



**REPUBLIC OF KENYA**

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

**CAUSE NO. 676 OF 2013**

**(Before Hon. Justice Mathews N. Nduma)**

**MESHACK KIMEU MUSYIMI.....CLAIMANT**

**VERSUS**

**UPPER HILL SPRINGS RESTAURANT LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The suit was brought vide a Memorandum of Claim on 14<sup>th</sup> May, 2013 seeking General Damages for alleged unlawful termination of employment and payment of terminal benefits to wit arrear salary for January to March 2013 at the rate of Kshs.14,000 per month, grant of certificate of service and costs of the suit.
2. The Claimant relies on the Memorandum of Claim and annexures thereto. The Claimant also filed list of documents on 20<sup>th</sup> April, 2016 in further support of the claim.
3. The Claimant chose not to testify in this matter and only filed written submissions.
4. The Claim is opposed vide a memorandum of Response and a Counter Claim filed on 10<sup>th</sup> June, 2013. The Respondent admits employment particulars of the Claimant and denies all other elements of claim in the Memorandum of Claim. The Respondent avers that the Claimant and others lost five crates of beer worth Kshs.22,500 and when asked to pay the lost beer, the Claimant and others absconded from work.
5. The Respondent prays that the suit be dismissed and the court directs the claimant to pay Kshs.22,500 for the lost beer and payment of Kshs.14,500 in lieu of notice because he absconded from work.
6. The Respondent did not adduce any evidence in opposition to the claim nor in support of the counter claim. The Respondent prays that the suit be dismissed with costs and the counter claim be allowed.

**Determination**

7. Section 107(1) of the Evidence Act, Cap 80 of the Laws of Kenya provides:-

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

8. Further, section 108 provides:-

“the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

9. In this case, both parties chose not to give any evidence at all. Pleadings, which are denied by the other party do not constitute evidence to prove alleged facts.

10. The Claimant has in terms of section 47(5) of the Employment Act, 2007 the burden of proving that the termination of employment was wrongful so that the burden shifts to the employer to rebut that evidence by adducing evidence that justifies the termination in terms of section 43 of this Employment Act which provides that the Employer shall prove the reason for the termination of employment.

11. The claimant is the person who loses, when no evidence is led at all and indeed has failed to prove on a balance of probabilities that the termination of his employment was wrongful.

12. The Claimant has equally failed to prove that he was owed any arrear salary by the time he separated from the employer.

13. The entire claim is dismissed except the prayer for grant of certificate of service because the fact of employment is not denied by the Respondent.

**Counter Claim**

14. The Respondent failed to prove the counter claim on a balance of probabilities having failed to adduce any evidence in support of the Claim. The Counter Claim is also dismissed.

15. The final orders of the court are as follows:-

The entire suit and counter claim are dismissed except the prayer for grant to the Claimant by the Respondent of Certificate of Service. The Respondent is directed to issue Certificate of Service to the Claimant within 14 days of Judgment.

Each party to bear the costs of the suit.

**Dated and Signed in Kisumu this 2nd day of May, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 30th day of May, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Muiav & Co. Advocates for Claimant

Mr. Koceyo & Co. Advocates for Respondent

Anne Njung'e – Court Clerk