



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 892 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 13<sup>th</sup> June, 2018)**

**DAUDI NGUMI MUTEVU.....CLAIMANT**

**VERSUS**

**KAMILI PACKERS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit on 25<sup>th</sup> May 2015 through the firm of Kangethe Waitere & Co. Advocates seeking payment, 1 month salary in lieu of notice, unpaid salaries, payment for leave days, overtime pay as well as compensation for wrongful termination.
2. He avers that he was employed by the Respondent on permanent basis on 8<sup>th</sup> April 2013 as a driver at a monthly salary of Kshs. 15,500 and on or about 7<sup>th</sup> January 2015 the Respondent without any just cause and/or excuse and without giving any notice or reasons whatsoever unlawfully and wrongfully terminated his employment which was irregular, unprocedural and in breach of the law and tenets of natural justice.
3. He further avers that, after the termination, the Respondent refused and/or failed to pay him his salary for the days he worked in the month of January 2015 and also refused to pay his terminal dues, he states that during the time of his employment, the Respondent made unlawful deductions of his salary from time to time during the year 2013 and 2014 and that the total amount deducted is Kshs. 33,513.80. He also states that the Respondent made him work overtime without pay for an aggregate total of 46.5 days.
4. He avers that during the time of his employment, the Respondent refused and/or failed to allow him to proceed on his annual leave and the Claimant claims for payment of the leave days accrued during the tenure of his employment.
5. He states that he was on permanent terms of employment and entitled to work with the Respondent until his retirement age of 60 years but due to the unlawful action of the Respondent, he has lost 13 working years and despite demand being made and notice of intention to sue having been given, the Respondent has refused, failed and/or neglected to make good this claim.
6. The Respondents filed a Reply to the Memorandum of Claim and Counter Claim where they admit that the Claimant was their employee where he was engaged as a driver from 8/8/2014 until 7/1/2015 when he absconded from work without leave and hence it did not owe the Claimant any terminal dues. Instead the Respondent demands from the Claimant a total of Kshs. 28,500 being 1 month's salary and special advance paid to him. They aver that he only worked for 4 days in January which he is entitled to which and will be deducted from the aforesaid amount he owes the Respondent.
7. They aver that there were no unlawful deductions from the Claimant's salary and continue to state that any deductions were lawful either on account of unexplained absence from work or pay off loans and salary advances that the Claimant had obtained from the Respondent.
8. They further aver that the Claimant went on paid leave in 2013 and utilized his 2014 leave to offset the number of days he had been absent from work in that year without permission and for which he had full salary. That he also never worked beyond the maximum hours to qualify for overtime pay. The Respondent further states that it was paying dues to the National Social Security Fund for the Claimant and therefore he is not entitled to severance pay.
9. The Respondent therefore urges the Court to dismiss the Claimant's claim with costs and further award the Respondent the sum of Kshs. 28,500 as per their Counterclaim.
10. The Claimant filed a Reply to the Memorandum of Defence and to the Counterclaim where he reiterates the contents of his Memorandum

of claim in its entirety. He denies absconding from work and deserting employment and puts the Respondent to strict proof. He avers that he was never issued with a company phone for his use at all. He also denies being issued with a warning letter by the respondent during his employment and does not owe the respondent any amount whatsoever.

11. He further avers that the Respondent deducted amounts from his salary and deny taking any loans or salary advances from the Respondent, he also states that he was never paid any leave days in 2013 neither did he go on leave in 2014 as alleged and that the Respondent acted out of malice and the termination is unlawful and unfair therefore he should be entitled to the amounts claimed.

12. He avers that he does not owe the Respondent the alleged amount of Kshs. 28,100 or any sum at all and as such he prays that the respondent's answer to the memorandum of claim and counter claim be dismissed and judgement entered as prayed in the claim.

13. The Claimants filed his submissions where he submits that his termination was unlawful and wrongful as the Respondent did not call any evidence and completely failed to discharge this burden and the only logical conclusion is that the termination was unfair he relied on the case of **Fredrick Muithis Thuita Vs Five Fourty aviation Limited (2013) eKLR.**

14. He avers that he had worked for the Respondent for 1 ½ years and is therefore entitled to be paid at least 15 days pay for the complete year worked. He also states that he worked for 7 days in the month of January 2015 for which he was never paid upon termination which he is entitled to as well as unpaid salary for the month of April 2013.

15. He further avers that payment for leave days accrued for the 2 years and overtime pay which is clear from his work schedule produced clearly proves that on several occasions the Claimant reported to work as early as 6 am and sometimes left work as late as 9 pm yet he was never paid for the overtime worked which accrued to 46.5 days. He also claims for unlawful deductions of salary in the stated months in his statement of claim and humbly urge the Court to allow the same as prayed with costs and interest.

16. The Respondents did not file their submissions as ordered by the Court.

17. I have examined the averments of both parties and submissions by the Claimant. This issues for determination are as follows:-

***1) Whether the Respondent had valid reasons to terminate the services of the Claimant.***

***2) Whether the Respondent followed due process before dismissing the Claimant.***

***3) Whether the counter claim is proved.***

***4) What remedies to grant in the circumstances.***

18. On the 1<sup>st</sup> issue, the Respondents aver that the Claimant absconded duty on 7/1/2015. The Respondent do not however explain why they did not write a letter to him at his known address. The Respondent attached Appendix 1(b) to their response but there is no certificate of posting attached as such there is no evidence that they indeed wrote the letter to him or even posted it.

19. The Claimant wrote a demand notice to the Respondents on 9/3/2015 after the letter of 16.1.2015. The Respondents never replied to indicate that the Claimant had absconded duty.

20. The Respondents also never served the Claimant with any letter of termination on account of absconding duty.

21. The Claimant gave evidence in Court and stated that he was dismissed verbally on 7/1/2015. The Claimant also called evidence and stated the same facts. He stated that he was chased away from work.

22. The Respondent on their part failed to call any evidence and also never filed any submissions. In their case then, the evidence of the Claimant remained uncontroverted. In Civil of Appeal No. 140/2008 at Nairobi **JJA Visram, Mwilu (as she then was) and Otieno Odek** rendered themselves as follows:-

***“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence”.***

23. The Respondent never gave evidence and the documents on the file remain just hearsay evidence and so cannot be relied upon by the Respondent. In thus follows that the evidence of Claimant remains uncontroverted as the Respondents never submitted any evidence before Court.

24. In this case then I find that the Respondents had no reason to dismiss the Claimant as stated and there contention that he absconded is not true.

25. On the 2<sup>nd</sup> issue, the issue of due process does not arise as none was carried out as envisaged under Section 41 of Employment Act.

26. The Respondent made a counter claim against the Claimant but never led any evidence to prove the same and therefore the counter claim is not prove and the same is dismissed accordingly.

27. It is therefore my finding that the Claimant was unlawfully and unfairly dismissed by the Respondent and I find for him and award him as follows:-

*1. 1 months' salary in lieu of notice = 15,500/=.*

*2. Unpaid salary worked for 7 days in January 2015 = 3,617/= .*

*3. Leave accrued for 2 years = 21,700/=.*

*4. Unpaid salary for the month of April 2013 = 15,500/=.*

*5. Overtime pay equivalent to 46.5 days = 48,081/=*

*6. 6 Months' salary as compensation for unlawful termination = 6 x 15,500 = 93,000/=*

*Total = 197,398/=*

*7. The Claimant should also be issued with a certificate of service and Respondent should pay Court fees and interest at Court rates with effect from the date of this judgement.*

**Dated and delivered in open Court this 13<sup>th</sup> day of June, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties