



**REPUBLIC OF KENYA**

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

**CAUSE NO.1570 OF 2014**

**MACORIUS ODHIAMBO ONYANGO..... CLAIMANT**

**- VERSUS -**

**SENIORS DRIVING SCHOOL LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 2<sup>nd</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 09.09.2014 in person. He claimed for:

- 1) An order that the respondent to issue certificate of employment to the claimant.
- 2) An order that the respondent to pay the claimant Kshs. 489, 599.65 being underpayment of wages Kshs.77, 533.10; balance of 6 days wages Kshs.2, 542.85; balance of notice pay Kshs.3, 685.70; annual accrued leave for 17 months (29.75) days Kshs.22, 575.00; 1632 hours overtime worked Kshs.147, 034.60; and 12 months' salary compensation Kshs.236,228.40.
- 3) Costs of the action.
- 4) Interest at Court rates.
- 5) Any other relief the Court may deem fit to grant.

The statement of defence was filed on 07.10.2014 through Kiarie Njuguna & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The parties agree that they were in employment relationship from 01.11.2010 to 31.12.2011.

The **1<sup>st</sup> issue** for determination is the capacity or position the claimant was employed to serve. The claimant alleges he was employed as a panel beater or painter grade I. The respondent says that the claimant was employed an untrained artisan. The claimant testified that he trained at National Youth Service but he did not complete the training due to some dispute. He confirmed in his evidence that he had no trade test certificate. The Court returns that his claim that he was a panel beater or painter grade I will therefore collapse. He was employed as untrained artisan as urged for the respondent.

The **2<sup>nd</sup> issue** for determination is whether the claimant's contract of service was unfairly terminated. The claimant had written on 08.11.2011 resigning due to unresolved grievances such as doubling of the off days when he went only for one off day. After discussions he rescinded the resignation and continued to work. His employment was subsequently terminated by the letter dated 07.03.2012 by giving of 30 days' termination notice in accordance with section 35 of the Employment Act, 2007. He would be paid all his dues by 06.04.2012. He was then paid Kshs.16, 667.00 and he acknowledged receipt by signing on 07.04.2012 and confirmed he had no other claims against the company. The Court returns that the respondent was entitled to terminate by giving the notice as envisaged in section 35 of the Act and the termination has not been shown to have been unfair in any material respect.

The claimant prays for underpayment, and overtime over the period served and the **3<sup>rd</sup> issue** for determination is whether he is entitled as prayed for. The termination was on 07.04.2012 and the suit was filed on 09.09.2014. The Court finds that the claims were with respect to a continuing injury whose cause of action accrued on 07.04.2012 upon their cessation thereof. Under section 90 of the Act, the cause of action was filed outside the 12 months period of limitation. The prayers will fail.

To answer the **4<sup>th</sup> issue** for determination the Court returns that the claims for 6 days wages, balance of notice pay, and any outstanding leave

were clearly subject of the discharge signed by the claimant on 07.04.2012 and the claimant is bound and cannot go back on the discharge for these specific matters parties agreed upon under the discharge agreement. The Court considers that at an earlier time the claimant had resigned but the respondent got him to stay on which must have prompted the claimant to feel injured by the ensuing sudden termination under section 35. In that consideration, each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for the dismissal of the claimant's suit with orders that each party to bear own costs of the proceedings.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 2<sup>nd</sup> November, 2018**.

**BYRAM ONGAYA**

**JUDGE**