



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT MOMBASA**  
**CAUSE NO. 758 OF 2017**

**CHARLES OKUMU BWIRE..... CLAIMANT**

**- VERSUS -**

**BRICK AND MORTAR HOLDINGS LTD..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 11<sup>th</sup> March, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 21.09.2017 through Nabwana Nabwana & Company Advocates. The claimant prayed for judgment against the respondent for:

1. A declaration that the claimant was unlawfully and unfairly terminated.
2. One-month pay in lieu of notice Kshs. 92, 000.00.
3. Unpaid house allowance Kshs. 264, 000.00.
4. Unpaid salary from February to date of filing suit at Kshs. 552, 000.00.
5. Unpaid rest days being 1 off day per week 05.07.2015 to 03.03.2017 Kshs. 535, 384.00.
6. Unpaid public holidays between 05.07.2015 to 03.03.2017 being 15 public holidays Kshs. 92, 307.69.
7. A certificate of service.
8. 12 months' gross salary in maximum compensation for unlawful termination at Kshs. 1, 104, 000.00.
9. Interest on prayers 1, 2, 3, 4, 5 and 6 from the date of filing the cause until payment in full.

The claimant's case is as follows. The respondent employed him from 05.07.2016 to 03.03.2017 as a general supervisor. He worked for 1 year 10 months. As at employment he was paid Kshs. 80, 000.00 per month. He alleges he worked 7 days per week without a rest day or off being 87 Sundays. Further he was not housed or paid house allowance per section 31(1) of the Employment Act, 2007. On 16.02.2017 he was suspended for 2 weeks and he reported back at work at the end of the suspension on 03.03.2017 he was not allowed back at work or given a letter of termination. Further between 05.07.2015 to 03.03.2017 the respondent denied him 15 public holidays and was not paid at double rate as required. As no reason was offered to him on termination of the employment, the termination was unfair under section 43 of the Act.

On 04.05.2021, the claimant filed a notice of change of advocates to Ochieng Eddie Vincent & Company Advocates.

The affidavit of service of the memorandum of claim and the notice of summons was filed on 25.10.2021 and is sworn on 01.11.2017 showing that service was effected on 01.11.2017 at the respondent's office. The mention and hearing notices were served and the respective affidavits of service are on record. Despite service the respondent failed to enter appearance, to file a response, or to attend at the mention or hearing of the suit. The suit proceeded by way of formal proof. The claimant testified by way of adopting his witness statement and relying on the documents on record. Counsel for the claimant opted not to file any submissions but relied on the pleadings, documents and the evidence. The Court has considered all the material on record and makes findings as follows.

The **1<sup>st</sup> issue** for determination is whether there existed a contract of service between the parties. At paragraph 2(a) of the statement of claim the claimant has pleaded thus, **“The claimant states that he was employed by the respondent from 05.07.2016 to 03.03.2017 with a job designation as a general supervisor.”** At paragraph 2(b) thereof he pleads that he had been in continuous and uninterrupted employment for a period of 1 year and 10 months. At paragraph 2(c) thereof he pleaded that upon employment he was paid Kshs.80, 000.00 per month and up to the time of termination of employment.

In his witness statement the claimant has testified thus, **“I was first employed by the respondent sometime on 5/07/2015 under the designation of a general supervisor at a salary of Kes.50, 000/=.**

I have retained continuous employment since 5.07.2015 till my indirect termination on 3.03.2017 under the same job designation as a general supervisor, and my salary was increased to Kes. 80, 000/= as at the time of my termination as evidence by the copies of pays lip attached to my list of documents.

Throughout my entire period of employment, being 1 year 10 months, the respondent failed and omitted to give me a written formal employment contract. I consider myself a term contract or permanent employee by operation of law having been in employment for more than three consecutive months.”

The Court has carefully considered the pleadings against the evidence. While pleading that he was employed on 05.07.2016, his evidence is that the employment commenced on 05.07.2015. Even if it was to be taken that the employment commenced on 05.07.2015 and ending on 03.03.2017, it would be only 1 year and 8 months of service and not 1 year and 10 months of service. Further, while pleading that the pay throughout the employment was Kshs. 80, 000.00 per month, the evidence is that the initial monthly payment was Kshs. 50, 000.00 increasing to Kshs. 80, 000.00, the increment being effected on an unknown date. In view of the inconsistencies between the pleadings and the evidence, the Court returns that the claimant’s inconsistency and incoherency cannot be trusted and he has thereby failed, on a balance of probability, to establish the alleged contract of service as defined in section 2 of the Employment Act, 2007. While making that finding, the Court has considered that while alleging that the employment was concluded orally, the claimant has not provided the details of the respondent’s director or senior employee who may have employed him orally. The Court finds that in absence of such details on the formation of the alleged oral contract, it is difficult to return that on a balance of probabilities, the named respondent company which invariably had no mouth to speak towards concluding the oral contract of service, indeed employed the claimant.

The Court has also considered the suspension letter of 17.02.2017. It addresses the claimant as the **“Operation Officer”** while the claimant pleaded and testified that he was employed as a general supervisor. Further, the NSSF statement dated 19.04.2017 is for the period 01.01.1988 until 30.09.2016 and it shows that the claimant was the respondent’s employee with the last contribution being for September, 2016 and, if indeed the claimant was in the respondent’s service as alleged, he has not explained why after September 2016, no contributions had been made. Thus even if parties may have been in some contract of service, the claimant appears to have withheld and not disclosed crucial terms and conditions of the alleged contract of service as to enable the Court to justly, proportionately and effectively adjudicate upon the claimant’s claims and prayers.

To answer the **2<sup>nd</sup> issue** for determination, the Court returns that the claimant having failed to establish the existence of a contract of service, the claims and remedies as made will fail. The suit is hereby dismissed with orders the claimant to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 11<sup>TH</sup> MARCH, 2022**

**BYRAM ONGAYA**

**JUDGE**