



**REPUBLIC OF KENYA**

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

**CAUSE NO 747 OF 2017**

**MUSEE KITHU.....CLAIMANT**

**VS**

**AUTO CONTINENTAL LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Musee Kithu was an employee of Auto Continental Limited, working in the position of Truck Driver, from 13<sup>th</sup> March 2013 until 10<sup>th</sup> November 2015. By his Memorandum of Claim dated 15<sup>th</sup> September 2017, he seeks relief for unlawful termination of employment.
2. The Respondent filed a Response on 12<sup>th</sup> October 2017, to which the Claimant responded on 13<sup>th</sup> March 2018.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Director, Arif Pasta.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent on 13<sup>th</sup> March 2013. He earned a monthly salary of Kshs. 22,174. He claims that on 10<sup>th</sup> November 2015, he reported to work as usual but his employment was terminated verbally.
5. The Claimant makes a case of unlawful termination of employment and seeks the following remedies:

- a) One month’s salary in lieu of notice.....Kshs. 22,174
- b) Leave pay for 2 years.....22,174
- c) Service pay for 2 years.....22,174
- d) 12 months’ salary in compensation.....266,088
- e) Overtime for 2 years.....410,000
- f) Public holidays pay.....15,000
- g) Costs plus interest

**The Respondent’s Case**

6. In its Response dated 12<sup>th</sup> October 2017 and filed in court on the same date, the Respondent admits having employed the Claimant as a Truck Driver at a monthly salary of Kshs. 22,174 effective 13<sup>th</sup> March 2013.
7. The Respondent denies terminating the Claimant’s employment and states that the Claimant worked until 26<sup>th</sup> November 2015 when he resigned by giving one day’s notice, instead of the one month’s notice required under his contract of employment.
8. The Respondent claims to have suffered loss as a result of the Claimant’s failure to give adequate resignation notice. The Respondent

accuses the Claimant of malice and sabotage by resigning to join a competitor company as a driver.

**Findings and Determination**

9. Both in his Memorandum of Claim and witness statement filed in court, the Claimant alleges that his employment was unlawfully terminated by the Respondent.

10. However, when he appeared before the Court, he testified that he himself resigned from employment on 26<sup>th</sup> November 2015. He therefore abandoned the prayers for compensation and notice pay.

11. Regarding the claim for leave pay I have this to say; the Respondent as the custodian of employee records ought to have adduced documentary evidence to counter the claim. In the absence of any such records, I invoke Section 10(7) of the Employment Act and allow the claim for leave pay.

12. Having been a contributing member of the National Social Security Fund (NSSF), the Claimant is not entitled to service pay.

13. The Claimant further claims overtime compensation and public holidays. In the final submissions filed on behalf of the Respondent, reference was made to the decision in *Rogoli Ole Manadiegi v General Cargo Services Limited [2016] eKLR* where my brother **Rika J** stated the following:

*“It is true the employer is the custodian of employment records. The employee, in claiming overtime however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee.”*

14. The Claimant made no attempt to explain the sums claimed under the overtime and public holidays limbs. The said claims were therefore unproved and are dismissed.

15. In the end, I enter judgment in favour of the Claimant as follows:

- a) Leave pay for 2 years (22,174/30x21x2).....Kshs. 31,044
- b) Prorata leave for 8 months (22,174/30x1.75x8).....10,348
- Total.....41,392**

16. This amount will attract interest at court rates from the date of judgment until payment in full.

17. Since the Claimant’s claim only succeeds in part, I direct that each party will bear their own costs.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF DECEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ngonze for the Claimant

Mr. Otieno for the Respondent