



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 105 OF 2016**

**GEOFFREY MUTHOI MUIRURI.....CLAIMANT**

**VERSUS**

**NAKU MODERN FEED LIMITED AKA NAKURU MODERN FEED LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondents for unfair termination of his employment and for payment of his terminal dues.
2. The Claimant stated that he was employed by the Respondent in January, 2010 as a turn Boy earning a gross salary of Kshs. 6,000 per month.
3. The Claimant states that he was not housed by the Respondent neither was he given any house allowance. Also that he never went for his annual leave as required in law neither was he paid for the same.
4. He states that he worked diligently for the Respondent until 28<sup>th</sup> June, 2014 when his employment was terminated.
5. Prior to the termination the claimant avers that on 4<sup>th</sup> April, 2014 he was sent together with the Respondent driver one Charles Otieno Okoth to Nairobi to deliver feeds and in return collect lime and sieve plate. That they used the Respondent motor vehicle registration number KAY 592Q to ferry the said goods. However, on reaching Greenstead area along Gilgil-Nakuru Road their vehicle was hijacked and the he together with the driver were forced to alight then the carjackers speed off with the said Lorry. They then informed the Respondent manager of the carjacking issue who reported the matter to Mwiriki Police station the following day.
6. Subsequently the Claimant together with the driver were arrested and charged at Nakuru Chief Magistrates Court with stealing by servant under Criminal case number 762 of 2016. They appeared in Court and were released on cash bail on the 16<sup>th</sup> May, 2014. The claimant then reported to his place of work however he was turned away by the Respondent manager Mr. Javis Kariuki and advised to stay at home till the criminal case is concluded.
7. The claimant together with the driver were acquitted of the criminal charges on the 19<sup>th</sup> May, 2014. The next day he reported to work and learnt that the manager Mr. Javis Kariuki had left the Respondent's employ. He then requested to speak with the director of the Respondent one William Karanja Njoroge but could not get hold of him till 27<sup>th</sup> August, 2014 when he send him a test message requesting to be informed of his work status, to his surprised the Respondent director responded that he did not know him.
8. When the claimant received the said message he indeed confirmed that his employment had been terminated and thus filed this Suit. He states that he was not called for any disciplinary hearing prior to the dismissal.
9. The claimant alleged that the Respondent terminated his services unfairly when he had worked for him continuously for 4 years 8 months. He thus prayed for judgement against the Respondent for Orders that; -

**a) One-month salary in lieu of Notice**

**b) Salary underpayment**

**c) Unpaid salary**

**d) Unpaid house allowance**

**e) Pro-rata leave**

**f) Pay for annual leave earned**

**g) Overtime pay**

**h) Pay for public holidays worked**

**i) Gratuity**

**j) 12 months' salary as Compensation for wrongful termination of contract of employment in terms of section 49(1)(c) of the Employment Act.**

**k) Costs and interest in (a) –(j) above,**

**l) A certificate of service under section 51 of the Employment Act**

**m) Any other relief that this court may deem fit and just to grant in the circumstances.**

10. The Respondent entered appearance and filed a Response to the claim on the 6<sup>th</sup> June, 2016 denying all the averments pleaded and stating that the Respondent gave work to the claimant on casual basis for about a month from 14<sup>th</sup> March, 2013 to 1<sup>st</sup> April, 2013, attending as a turn boy to motor vehicle registration number KXV 362. That after that the Respondent never engaged the claimant to date.

11. The Respondent states that their driver one Charles Okoth had been assigned work to go bring some goods in Nairobi aboard motor vehicle registration number KAY 592Q Mitsubishi FH Lorry, which on return was allegedly hijacked and the said vehicle went missing. The Respondent through its manager reported the matter to a police station and two people were arrested being the Respondent Driver Mr. Okoth and the claimant. The Respondent contends that the claimant was aboard the said vehicle without authority and instruction and that he never assigned him any work at the said time.

12. The Respondent then contended that the claimant is not their employee and the claim herein is without any basis.

13. In response to the defence the claimant filed a reply on the 11<sup>th</sup> July, 2016 and reiterated the contents of his claim.

#### **Hearing.**

14. This matter proceeded for hearing on the 19<sup>th</sup> October, 2017 where the claimant, **Geoffrey Muthoki Muiruri(CW-1)** adopted his witness statement filed on 11<sup>th</sup> March, 2016 and in summary stated that he was employed as a turn boy in January, 2010 and worked till April, 2014 and produced invoices dated 24.10.2012 as exhibit 3 and 4. He testified that on 3.4.2014 the Respondent driver, Mr Okoth and him were directed by the Respondent to deliver animal feeds to a client in Nairobi which they did and deposited the money received in the Respondent's bank account. After delivering the said feeds the Respondent's driver Mr. Okoth was sent Kshs 50,000 on his mobile phone to buy two sieves from Doshi Company and 7 tonnes of lime at Mlolongo and then passed by polypack industries at Magana to collect 10 bale of empty bags. The claimant then produced a statement by Karanja Njoroge as exhibit-1.

15. The Claimant testified that they drove back to Nakuru however Upon reaching greenstead area they were hijacked by 10 armed men who took over the control of the vehicle and gave them a serious beating. The claimant upon being released by the carjackers informed the Respondent manager who came and took them to St. Elizabeth Hospital for treatment. The next day while still in hospital the claimant testified that they were summoned by the Respondent director to the police station and it then that he was arrested and charged. He then produced the charges sheet as Exhibit 2.

16. The claimant testified that he was acquitted of the charges and produced a ruling as Exhibit 5. He then followed up to be taken back by the Respondent to no avail.

17. On cross examination he testified that he worked from January, 2010 continuously till his termination. That he never wrote any letter requesting to resume employment but that he requested the director vide a text message. He also stated that he was underpaid but could not tell exactly how much a turn boy is to be paid. He also insisted that he worked overtime and never paid and that he ought to be paid gratuity since the claimant never submitted any NSSF contributions.

18. The defence case proceeded on the 16<sup>th</sup> September, 2021. The Respondent called one witness, **William Karanja(RW-1)**, the managing Director of the Respondent who adopted his witness statement filed on 31.5.2016.

19. RW-1 testified that the claimant once worked for the Respondent albeit for a short period of time between 14<sup>th</sup> March, 2013 to 23<sup>rd</sup> March, 2013 as a casual therefore was not an employee. He maintained that the claimant was arrested along with his driver but that he never sent the claimant on the fateful day. He testified that he did not know who Javis Kariuki was and therefore he could not transact on behalf of the Respondent. He denied any employment relationship with the claimant and prayed that the claim be dismissed.

20. On cross examination, he admitted that he was the complainant at the police station and that the claimant was charged with the offence of stealing by servant. He also admitted that he testified in Court that the claimant was a turn boy. He then denied that the claimant was their employee.

#### **Claimants submissions**

21. The claimant submitted that he was the claimant employee since 2010 and that the Respondent has not provided any evidence to the contrary when he is mandated under section 10(7) of the Employment Act. The claimant reinforced its argument by citing the case of **Martin Ireri Ndwiga V Olerai Management Company [2017] eKLR**.

22. The claimant further submitted that the records produced by the Respondent are not to be relied on because he did not give a detailed information of the claimant further that the claimant produced invoices issued on 24.10.2012 which were not challenged by the Respondent. Also that the Respondent's pleadings indicating that the claimant worked from 14<sup>th</sup> March, 2013 to 1<sup>st</sup> April, 2014 is different from his testimony that he alleged that the claimant worked from 14<sup>th</sup> march to 2<sup>nd</sup> march, 2013.

23. The claimant submitted that as much as the claimant was initially employed as a casual employee the fact that he worked continuously till 2014 converted his employment to that of an employee as envisaged under section 37 of the Employment Act. In this he cited the case of **Silas Mutwiri V Haggai Multi-Cargo Handling Services Limited [2013] eKLR** and the case of **Kesi Mohamed Salim V Kwale International Sugar Co Ltd [2017] eKLR**.

24. The claimant then submitted that he was constructively dismissed from employment by the Respondent when they Respondent failed to take him back after he was acquitted of the criminal charges. He then argued that the termination was unfair in the circumstances and prayed for the claim to be allowed as prayed.

#### **Respondent's Submissions.**

25. The Respondent on the other hand maintains that the claimant was not their employee but rather a casual labourer who was engaged once for a period not more than a month. It was submitted that the allegation that the claimant worked before 2013 and the production of the LPO cannot be used as prove of employment for the reason that the LPO did not have the Respondent's stamp neither was it signed by the claimant. In this they cited the case of **Total Kenya Limited Formerly Caltex Oil(K) Ltd Vs Janevams Ltd [2015] eKLR**.

26. The Respondent then submitted that there are disparities in dates that the claimant alleged to have reported back to work, that on one point he alleged to have reported on 19<sup>th</sup> may, 2014 and on another point on the 20<sup>th</sup> May, 2019. Also that the Claimant alleged to have been send away by a Mr. Davis who is unknown to the Respondent.

27. The Respondent submitted that the claimant is tasked with proving his case on a balance of probability which prove he has failed at and the Respondent cannot therefore be tasked with disproving what has not been demonstrated. In this they cited the case of **Ahmed Mohamed Noor V Abdi Azziz Osman [2019] eKLR**.

28. The Respondent prayed that the claim be dismissed with costs.

29. I have examined the evidence and submissions of the parties herein. From the evidence submitted by the claimant herein, he was charged before a magistrate's court in Criminal case No. 762 of 2013 Republic VS Charles Okoth & Another.

30. The charge sheet produced in court show that the claimant Geoffrey Muthoki Muiruri was the 2<sup>nd</sup> accused person and the charge was the offence of stealing by servant under Section 281 of the Penal Code.

31. Particulars of the offence indicated that they were servants to William Karnaja – RW1 herein who indicated that he is the Managing Director of the respondent herein.

32. Despite RW1 denying he was an employee of the claimant, the evidence produced point to the fact that indeed the claimant had been employed by the respondent herein.

33. The claimant explained the circumstances leading to his termination after the charges preferred against him.

34. The circumstances under which the claimant was terminated despite being charged in court have not been explained by the respondent whose defence was that the claimant was never their employee.

35. This does not answer as to how he was then charged with stealing by servant and why the RW1 testified in the Criminal Court that the claimant was a loader and turnboy of his vehicle that got lost.

36. The claimant having been terminated without following due process and without establishing the existence of valid reason, I find the dismissal of the claimant unfair and unjustified.

37. In terms of remedies sought, I find for claimant and award him as follows:-

**1. 1 month salary in lieu of notice = 9,372.15/=**

2. Unpaid house allowance as pleaded being 67,742.90/=

3. 8 months salary as compensation for unfair termination

= 8 x 9,372.15/=

= 74,977/=

4. Service pay for 4 years = 4 x 15% of 9,372.15 = 5,623/=

**GRAND TOTAL** = 157,715/=

Less statutory deduction

5. Other parts of the claim including overtime not proved

6. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

**In the presence of:**

Mugure holding brief for Konosi for Claimant – present

Respondent – absent

Court Assistant – Fred