



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 289 OF 2015**

**MWONGOLO YAWA CHILUNGU.....CLAIMANT**

**- VERSUS -**

**OMAR KURBY T/A EMIRATES**

**TYRES & BATTERIES LIMITED..... RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 10<sup>th</sup> December, 2021)**

**JUDGMENT**

The claimant filed the memorandum of claim on 06.05.2015 through Osoro Omwoyo & Company Advocates and against Emirates Tyres & Batteries. The respondent filed on 15.06.2015 the response to the memorandum of claim through Mogaka Omwenga & Company Advocates. The amended response to the claim was filed on 14.07.2016. The respondent pleaded that Emirates Tyres & Batteries Limited was incorporated on 24.04.2007 and it did not exist in 2000, the year the claimant had alleged to have been employed by the respondent. The respondent in the initial memorandum of claim pleaded that it had never employed the claimant and the suit be dismissed with costs.

The claimant then filed an amended memorandum of claim on 05.07.2016 against the respondent as named and through Otieno Otwere & Company Advocates. The claimant pleaded that at all material time he worked for the respondent as a casual or general worker caretaker in 2000 until 04.11.2013 when he was unfairly terminated from service after 12 years of service. The claimant pleaded that on 26.09.2005 while on duty he was engulfed in a fire which erupted as he was unblocking sewerage at the respondent's garage at 777 Saba Saba traffic lights area. Further he became unconscious and found himself at Coast General Hospital where he was undergoing treatment. The claimant pleads that he recovered and continued to work for the respondent until 2013 and who personally assigned him duties and paid him - despite the respondent having incorporated a company known as Emirates Tyres and Batteries Limited. The claimant's further case was that despite summoning by the Labour Officer, the respondent refused to compensate him under WIBA, 2007. That further, he was unfairly terminated without notice and discriminatively so. As evidence of employment, the claimant pleaded that the respondent contributed his NSSF partially; the claimant had letters by Labour Officer addressed to the respondent; and he had discharge summary when he was treated for the injuries sustained.

The claimant pleaded particulars of breach of contract as follows:

- a) No termination notice was served.
- b) Assigning the claimant difficult duties without proper training to perform.
- c) No leave or leave allowance was given to him.
- d) Not certificate of termination and terminal dues.
- e) He was terminated on grounds that he was weak or feeble due to the electrocution and injury suffered.
- f) He was not paid sick off.
- g) Locking out claimant not to collect certificate of termination and terminal dues.
- h) Deducting and failing to remit NSSF and NHIF dues.
- i) Overtime and leave allowance not paid as due.

- j) Claims for industrial accident.

The claimant claimed for:

- a) Notice payment Kshs. 5, 000.00.
- b) Less paid on notice in lieu of termination Kshs. 3, 580.00.
- c) Underpayment for 12 years Kshs. 515, 520.00.
- d) Leave allowance for 12-years x 5, 000.00 Kshs. 6, 000.00.
- e) Underpaid leave for 12 years Kshs. 42, 960.00.
- f) 12 months' payment for unfair termination Kshs. 102, 960.00.
- g) Deducted and not remitted NSSF Kshs. 57, 600.00.
- h) Deducted and not remitted NHIF Kshs. 57, 600.00.
- i) Overtime worked not paid....
- j) Total claim Kshs. 845, 220.00.

The claimant prayed for judgment against the respondent for:

- a) Payment of Kshs. 845, 220.00.
- b) A declaration the claimant was employed permanently.
- c) 12-months payment for unfair and wrongful termination.
- d) Certificate of service to issue.
- e) General and special damages for industrial accident.
- f) Payment of overtime.
- g) Leave and house allowance.
- h) Costs of the suit.
- i) Interest in a, b, and c above.
- j) Any other relief the Court may deem just.

The **1<sup>st</sup> issue** for determination is whether the parties were in a contract of service. The respondent denies that he ever employed the claimant. The respondent (RW) testified that he was the Director for Emirates Tyres & Batteries Limited (hereinafter the Company) and he denied that he did not know the claimant. Further that the company was incorporated and registered on 22.09.2008 as per exhibited certificate of incorporation so that it could not have employed the claimant in 2000 as alleged. Further, the company registered as an employer with NSSF per letter dated 22.09.2008 by the NSSF and, deductions for its employees were effective August 2008. The claimant testified that the respondent employed him from 2000. The claimant testified that the demand letter and the Labour Officer's letters were all addressed to the Company and no letter was addressed to the respondent. He confirmed that he had no document confirming the named respondent had employed him. The claimant then testified that the respondent terminated his employment in November 2013 on allegations of poor performance. The respondent has exhibited records of his and the company's employees and the claimant is not one of them.

The Court has considered the evidence and returns that on a balance of probability, the claimant has failed to establish that he worked for the respondent or the company and has failed to establish the alleged contract of employment and its existence. For instance, other than alleging that he was employed by the respondent and testifying as much, he has not provided the date or even month in 2000 when the respondent may have employed him and the duties assigned and salary earned in 2000. Other than referring to the said incident where he was injured at work, he has not accounted for his roles in the respondent's service from 2000 to November 2013 when he says he was terminated on account of poor performance. The accident is alleged to have taken place on 26.09.2005 and it is not clear why the suit was filed on 06.05.2015 long after lapsing of 6 years of limitation for a claim based on contract under the Limitation of Actions Act that was applicable in 2005. Further, after the injury, the claimant appears not to have raised grievances with the respondent as the employer. The termination is then alleged to have been in November 2013 but in any event 12 months of limitation (from date of cessation of the continuing injuries of alleged underpayment, leave payments, overtime and NSSF or NHIF deductions in November 2013) under section 90 of Employment Act,

2007 applies and the claims were time barred when the suit was filed on 06.05.2015.

The Court upholds the respondent's submission that the claimant in his witness statement testified that he was employed by the company in 2000 yet the company had not been incorporated in 2000. Further the respondent's submissions that the claimant testified that he had no documents to show that the respondent employed him. The Court finds it curious that even after the very bad injury in 2005, the claimant had no document implicating the respondent with that alleged injury claim.

The Court finds that there existed no employer and employee relationship between the parties and the suit is liable to dismissal.

In conclusion the memorandum of claim as amended is hereby dismissed with costs.

**Signed, dated and delivered by video-link and in court at Mombasa this Friday 10<sup>th</sup> December, 2021.**

**BYRAM ONGAYA**

**JUDGE**