



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 299 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

JAWADU HAMAD OMAR.....CLAIMANT

**=VERSUS=**

EAST AFRICA SEA FOOD LIMITED.....RESPONDENT

**J U D G E M E N T**

1. The Claimant seeks reinstatement to his job and in the alternative award of general damages for unlawful termination of employment. The Claimant further seeks refund of deducted but unremitted NSSF dues.

**Facts of the Case**

2. The Claimant in his Memorandum of Claim and sworn testimony told the court that he was employed by the Respondent to oversee off-loading of the Respondents fish at Usoma Beach on or about 2003 at a monthly salary of Kshs.14,075.
3. That the Claimant worked diligently and continuously without any problems until January 2014, when the Respondent unlawfully refused, neglected or stopped paying the Claimant his monthly salary.
4. The Claimant states that his employment was terminated on or about 4<sup>th</sup> January, 2014 without payment of terminal benefits, without notice, notice to show cause or any reason and he seeks general damages in respect thereof.

**Response**

5. The Respondent filed a Memorandum of Reply on 5<sup>th</sup> December, 2015 in which it states that the Claimant was employed on 1<sup>st</sup> September, 2009 as a casual employee based at Usoma Beach. That he used to work for 2 to 3 days a week depending on the availability of fish. That his work was to oversee off-loading of fish from boats and loading same into vehicles.
6. On 1<sup>st</sup> December, 2013, the Claimant was issued a casual employment contract with a monthly salary of Kshs.10,890 inclusive of house allowance.
7. That on or about 23<sup>rd</sup> November, 2013 the Respondent got a complaint from its Fish agent Annet

Nalugwa that the Claimant had stolen 300Kg of fish worth Kshs.90,000 and wanted the company to pay for the loss. The client further stated it had lost trust in the Claimant and wanted to be assigned another person who was loyal and trust worthy. The letter of complaint was produced as appendix '3' to the statement of claim.

8. The Claimant continued to work while investigations were carried out and was paid salary for December, 2013. The pay slip dated 31<sup>st</sup> December, 2013 was produced as appendix 4. It shows payment of a gross salary of Kshs.10,890 and NSSF deduction of Kshs.200.

9. That the Claimant worked for five (5) days in January, 2014 and disappeared only to resurface on 21<sup>st</sup> January, 2014 with a letter from Kisumu Labour Office alleging that he had left employment due to ill health. The letter was produced as exhibit 5.

10. The Respondent, replied to the letter by the labour office denying the allegations by the Claimant.

11. The Claimant went quiet until the Respondent received a letter of demand dated 3<sup>rd</sup> June, 2014 claiming payment of terminal benefits. The letter was produced as exhibit 6. The Respondent denied the contents of the demand letter by a letter dated 17<sup>th</sup> June, 2014 – produced as Appendix 7.

12. The Respondent prays the suit to be dismissed for lack of any basis.

13. The Respondent called RW1 Pius Makatiang in support of its statement of defence. He was the Administrator Assistant of the Respondent from 2002 and knew the Claimant well.

14. RW1 explained the circumstances of the case as set out herein before adding that the Claimant absconded duly following a complaint by a client. That the Claimant's employment was not terminated and he was owed no arrear salary by the Respondent. That the Claim has no basis and it be dismissed with costs.

### **Determination**

15. The issues for determination are –

(i) Whether the employment of the Claimant was terminated by the Respondent or the Claimant absconded work.

(ii) Whether the Claimant is entitled to the reliefs sought.

### **Issue I**

16. The Claimant has the onus of proving on a balance of probability that his employment was terminated by the Respondent and that he did not abscond duty even before the court embarks on the 2<sup>nd</sup> limb of this enquiry to establish whether the termination was lawful and fair.

17. In **Eastern Produce (K) Limited v John Lumumba Mukosero, Eldoret Civil Appeal No. 25 of 1998**, it was held –

*“The fact that one party has filed a suit or made a claim by itself is not proof that there is a Prima facie case which the defendant must rebut. It is for the Plaintiff to prove liability and this onus of proof does not shift whatsoever.”*

18. The facts of this case clearly show that the Claimant worked upto end of December and was paid a monthly gross salary of Kshs.10,890 on 31<sup>st</sup> December, 2013. The Respondent deducted NSSF dues of Kshs.200 leaving a net salary of Kshs.10,690.

19. The letter from the labour office dated 21<sup>st</sup> January, 2014 and sent to the Respondent indicates that the Claimant reported to the Labour Officer that he had worked for the Respondent until 4<sup>th</sup> January, 2014 when he left employment due to ill health and was claiming payment of accrued leave and any other legal dues.

20. The Claimant did not report to the Labour Office that the Respondent had terminated his employment, without notice, notice to show cause or reason.

21. The court has perused the complaint by one Annet Nalugwa, a fish Agent against the Claimant dated 23<sup>rd</sup> November, 2013 which collaborates the evidence by RW1 that the Claimant disappeared from the employment of the Respondent while this complaint was being investigated.

22. The balance of probabilities indicate that the Claimant feigned sickness and disappeared from the employment of the Respondent following the aforesaid complaint about him.

23. Accordingly, the respondent has discharged its evidential burden in rebuttal of the allegations by the Claimant that the Claimant's employment was unlawfully and unfairly terminated by the Respondent. The Claimant has failed to prove his case on a balance of probabilities and the same is dismissed.

24. On the issue of terminal benefits, it is for the Claimant to prove each and every particular of claim made against the Respondent. The evidence before court shows that the Claimant was paid salary for days worked until 31<sup>st</sup> December, 2013.

25. The Claimant was not paid salary for the five (5) days worked in January 2014 because he absconded duty. The Claimant is entitled to the five (5) days salary for the days worked even though same was not specifically claimed by the Claimant in the Memorandum of Claim. The court makes no order in this respect.

26. The Respondent produced a report from NSSF showing that it remitted NSSF dues in respect of the claimant for the years 2010 to 2013. The Respondent added that the Claimant was employed as a casual prior and only worked 2 to 3 days a week and so no NSSF dues were deducted from his daily wage or remitted to NSSF.

27. The Claimant has again failed to prove on a balance of probabilities that he was entitled to be registered by the Respondent with NSSF and dues remitted on his behalf for the period before 2010. This claim also fails.

28. In the final analysis the suit by the claimant lacks merit and is dismissed with no order as to costs.

**Judgement Dated, Signed and Delivered this 14th. day of December, 2017**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**

Mr. Ayayo for Claimant

Ouma for Respondents

CC. Chrispo Aura



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