recover.

10. On the other hand, I find that the respondent has proved using employment records, namely master roll for March and April 2015 that the claimant worked until 30.3.2015 when he was given 3 days off after he reported that he had been injured while on duty. That the said records further proves that he reported back to work on 4.4.2015 and was given further 8 off days so as to come on 13.4.2015, but he never reported back to work, and he has not done so ever since. I therefore find that the respondent has proved on a balance of probability that the claimant is the one who terminated his services effective 13.4.2015 through absconding and he never reported back to work.

### **Reliefs**

#### **Notice and Compensation**

11. In view of the foregoing finding that it is the claimant who terminated the contract of employment, he is disqualified from getting salary in lieu of notice and compensation for unfair termination under section 49(1) of the Employment Act.

#### **Leave**

12. Cw1 worked for one year before termination and earned 21 leave days equalling to ksh.10,096.15. He is however awarded what he prayed for that is ksh.6,250.

#### **Disposition**

13. For the reason stated above I enter judgment for the claimant in the sum of **ksh.6,250** plus interest from 30<sup>th</sup> March 2015 till payment in full. Each party to bear his own costs.

Signed, dated and delivered at Mombasa this 9<sup>th</sup> day of December 2016.

O.N. MAKAU

JUDGE