



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1392 OF 2015**

**VICTOR SENDEU OMWENGA.....CLAIMANT**

**VERSUS**

**GENERAL TIMOTHY MISIANI ORWENYO T/A GMT SERVICES...RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed suit by way of a Memorandum of Claim dated 10/08/2015 for wrongful and or unfair termination of his employment on account of redundancy and non-payment of his accrued dues by the Respondent. He averred that he was employed by the Respondent as a Loader from December 2002 and later became a Storekeeper. That his starting monthly salary was Kshs.5,500/= but as at the date of termination of his employment it had been increased to Kshs.10,000/=. He further averred that he worked for the Respondent daily from 6.00 am to 6.00 pm including Sundays and Public Holidays during the entire employment period and he never went for any annual leave or paid cash in lieu. He further averred that on 30/07/2014, the Respondent unlawfully and without according him, a hearing terminated his employment effective 01/08/2014 and refused to pay his terminal dues. He therefore prayed for the following reliefs:-

a) Salary arrears	Kshs	7,000.00		
b) Pay in lieu of Notice	Kshs.	10,000.00		
c) 12 months' salary for unlawful termination	Kshs.	120,000.00		
d) Accrued Leave	Kshs.	117,500.00		
e) Severance pay @ 15 days per year for 11.75 years)2	Kshs.	58,750.00		
f) Overtime:				
(i) Normal week-(33hours x 52weeks				
x 11.75 years	x	Kshs.120)	Kshs.	2,419,560.00
(ii) Sundays-(13 hours x 52 weeks				
x 11.75 years	x	Kshs.160)	Kshs.	1,270,800.00
(iii) Public Holidays-(13hours			x	11days
x 11.75 years	x	Kshs.160)	Kshs.	268,840.00
<b>TOTAL Kshs. 4,272,450.00</b>				

- g) Certificate of Service.
- h) Costs and interest.
- i) Any other relief this Honourable Court may deem just to so grant.

2. The Respondent filed defence on 17.9.2015 denying any employment relationship with the claimant and the alleged unlawful termination of the said non-existent employment relationship. He further denied the Claimant's entitlement to the reliefs sought in his Claim and averred that he is a total stranger to the muster roll exhibited by the Claimant. He further averred that the claimant with others operated their own garage where he used to take his vehicles for repair and paid them all agreed fee. He therefore prayed for the entire Claim to be dismissed with costs.

3. The Claimant filed a Reply to the Defence on 28.10.2015 denying the allegation that he, together with others operated a garage of their own and reiterated that his relationship with the Respondent was that of employer-employee and not otherwise. He further reiterated that he obtained the said Muster Roll from the Respondent and it was part of the records of his employment made by the respondent.

4. The main issues arising from the pleadings herein are whether there was employment relationship between the parties herein, whether the relationship was unlawfully terminated through redundancy and finally, whether the claimant is entitled to the reliefs sought. During the hearing the claimant testified and called one witness but the respondent never tendered any evidence despite being given adequate opportunity to do so. After the hearing, only the claimant filed written submissions.

### **Claimant's evidence**

5. The Claimant testified as CW1 and adopted his Witness Statement dated 30/06/2018 as part of his evidence in this suit. In brief he stated that he was employed by the respondent in 2002 as a Loader/Store keeper starting with a salary of Kshs.5,500 per month but which was increased to Kshs.10,000. That he was never given a written contract but he worked from 6.00 am to 6.00 pm every day without any off day, public holidays or annual leave as contemplated by the Employment Act and he was never compensated for the overtime worked. He produced copies of Muster roll and Mpesa Statement from the respondent's foreman to prove that he was employed and paid by the respondent.

6. He further testified that at times, the Respondent used to pay him and the other employees' salaries through Mr. Thomas Onchiri Mobagi's Mpesa account (the Foreman) and he in turn paid them in cash upon signing the Muster Rolls which are maintained by the Respondent. That the respondent never remitted any NSSF contributions on his behalf. That he worked for the respondent for 11.75 years until 1.8.2014 when he was dismissed for no offence and without being given a hearing. That the dismissal was done by the respondent through the Foreman's Phone. That before the dismissal, he had not been paid his salary for July 2014. He therefore prayed for reliefs sought in his Claim.

7. CW2, Thomas Onchiri Mobagi, adopted his Witness Statement dated 30.6.2018 as part of his evidence. He confirmed that the claimant was employed by the respondent as a Loader/Storekeeper from December 2002 and denied that they were independent garage operators. He contended that CW1 and all other employees of the Respondent used to sign for payments made to them on the Muster Roll produced in court and other documents which are in the possession of the Respondent. He confirmed that the Claimant was terminated through a call made through him and contended that the termination was without reasonable or justifiable explanation, without notice and without paying him lawful emoluments. He further stated that the claimant worked overtime and never went for his annual leave and he was never compensated for the same.

### **Claimant's Submissions**

8. The Claimant submitted that an employer is obligated under **Section 9 of the Employment Act** to reduce into writing a contract of service which is more than three months or a number of working days in the aggregate amounting to three or more months. That **Section 10(7) of the Employment Act** provides that the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer if the employer fails to produce a written contract in any legal proceedings.

9. He further submitted that the Respondent did not advance to him any valid reason for terminating his employment and that there is a clear absence of justification for the termination as required by **Section 45 and 47(5) of the Employment Act**. That the Respondent has failed the fairness test required under **Section 45(4) (b) of the Act** and that the termination of his employment fell short of the tenets of justice and equity and was contrary to the Rules of Natural Justice. Consequently, he submitted that his employment was terminated by the respondent unlawfully, unprocedurally and unfairly contrary to **Section 45 of the Act**.

10. He relied on **Walter Ogal Anuro –v- Teachers Service Commission [2013] eKLR** where the court held that there must be both substantive justification and procedural fairness for a termination of employment to pass the fairness test. He further relied on the case of **David Gichana Omuya –v- Mombasa Maize Millers Limited [2014] eKLR** where the court held that Section 41 requires an employer to explain to an employee the reasons for terminating their services and to further hear and consider any representation by the employee before terminating them.

11. According to the Claimant, he has proved his case on balance of probability and he should be granted the reliefs sought in his Claim against the Respondent including one month's notice pay pursuant to **Section 36 of the Employment Act** and 12 months' wages for the unlawful termination pursuant to **Section 49(1) of the Act** as read together with **Section 50**. He further contended that he is entitled to accrued leave for 11.75 years at the rate 21 working days per year under **Section 28 of the Employment Act**. He calculated the accrued leave as being **Kshs.10,000 / 30 days x 21 days x 11.75 years = Kshs.82,249.90**.

12. He further submitted that he is entitled to overtime pay and contended that the Respondent did not controvert his testimony that he worked overtime and daily including on rest days and on Public Holidays. He relied on the case of **Evans Katiezo Aligulah –v- Eldomatt Wholesale and Supermarket Ltd [2016] eKLR** where the court held that for the avoidance of doubt, the formula for overtime calculation is provided for under Rule 6 of the Regulation of Wages (General) Order as follows:

**“6. (1) Overtime shall be payable at the following rates -**

**(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;**

**(b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.**

**(2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee’s basic minimum monthly wage.**

**(3) Notwithstanding subparagraphs (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks -**

**(a) one hundred and forty-four hours for employees engaged in night work;**

**(b) one hundred and sixteen hours for all other adult employees.”**

13. Flowing from the foregoing, he computed his overtime claim as follows:

**Normal week hourly rate = 1.5(Kshs. 10,000 x 1/225) =**

**Kshs. 66.60(33hours x 52weeks**

**x 11.75years x Kshs. 66.60)..... Kshs. 1,344,065.58**

**Sundays hourly rate =**

**2(Kshs. 10,000 x 1/225) =Kshs. 88.88**

**(13 hours x 52 Sundays x**

**11.75 years x Kshs. 88.80).....Kshs. 705,973.84**

**Public Holidays hourly rate =**

**2(Kshs. 10,000 x 1/225) = Kshs. 88.88**

**(13hours x 151 gazetted**

**public holidays x Kshs.160) .....Kshs. 174,471.44**

**TOTAL Kshs. 2,224,510.86**

14. Finally, the Claimant submitted that the Respondent never remitted NSSF contributions for him during his service and prayed for service pay pursuant to **Section 35 of the Employment Act**. He also prayed for a Certificate of Service under **Section 51 of the Act** to be issued within a time frame fixed by the Court together with costs and interests.

**Analysis and determination**

The issues for determination are:

- a) Whether the Claimant was in an employment relationship with the Respondent.
- b) Whether the Claimant was unfairly terminated from his employment by the Respondent.
- c) Whether the Claimant is entitled to the reliefs as prayed in the Memorandum of Claim.

**Whether the Claimant was in an employment relationship with the Respondent.**

15. The burden of proving the employment relationship between the parties herein rests on the claimant who alleges that it existed. Section 2 of the Employment Act defines an “employee”, as follows:

***“Employee” means a person employed for wages or salary and includes an apprentice and indenture learner.”***

16. Respondent has pleaded that the Claimant was never his employee but a person who together with others owned a garage where his vehicles used to be repaired at a fee. He further averred that he was simply a customer for repairing services given to him by the Claimant. The Claimant has, however contended that he was employed by the respondent as a Loader and later became Storekeeper. He denied being a mechanic and stated that he was initially employed to load sand in the respondent’s trucks before being deployed to manage the respondent’s store where the trucks were being repaired. The Claimant and CW2 produced a Muster Roll which they used to sign to receive payment from the respondent. They also produced Mpesa Statement for CW2’s telephone number to prove that the respondent paid them as his employees. The respondent never adduced any evidence to rebut the claimant’s evidence.

17. In ***Everret Aviation Limited –vs- the Kenya Revenue Authority [2013] eKLR***, Kimondo J held that the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical in determining whether there exists an employment relationship.

18. After considering the law, the foregoing precedent and the uncontroverted evidence by the claimant and his witness that he was employed by the respondent for monthly salary, I find on a balance of probability that the Claimant was an employee of the Respondent. The said finding is fortified by the Muster Roll produced by the claimant as an exhibit which he used to sign for his salary when being paid by the respondent’s Foremen. The claimant has also produced the Mpesa Statement for the Foreman’s (CW2) phone which shows that the money was sent to the Foreman by the respondent. I therefore dismiss the respondent’s defence that the claimant was an independent contractor for repair services.

#### **Whether the Claimant was unfairly terminated from his employment by the Respondent.**

19. Under section 45(2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) and that it was done after following a fair procedure. A valid and fair reason is one that relates to the employees conduct, capacity and compatibility or based on the employer’s operational requirements. Fair procedure on the other refers, but not limited to according of a fair hearing to the employee before termination.

20. In this case, the claimant contended that he was dismissed via a phone call to CW2 for asking for money to go to hospital. The reason cited was that he (claimant) was disturbing him by asking for money when he did not have any. The claimant contended that the reason cited did not justify termination and the procedure followed was not fair because he was not accorded any hearing before the termination. The said evidence was not controverted by the respondent who did not tender any evidence. He therefore failed to prove a valid reason for dismissing the claimant and he did not prove that he followed a fair procedure before dismissing him as required by section 41 of the Employment Act.

21. Section 41 of the Employment Act provides as follows:

***“41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct ... explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make.”***

22. In view of the uncontested evidence by the claimant and his witness, I must find and that the claimant has proved on a balance of probability that the termination of his employment by the respondent was indeed unfair and unlawful within the meaning of section 45 of the Act.

#### **Whether the Claimant is entitled to the reliefs as prayed in the Memorandum of Claim.**

23. Having found that the termination was unfair, I award the claimant one month salary in lieu of notice plus 10 months gross salary compensation for the unfair termination under **Section 49 read with section 50 of the Employment Act**. In according the said compensation I have considered the claimant’s long service of over 11 years without any disciplinary issues. I have also considered the fact that he never contributed to the termination through misconduct. The claimant computed the claim based on a salary of Kshs.10,000 which I also adopt.

24. The claim for salary arrears of Kshs.7,000 is allowed because it was the cause of the termination of the claimant’s employment. I also award him leave for 11.75 years worked because the respondent never disproved the claim by leave records. However, the claim for severance pay is dismissed because the separation was not through redundancy. Likewise, the claim for overtime is dismissed for being exaggerated and for lack documentary evidence in support. CW2 was the foreman who was able to produce the Muster Roll but failed to produce attendance register to prove the alleged overtime.

25. Finally, I grant the prayer for Certificate of Service which shall be in accordance to section 51 of the Employment Act.

#### **Conclusion and disposition**

26. I have found that the claimant herein was an employee of the respondent within the meaning of section 2 of the Employment Act. I have further found that the said employment relationship was terminated by the respondent unfairly and the claimant is entitled to compensation plus other accrued dues. Consequently, I enter judgment for him against the respondent in the following terms:

Unpaid	salary				Kshs.	7,000
Salary	in	lieu	of	notice	Kshs.	10,000
10	months'	salary		compensation	Kshs.	100,000
Accrued	leave	(11.75	x	21/26x	10,000)	Kshs. 94,903.85
TOTAL						Kshs.211,903.85

27. The said award is subject to statutory deductions. The claimant is also awarded certificate of Service, costs and interest and court rates from the date hereof.

**Dated, Signed and Delivered in Open Court at Nairobi this 26th day of July 2019**

**ONESMUS MAKAU**

**JUDGE**