



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2082 'B' OF 2012**

**GEORGE OGWENO.....CLAIMANT**

**VERSUS**

**AUTOLITHO LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on the 15<sup>th</sup> October 2012 seeking redress for three issues namely, unfair termination of employment, payment in lieu of notice and certificate of service. He averred that he was employed on 9<sup>th</sup> September 1991 as a subordinate staff until 15<sup>th</sup> January 2010 when the Respondent without any justifiable cause unfairly and unlawfully terminated the Claimant's contract without paying him his final dues. It was averred that the Claimant at the time earned Kshs. 270/- per day making a total of Kshs. 8,100/- per month and that on 15<sup>th</sup> January 2010 the matatu he was travelling in was car jacked and he lost Kshs. 25,000/- that was rent payment for one of his co-workers. He averred that the incident was reported to the Police at Shauri Moyo Police Station and to the Respondent's director Mr. Amit Chotai who orally terminated his services. He averred that he was entitled to notice and reasons for the termination and an opportunity to be heard. He averred the dismissal was unfair as he had diligently served the Respondent for 18 years to the best of his ability. He thus sought payment of salary in lieu of notice Kshs. 8,100/-; overtime for 18 years Kshs. 174,960/-; rest day per week for 18 years Kshs. 233,280/-; unpaid annual leave for 21 days for 18 years Kshs. 102,060/-; service for 18 years at the rate of 15 days for each year worked Kshs. 72,900/-; and compensation for one year Kshs. 97,200/-. He averred that he sought audience with the Respondent but the Respondent arrogantly and contemptuously declined, ignored and/or refused to make good the Claimant's claim. The Claimant sought the payment of the sums above as well as costs of the suit and a certificate of service. The Respondent filed a memorandum of reply on 23<sup>rd</sup> April 2013 and in it averred that service pay was not payable as the Claimant was paid for every year worked for all the years worked. It was averred that all the overtime worked if any was paid at the end of each month and hence no overtime days were pending payment. The Respondent averred that the Claimant absconded from his employment. The Respondent averred that the claim was defective did not disclose a cause of action. The Respondent averred the Claimant was a casual who absconded from duty because of gross misconduct, dishonesty and misappropriation and the Respondent claimed the Kshs. 25,000/- lost whilst in the possession of the Claimant. The Respondent thus urged for the dismissal of the claim with costs.

2. The claim was heard partly by Rika J. on 3<sup>rd</sup> October 2013 where the Claimant testified that he had been employed by the Respondent from September 1991 and was not issued with a letter of employment. He stated that he worked for 9 hours a day from 8.00am to 5.45pm and was robbed alongside other passengers in a matatu on 15.1.2010. In cross-exam he testified that he worked 24 days in a month and thus claimed overtime for 18 years. He stated that he did not make a demand on the employer during those 18 years. He denied that he absconded from work and that he was going to pay his supervisor's rent in the CBD when he was robbed.

3. The case went into hiatus from then till a notice to show cause was issued in mid 2017 by the Court serving a Notice to Show Cause why the suit should not be dismissed for want of prosecution. The parties offered to proceed with defence case which proceeded on 30<sup>th</sup> November 2017. The defence called Joyce Mumba Munuhe a personal assistant to the director. She testified that she knew the Claimant who had worked for about 4 years. She stated that staff would report at 8.00am, work till 5.45pm with a 45 minutes lunch break and also worked on Saturdays which was overtime and it was only if there was extra work that people worked on holidays. She testified that the Claimant never returned after he was told to bring the Occurrence Book. In cross-examination she testified that she was not the one who employed the Claimant, that she joined the Respondent in 2006 and was not sure when the Claimant joined the Respondent. She stated that she was not responsible for the termination of the Claimant which was on account of the loss of cash he was to pay as rent. She stated that the Claimant was a messenger and that normally a company vehicle was used to take cash to the bank and on that day the Claimant went by matatu. In re-examination she stated that she could not say that the Claimant was terminated and that he was told to bring the OB and he did not return.

4. The Claimant filed submissions on 11<sup>th</sup> December 2017 and the Respondent filed their submission on 15<sup>th</sup> December 2017. The Claimant submitted that he had a clean record but all hell broke loose when he was asked to pay rent for one of the staff and lost the Kshs. 25,000/- entrusted to him and that his termination was unfair and unlawful. He submitted that the Respondent breached the provisions of Section 37 of the Employment Act as the Claimant worked for 18 years as a casual. The Claimant submitted that the evidence of the Respondent's witness was to be treated with caution as she stated the Claimant had worked for 4 years yet she found him in the employment of the Respondent when she was employed. The Claimant submitted that he had been banking money for 6 months and had not stolen or misappropriated it. He submitted that it was the role of the company accountant to bank or deliver company funds and that the Respondent should have investigated and checked with the police station to confirm if the incident had occurred. The Claimant submitted that the Respondent did not hear the Claimant or carry out proper investigations. The Claimant submitted that there was no fair hearing before the termination. The Claimant relied on the case of **Ezekiel Mburu Kangethe & Others v Mugoiri Five Farmers' Co-operative Society Limited Nyeri Cause No. 146 of 2015** (unreported) for the proposition that failure to give reasons for the termination renders the dismissal unlawful. Reliance was also placed on the case of **Grace Muthoni Gitonga v Rosa Project Nairobi Cause No. 264(N) of 2009** (unreported) where the court held that termination without notice of at least one month violated the rights of the claimant as employee and was unlawful as contemplated under Section 45 of the Act. The Claimant cited the case of **Martin Wekesa Wamalwa v Barrow & Grundy (Ukunda) Limited [2013] eKLR** where the court held that summary dismissals are also subject to the procedural fairness requirements of Section 41 of the Employment Act.

The Claimant thus submitted that he was entitled to the prayers in his claim as the Respondent had failed to observe the strictures of the law.

5. The Respondent submitted that the Claimant was employed as a messenger until 15<sup>th</sup> January 2010 when he was sent to deposit Kshs. 25,500/- which was rent for one of the staff of the Respondent and the Claimant came back several hours later alleging that the matatu he had boarded was carjacked by thugs and the money stolen from him. The Respondent submitted that the Claimant was informed by the director to go and report the matter to the Police and did not bring back the OB until he filed the suit claiming that he was terminated without fair trial. The Respondent submitted that the Claimant did not provide any evidence from the Police station that he had reported the matter by way of a stamped notification of report. The Respondent submitted that it was clear the Claimant stole the money that entrusted to him and came up with the carjacking story as a cover up. The Respondent submitted that the Claimant was not entitled to the reliefs claimed as he absconded from work and as a casual was not entitled to the leave for 21 days for 18 years. The Respondent relied on the case of **Davis Sokoto Nanyamal v Church World Service (CWS)/Resettlement Support Centre (RSC) Africa [2017] eKLR** where the court dismissed the claim.

6. The Claimant claimed that his dismissal was unfair and unlawful. He asserts that he was robbed in a matatu while on his way to pay rent in the CBD for a co-worker. The Claimant seeks overtime for 18 years, leave for 18 years, rest days for 21 years as well as one month's salary in lieu of notice and compensation for the dismissal. The Claimant's claim for dues for 18 years is misplaced as the considerable portion of those claims is woefully time barred. Under Section 90 of the Employment Act, there is no room for survival of a claim beyond the 3 years limitation period. In other words, the Claimant could only claim for any dues he feels he was entitled to within 3 years of the breach. In the case before me, he asserts he was entitled to overtime for 18 years, rest days and leave days. No evidence of any claim being lodged by way of a request for payment was exhibited. No records were produced to show that even for the period the Claimant was within his rights to raise the issue of underpayment or leave denial was produced. I find that under the heads of the claim for leave, overtime and rest days no evidence was led and I dismiss them. As regards the employment, the Claimant alleged that he was orally dismissed by Mr. Chotai. He was given some money to bank and the cash was allegedly stolen from him. No record of the Police report was availed to lend credence to the Claimant's narrative. If indeed he was robbed, why did he not show evidence of forwarding the OB to the Respondent? Why did he not have a record of the Police report? Why did he not report the dismissal to the Labour office in terms of Section 47 of the Employment Act? The Claimant had a burden to discharge in regard to his claim under Section 47(5) of the Employment Act which provides as follows:-

*47.(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination shall rest on the employer*

7. On the basis of the evidence tendered, it is clear that the Claimant did not discharge his evidentiary burden and on a balance of probabilities I find that the Claimant absconded from work. He never returned to produce the report that was sought for the loss he alleged to have suffered in the hands of some thugs in matatu. In the final analysis I dismiss the claim but order each party to bear their own costs.

It is so ordered.

**Dated at Nairobi this 10<sup>th</sup> day of January 2018**

**Nzioki wa Makau**

**JUDGE**

**Delivered at Nairobi this 22<sup>nd</sup> day of January 2018**

**Radido Stephen**

**JUDGE**