



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

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 652 OF 2013**

**KENYA NATIONAL PRIVATE SECURITY**

**WORKERS UNION .....CLAIMANT**

**VERSUS**

**KENYA KAZI SECURITY SERVICES LIMITED.....RESPONDENT**

M/s Onyancha for the Claimant

M/s Kamau for the Respondent

**JUDGMENT**

1. Suit was brought vide a Memorandum of Claim dated 9<sup>th</sup> May, 2013 seeking for;

1. one month's salary in lieu of notice
2. gratuity for 12 years worked
3. ten (10) months compensation for loss of employment
4. certificate of service
5. costs of the suit

**Facts of the Claim**

2. The Claimant was employed by the Respondent in June, 2000 as a Security Guard at an initial salary of Ksh.5,300.00.

3. The Claimant served continuously for 12 years until 14<sup>th</sup> December, 2011 when he became sick.

4. The Claimant was admitted at Holy Family Mission Hospital in Nangina and has produced various medical records marked 'APP1' to the Memorandum of Claim.

5. The Claimant states that he had sought permission to go to hospital which permission was granted and was surprised when on 27<sup>th</sup> December, 2011, he was issued a letter of desertion marked 'APP3'.

The letter reads partly,

*“Our records indicate that you have not reported on duty since 12<sup>th</sup> December, 2011 and no information has been received to explain your unauthorised absence.”*

6. *“In view of the above, the company has summarily dismissed your services for desertion in accordance with the Employment Act, 2007 with effect from 12<sup>th</sup> December, 2011..... Any grounds for appeal against this decision should be submitted in writing within seven (7) days.”*

7. That the Respondent was at all material times aware of the whereabouts of the Claimant, hence he was paid salary in the months of December, 2011 and January, 2012.

8. That the Respondent was well aware of the Claimant’s sickness and the dismissal for desertion was unlawful and unfair.

9. The Claimant testified under oath and told the court that he was employed on 1<sup>st</sup> June, 2006 and at the time of dismissal he earned Ksh.16,000.00 per month. He had served for about ten and a half years by the time of his dismissal on 27<sup>th</sup> December, 2011.

10. In his testimony, he said he had written a letter to the employer to attend to his child’s case at the Busia Magistrate Court. The child had dropped out of school.

11. The Supervisor, Mr. Kamotho, granted him permission. After the case, the Claimant became ill and made a telephone call to the Control Room of his employer stating that he was sick and would attend hospital. The Control Room gave him the go ahead to attend hospital. He attended Holy Family Mission hospital, Nangina on 14<sup>th</sup> December, 2011 and was an outpatient until he reported back to work.

12. Upon recovery, he went back to duty but was given a dismissal letter for desertion.

13. The Claimant reported the matter to the Union. The Claimant and a Union representative met the Operations Manager of the Respondent, Mr. Gitonga to explain his predicament.

14. The Respondent did not recall him to work and was not paid terminal benefits. The NHIF was stopped while he was undergoing treatment and so the hospital bill was not paid for by NHIF.

15. The dispute was reported to the Ministry of Labour and conciliation meetings were arranged. The Respondent failed to attend the meetings. The Claimant seeks the relief sought in the Memorandum of Claim therefore.

16. Under cross-examination, the Claimant admitted that he was deducted NSSF and NHIF dues and same were remitted.

17. He reiterated that he had permission to attend court on 9<sup>th</sup> December, 2011 but subsequently got ill and called the Respondent to explain his predicament. He explained that he was admitted in hospital from February, 2012 and returned to work in June, 2012. That he was at home for a period of six (6) months. He did not write a letter to the employer but had called the Control Room on 13<sup>th</sup> December, 2011.

18. The Respondent filed a Reply to the Memorandum of Claim on 4<sup>th</sup> June, 2013 in which it admits the Claimant was employed as a Security guard.

19. That on 12<sup>th</sup> December, 2011, the Claimant failed to attend work as he was required. On

27<sup>th</sup> December, 2011, the claimant having failed to return to work was summarily dismissed for desertion.

20. That the Claimant was paid terminal dues upon dismissal.

That the claim has no merit, and same be dismissed with costs.

21. The Respondent called RW1, Mr. Patrick Gitonga, Operations Manager of the Respondent. He told the court that the Claimant deserted work from 12<sup>th</sup> December, 2011 as explained in the letter of dismissal dated 27<sup>th</sup> December, 2011. That the Claimant was granted opportunity to explain his absence but failed to give a reasonable explanation for his absence.

22. The Claimant collected the letter of dismissal on 6<sup>th</sup> June, 2012, more than six (6) months later.

23. RW1 explained that, the company has a medical scheme and employees are treated in specified clinics and where the employee is taken elsewhere, the company pays the expenses for treatment. The Claimant did not notify the Respondent that he was sick. The medical sheets produced by the Claimant relate to attendance of a clinic in Busia when he was supposed to be on duty at Nairobi.

24. That it was unacceptable to be away for a period of over six (6) months and expect to be taken back by the company.

25. A disciplinary hearing was held when the Claimant reappeared in June, 2012 and he was unable to produce documents explaining his absence for over six months. He never got permission to attend hospital as alleged, or at all.

26. The Claimant is therefore not entitled to notice pay or any other terminal benefits as he deserted work.

27. Under cross-examination, RW1 insisted that no sick-off note was issued to the Claimant in terms of the company policy and none was produced by the Claimant. That the desertion notice was justified as the company could not wait for him forever. He was given a hearing when he returned, his explanation was unreasonable and the dismissal was upheld.

28. The Claimant was paid his last salary in December, 2011 and was not paid in February, 2012 as alleged.

## 29. **Issues for determination**

1. Did the Claimant have permission to be away from work or not?
2. Was he lawfully and fairly dismissed for desertion?
3. What remedy, if any, is available to him?

## **Issue I**

30. The Claimant did not produce any letter of authority to be away from work. He however, states that he had permission from his supervisor to attend court proceedings on 9<sup>th</sup> December, 2011. That after the case, he fell ill and did not return to work until June, 2012. A letter of desertion written on 27<sup>th</sup> December, 2011, was given to him in June, 2011 when he returned.

31. The Claimant did not fill the requisite sick-off forms because he alleges, he got sick while at home. There was no documentation showing that the Claimant was admitted in hospital during this lengthy period.

32. The Claimant was therefore unable to make a reasonable explanation to the court as to why, while an outpatient, he was unable to report to work and get proper authority to attend hospital.

33. After all, the Respondent had a medical cover for its employees and the Claimant would have received treatment in any of the designated hospitals by the Respondent. It is common cause that, at all material times, the Claimant was at his home district in Busia, where there was no designated clinic/hospital under the Respondent's medical cover.

34. The Claimant was also unable to explain why he could not send a relative or any other person to get the requisite medical leave forms from the employer for filling so as to get authority to be away from work.

35. The court finds that six months absence was an inordinate period to be away from work without proper authority from the employer.

36. It would be unreasonable to expect the Respondent to wait for an employee for such a long period because, its service to the clients would be greatly affected.

37. The court finds that though the Claimant had initial permission to attend court in Busia on 9<sup>th</sup> December, 2011, he deserted work for a period of over six months without permission.

## **Issue 2**

38. Was the dismissal lawful and fair?

39. The letter for dismissal on grounds of desertion was issued on 27<sup>th</sup> December, 2011 before the Respondent had opportunity to get an explanation from the Claimant of his whereabouts.

40. The court has found that the absence by the Claimant without proper notification was inordinate and unreasonable. The court is not satisfied that a telephone call to the Control Room would have sufficed in the circumstances when the Claimant was clearly not admitted in hospital but allegedly attended a local clinic as an outpatient. No explanation was given as to why the Claimant could not travel to the nearest office of the Respondent to seek proper leave of absence or instead send a representative, including a Union representative to get permission on his behalf.

41. The court is satisfied however, that the Respondent sought an explanation from the Claimant as to his whereabouts when he returned almost seven (7) months later and the Respondent was not satisfied with the explanation given.

42. The court is equally not satisfied with the explanation by the Claimant and finds that the Respondent had a reasonable cause to terminate the employment of the Claimant.

## **Issue 3 - Remedy**

43. The court notes that the Claimant had faithfully served the Respondent as a Security Guard for 10½ years and had accrued gratuity in terms of the collective agreement for the sector, which would be forfeited by fact of summary dismissal.

44. Taking all the circumstances of the case into account, the court reverts the summary dismissal to normal termination with the result that the Claimant would be entitled to payment of service gratuity for the served number of years.

45. The claim for notice pay is refused because the Claimant had deserted work and is not entitled to the same.

46. Similarly, the court having converted the summary dismissal to a normal termination finds

that the Claimant is not entitled to compensation as prayed, or at all.

47. The Claimant is entitled to a certificate of service as prayed.

48. **In the final analysis the court awards the Claimant;**

- i. Gratuity at the rate of eighteen (18) days salary for every completed year of service from 1<sup>st</sup> June, 2000 to 27<sup>th</sup> December, 2011 for 11 years in the sum of Ksh.105,000.00 (Ksh.1,600 x 18/30).
- ii. Certificate of service which should be given within 14 days from date of this Judgment
- iii. The award is payable with interest at court rates from date of the Judgment till payment in full.
- iv. Since, the Claimant is partly successful, he is entitled to the costs of the suit.

**Dated at Nairobi this 23<sup>rd</sup> day of April, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**

**Delivered by Hon. Hellen Wasilwa on 24<sup>th</sup> day of April, 2015.**

**In the presence of**