



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE. NO. 2495 OF 2017**

**GILBERT JEDIDAH OGANGO.....CLAIMANT**

**VERSUS**

**J.A.B ORENGO ADVOCATES.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim for terminal benefits, accrued salary plus compensation for unfair termination of the claimant's contract of service by the respondent in February 2016. It is the claimants case that the respondent unlawfully failed to pay his salary for 17 months forcing him to opt to leave the employment. In total he prayed for Ksh.947,500 made up of 17 months salary arrears at Ksh.20,000 per month, one month salary in lieu of notice. House allowance for the 89 months served, 12 months salary compensation for unfair termination, severance pay and General damages for Career Injury.

2. The respondent has denied having been in any regular employment relationship with the claimant and averred that the claimant was a part-time employee engaged as and when his services were required to be done simultaneously with his other gainful employment he had elsewhere. He therefore denied the alleged unfair termination and non payment of salary to the claimant and prayed for the suit to be dismissed with costs.

3. The suit was heard on 3.5.2018. When the claimant testified as Cw1 and called M/s Veronicah Achieng Odipo as Cw2. However, the respondent never attended the hearing but only sent his counsel to represent him. After the hearing counsel for both parties filed written submission.

**Claimant's Case**

4. Cw1 testified that he was employed by the respondent as a Court Clerk in September 2008 but he was never given a written contract of employment. He however produced a letter dated 7.12.2009 written by the respondent's Administrator Mr. Thomas Odhiambo Nduku to the Immigration Officer which acknowledged him as an employee of the respondent. He stated that his starting salary was Kshs.15,000 but in January 2011 it was increased to Kshs.20,000 per month. He contended that he worked continuously and his salary was being paid at the end of the month in arrears. He further contended that he was assigned an office at the Law firms premises where his duties included filing in the office, preparation of court documents, filing documents in court and service of process. He was reporting to M/s Julie Soweto the Senior Associate and the respondent paid for all his costs of travelling and court filing. He maintained that the said Administrator and the Senior Associates were the signatories to the respondent's Bank Account.

5. Cw1 further testified that from mid 2013, the respondent started delaying salary to him and all the other employees. He testified that in his last 17 months he was not paid any salary except on 29.2.2016 when he was paid Kshs.20,000. He stated that by then his salary arrears stood at 18 months forcing him to resign in February 2018 on account of the delayed salary. He further testified that before the resignation he spoke to Mr. Orengo personally and learned from him that he had cleared the salary arrears for all the other employees except for himself. He therefore prayed for reliefs sought in the suit.

6. On cross examination, Cw1 admitted that he was never served with a termination letter but he resigned from the employment. He however contended that he was in a way terminated by the employer considering the circumstances of his resignation. He relied on the Bank slips to prove that he was receiving salary from the respondent. He explained that he had a loan from the respondent which was being recovered from instalments of Kshs.2,000 per month.

7. Cw2 testified that she joined the respondent as an intern on 9.1.2012 attached to Miss Julie Soweto Advocate as her pupil master. She further testified Miss Soweto introduced the respondent's staff to her including the claimant who was working as a Clerk and whose office

was directly opposed the main Reception. She further testified that in her first 2 weeks, she was placed under the claimant to learn about office filing system, courts, libraries, filing and serving documents and letters to various officers among other things related to pupillage. She contended that she followed the claimant around as he performed the said duties assigned to him by the respondent. She further contended that the claimant like the rest of the staff worked daily all the year round until December when the firm used to close down.

8. Cw1 further testified that she continued in the respondent's firm until 20.11.2012 when he was admitted to the Bar and thereafter worked as an Advocate until 6.9.2013 when she resigned for nonpayment of salary for two months. She contended that the respondent never used to issue appointment letter to his employees and was paying salary by cheque but without any payslips. She further contended that the claimant like the other employees was being paid at the end of the month.

9. On cross examination, Cw2 maintained that she was introduced to the respondents clerks and secretaries when she joined the respondent. She contended that she interacted with the staff including the claimant while serving as a pupil and associate advocate. She further stated that at one time she was running the firm when Mr. Orengo was appointed a Cabinet Minister. She concluded by stating that she asked for an appointment letter but it was not issued and she learned that the rest were serving without.

### **Analysis and Determination**

10. After careful consideration of the evidence and the submissions filed the following issue are for determination:

- (a) Whether there existed any contract of service between the parties herein;
- (b) Whether the said contract of service was unfairly terminated by the respondent;
- (c) Whether the reliefs sought should be granted.

### **Contract of Service**

11. Section 2 of the Employment Act defines contract of service and an employee as:

***“an agreement, whether oral or written, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include foreign contract of service to which part III of this Act applied;***

***Employee means an individual employed for wages or salary and includes an apprentice and an indentured learner;”***

12. The respondent has denied the employment relationship in his defence and written submissions but he has not tendered any evidence to counter the oral evidence by the claimant and his witness. It is a well settled principle of the law that written pleadings and written submissions filed by counsel cannot rebut oral evidence tendered by the other party in an adversarial litigation. Consequently, I dismiss the defence and written submissions filed by the defence counsel and proceed to find that the claimant has proved on a balance of probability that he was employed by the respondent under a contract of service within the meaning of section 2 of the Act.

13. The claimant and his witness have tendered evidence to prove that he was employed continuously for a monthly salary of Kshs.15,000 per month which was later increased to Kshs.20,000 per month; that he was working from the respondent's office premises; that he was working under the instructions and control of the senior Associate in the firm to whom he was reporting; that all travel and filing expenses were paid for by the respondent; and that he was personally doing duties which related to the core business of the respondent. The said evidence meets the common law description of an employee under a contract of service which I discussed in ***Aloys Obuya Abuje & 5 others Vs Krystalline Salt Ltd [2016]eKLR*** cited by the respondent herein. In the said case I set out the ingredients of an employee at common law as follows:

- (a) *he is required to comply with the employer's instructions about when, where and how he must work;*
- (b) *he has been trained by the employer to gain experience for purposes of working for the employer;*
- (c) *he has been integrated into the business operations of the employer so that he is subject to the direction and control of the employer*
- (d) *he must render services personally;*
- (e) *he has assistances, hired, supervised and paid by the employer;*
- (f) *he has worked continuously for a long time;*
- (g) *he has specific working hours set by the employer;*
- (h) *he is working substantially full-time for the employer and is not free to work for other employers;*
- (i) *he performs work in the employer's premises.;*

- (j) *he is required to submit regular oral or written report to the employer;*
- (k) *he has his business trips or travel expenses paid for by the employer;*
- (l) *he has tools, materials and other requirement met by the employer;*
- (m) *he is easily dismissed at the will of the employer;*
- (n) *he has the right to terminate his contract without incurring any liability.*

### **Unfair termination**

14. Under section 49 of the Act, termination of the employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair reason. In this case, the claimant has contended that the respondent failed to pay his salary for 17 months without any justification forcing him to resign from the job. If I understand the claimant well, he contended that his resignation was not voluntarily but due to the circumstances occasioned by the respondent when he withheld salary for 17 months. It was therefore his case that he was constructively terminated by the respondent after he persistent with the failure to pay his salary for said months.

15. It is now trite that constructive termination of contract of service occurs when the employee is forced to resign from his employment after he is prevented to continue discharging his part of his contract by the employer through a repudiatory breach of the contract including but not limited to non payment of salary after it falls dues. In this case the claimant's evidence that his salary was withheld for over 17 months has not been rebutted by the respondent. Likewise the evidence by Cw2 that she also resigned from the respondent's employment for nonpayment of salary and that it was only paid after threatening to sue has not been rebutted. Consequently, I find and hold that the claimant's contract of service was constructively terminated by the respondent in February 2016. The said termination was unfair within the meaning of section 45 of the act because the respondent was not tendered any evidence to discharge his burden of proving that the termination was grounded on a valid and fair reason and that it was done after following a fair procedure.

### **Reliefs**

16. Under section 49 of the Act, I award the claimant Kshs.20,000 being one month salary in lieu of notice plus Kshs.240,000 being salary for 12 months' salary compensation for unfair termination. In awarding the said compensation, I have considered the length of service by the claimant and the fact that he did not contribute to the termination through misconduct.

17. I further award him the unrebutted claim for 17 months salary arrears amounting to Kshs.340,000. However, the claim for House allowance is dismissed for lack of evidence. Likewise, the claim for severance pay is dismissed because the termination was not through redundancy under section 40 of the Act. Finally, the claim for General damages for Career Injury is dismissed for lack of any legal basis.**Conclusion and Disposition**

18. For the reason that the claimant's contract of service was unfairly terminated by the respondent, I enter judgment for him in the sum of Kshs.600,000 plus cost and interest at court rates from the date hereof till payment in full. The said award shall be subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018**

**ONESMUS N. MAKAU**

**JUDGE**