



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

**AT MOMBASA**

**CAUSE NO. 347 OF 2018**

**ALI MWIJAA ALI.....CLAIMANT**

**- VERSUS -**

**SAFARI PETROLEUM LIMITE.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> December, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 01.03.2018 through M/s Tindika & Company Advocates. The claimant's case is as follows:

- a. He was employed by the respondent as a truck driver on 02.01.2009 by the letter dated the same date. He was unfairly terminated from employment on 08.10.2017 declaring him redundant.
- b. The redundancy was unfounded as the respondent was not experiencing any financial difficulties and the claimant's services as a driver remained crucial in the respondent's business involving transportation of petroleum products to third parties. The claimant was assigned to drive a non-commercial vehicle up to February 2014 when he was assigned to drive a lorry model Isuzu FVX with a tonnage of 16 tons. He transported petroleum products.
- c. At the time of employment, he was a trained, qualified and experienced driver. His case is that from 01.05.2015 to the time of termination on 08.10.2017 he was paid a basic salary below the minimum wage as per the Labour Institutions Act (Regulation of Wages) (General) (Amendment) Order of 2015 and 2017 (Legal notice 117 of 2015 and legal notice No. 107 of 2017) which stipulated a salary of Kshs. 24, 719.00 and 29, 169.00 respectively.
- d. Throughout service he was not paid house allowance per section 31 of the Employment Act, 2007.
- e. He was hired on probation on 01.01.2009 and confirmed by letter of 29.12.2011. He served for 8 complete years and the respondent called him to convey that it was intended to revise and alter the terms of his contract and reduce his salary and other benefits; and to convert his service from permanent employee to casual status. The claimant rejected and did not agree to the proposal especially that he was already underpaid under the wage orders. He received on 15.07.2017 the letter on change of employment terms. The letter changed his terms from fixed permanent to casual terms. In July 2017 the respondent paid a salary lower than the claimant's previous pay by depositing the payment in the claimant's salary account. The claimant's advocates wrote on 28.07.2017 conveying to the respondent that the actions were unlawful. The claimant received another letter dated 08.07.2017 declaring him redundant on account that he had rejected the reduced salary and that the respondent had financial difficulties.
- f. The claimant plead that the redundancy was unfair and unlawful because section 40 of the Employment Act was not complied with and the reason was not genuine as there was continuing work for him to continue performing as employed.

The claimant claimed as follows and as particularised in the memorandum of claim:

- a. Underpayment from 01.05.2015 to 30.04.2017 Kshs. 55, 056.00 as duly computed.
- b. Underpayment from 01.05.2017 to 08.10.2017 as computed Kshs. 40, 464.00.
- c. House allowance contrary to section 31 of Employment Act, 2007 from 02.01.2009 to October 2017 at 15% monthly basic pay per prevailing general wage orders as duly computed at a sum of Kshs. 297, 685.00.

d. Compensation for unfair termination Kshs. 22, 425 x 12 Kshs.269, 100.00.

e. A month's pay in lieu of notice Kshs. 22, 425.00.

f. Year 2015 leave due not taken Kshs. 19, 435.00.

The claimant prayed for judgment against the respondent for:

a. Certificate of service.

b. Declaration the termination was unfair.

c. Terminal dues as claimed amounting to Kshs. 704, 165.00.

d. Costs incidental to the suit.

The notice of summons was dated 28.05.2018. Rule 11(3) of the Employment and Labour Relations Court (Procedure) Rules provide that summons shall be valid in the first instance for a period of six months beginning on the date of its issue and the Court may extend the validity from time to time if satisfied that it is just to do so. The summons herein was valid for initial 6 months lapsing on or about 28.11.2018. The affidavit by John Kombe sworn on 24.07.2019 shows that on 29.05.2018 he visited the respondent's premises at 2.30pm located at Furaha Plaza along Nkuruma Road but was unable to effect service because he was informed that the respondent had closed their doors. On 24.07.2019 Counsel for the claimant filed an affidavit to support application for renewal of summons but such application was not filed at all and no orders for renewal of summons are on record. It appears that the deputy registrar reissued summons on 29.07.2019 without a requisite order by the Court for extension of summons. The process server John Kombe has sworn an affidavit of service stating that on 30.07.2019 at 10.00am he visited the respondent's offices at Bamburi – Mtamboni Road off Mombasa –Malindi Road at Safari Petrol Station Building but the respondent had shifted and was unable to serve because the claimant does not know where they shifted to. Counsel for the claimant filed an affidavit on 22.01.2021 in support of an application for renewal of summons but no such application was filed and urged that the summons issued on 28.05.2018 had lapsed but had not been served or extended. Thereafter, there is nothing on record that the summons was ever extended by relevant Court order and there is no evidence that the summons was ever served. The record is that the summons lapsed, they were not extended and they were never served.

Thus, the Court returns that on 03.11.2021 the Court was misled that the respondent had failed to enter appearance and the Court further returns that the order given on that date that hearing on formal proof on 08.12.2021 at 9.00am for 10 minutes and claimant to serve a hearing notice was all made upon a misleading fact that the summons had been duly served. That order and all consequential proceedings including the ex-parte hearing on 08.12.2021 and directions for judgment on 17.12.2021 are all liable for setting aside.

The affidavits of service on record are that the respondent has closed doors and cannot be found. The further record is that the summons have never been served and they have since lapsed. In the circumstances the Court finds that the suit has indeed abated and the claimant having confirmed to the processes server that he cannot trace his employer, the suit indeed abated as no summons have ever been served. While making that finding, the Court considers that the claimant has taken inordinate delay to serve the summons or to seek renewal of summons to the extent that he can no longer trace his alleged former employer and the Court must not act in vanity. Further, the Court observes that while alleging that he was employed by the named respondent, the claimant has exhibited a letter of appointment dated 02.01.2009 and a letter of completion of probationary period dated 29.12.2011 by one Al-Lely Petroleum Ltd and whose relationship with the named respondent has not been pleaded and established at all. Again the letter of change of employment terms dated 15.07.2017 by the respondent refers to a letter dated 29.05.2017 but which is not exhibited at all. Further, the letter of redundancy notice dated 08.09.2017 refers to letters dated 29.05.2017 and 15.07.2017 both of which are not exhibited at all and the claimant has not pleaded or given evidence about those letters. The Court finds that with such gaps in the claimant's evidence and the summons having not been served on account the claimant cannot trace the respondent, on a balance of probability, his case against the respondent cannot be sustained. In any event, the letter of initial employment was not by the respondent and the Court finds that employment relationship was not established at all.

In conclusion the suit is hereby determined as abated with no orders on costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 17<sup>TH</sup> DECEMBER, 2021**

**BYRAM ONGAYA**

**JUDGE**