



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO 1943 OF 2015**  
**(Formerly High Court Civil Appeal No. 93 of 2008)**

**(From Judgment of Acting SPM in Nairobi RMCC No. 11810 of 2006)**

**PELICAN HAULAGE CONTRACTORS LTD.....APPELLANT**

*Versus*

**JOEL KINYANJUI KANG'ETHE.....RESPONDENT**

**Mr. Deya for Appellant**

**Mr. Kibunja for Respondent**

**JUDGMENT**

1. Being dissatisfied with the Judgment of the Honourable Miss E. Maina, Acting Senior Principal Magistrate in Nairobi RMCC No. 11810 of 2006, the Appellant filed the appeal based on grounds that may be summarized as follows;

- i. The Learned Magistrate erred in law and fact in finding that there existed a contract of employment between the Respondent and the Appellant
- ii. That the Magistrate erred in law and fact in finding that the Respondent was unlawfully dismissed from employment by the appellant; and
- iii. The Magistrate erred in law and fact in holding that the special damages sought had been sufficiently proved.

2. The Appeal is opposed by the Respondent vide written submissions filed on 17<sup>th</sup> November, 2015.

3. In the main, the Respondent submits that he had proved on a balance of probabilities, that there was a contract of employment between the parties; that his employment was unlawfully terminated by the Appellant and that the special damages he had sought in the Plaintiff were duly owed to him by the Applicant.

4. That the onus of proof was discharged by the Respondent vide oral testimony under oath, which evidence was not rebutted at all by the Appellant having chosen not to tender any evidence in rebuttal.

That the Statement of Defence contained bare denials and could not sufficiently rebut the credible and cogent evidence adduced by the Respondent in court.

### **Determination**

5. On the issue whether or not there existed a contract of employment between the Respondent and the Appellant, the Appellant in its Statement of Defence dated 16<sup>th</sup> January, 2007 admitted that the Respondent was its employee from 1<sup>st</sup> March, 2004. The learned Magistrate needed not go any further on this matter. The Appellant cannot therefore fault the finding of the court aquo in this respect.

6. With regard to the second ground of Appeal that the Claimant did not establish that his employment was unlawfully terminated, Learned Magistrate evaluated the sworn testimony of the Respondent to the effect that, he was employed as a truck driver by the Applicant earning a salary of Kshs.14,000 per month. That he was not given a letter of employment. That on 11<sup>th</sup> February, 2006, he was at a petrol station while driving motor vehicle KAR 304X. That, an empty container was blocking his path as he prepared to leave the petrol station. That there was no driver in the other truck and so he decided to move it as the driver had left the keys inside.

7. That the Respondent had meanwhile not removed the ignition key from his truck as he simply wanted to move the obstacle quickly. However, his turn boy by the name of Shihudu, drove the truck and it collided on the truck he had just moved.

8. That the turn boy was arrested for causing the traffic accident. The Appellant summoned the Respondent to Nairobi and his employment was terminated without notice and was told to go wherever he knew. This was after the Appellant had been told to change his Statement of Defence at the police station to reflect that it was him who was driving the truck and not the turn boy and he had declined to do so.

9. The learned Magistrate captured this evidence accurately in her Judgment and found that the Appellant did not adduce evidence in rebuttal and therefore, the Respondent's evidence is uncontroverted. The Magistrate also expressed surprise that the Appellant, after admitting in the Statement of Defense that the Respondent was its employee purported to deny this issue in its final submissions.

10. With regard to the issue of special damages pleaded by the Respondent in the Plaint, the learned Magistrate correctly found that, no evidence was adduced to rebut the claims and therefore, the Respondent, had discharged his onus in this regard.

11. The learned Magistrate stated

*“A fact that is expressly admitted need not be proved. I am indeed satisfied that the Plaintiff's evidence is uncontroverted and proceeded to enter Judgment in his favour against the Defendant for a sum of Kshs.47,830”.*

12. The court cannot fault this finding by the learned Magistrate.

13. In the case of **Geoffrey Omondi and Another Vs Emergency Assistant Radio Service Nairobi HCC of No. 340 of 1997 Waki J**) at page 3 stated;

*“what amounts to strict proof must of course depend on the circumstances as was stated in Ratcliffe's case, namely the character of facts producing the damage and the circumstances under which those acts were done and we would include the circumstances which the Claimant finds himself operating in after say a road traffic accident. If, for instance, there would be evidence that following a road traffic accident the Claimant was admitted in hospital. That he paid hospital charges but lost receipts issued to him following the treatment then it would be,*

*“the Vainiest pendency” to insist that only production of the receipts would constitute strict proof”.*

14. This court agrees with the rendition by the learned Judge. In the circumstances of this case, there is uncontroverted evidence by the Respondent that he was not given a letter of employment nor was he given a letter of termination. The oral testimony by the Respondent sufficed to prove that he earned a monthly salary of Kshs.14,000 and was therefore entitled to payment of Kshs.14,000 in lieu of notice. That he was not paid the salary for the days worked in the month of February 2006 when his employment was terminated on 15<sup>th</sup> February, 2006 in the sum of Kshs.7,000. He was entitled to payment in lieu of leave days not taken in the sum of Kshs.12,830 and the Appellant had held a deposit equivalent to one month's salary in the sum of Kshs.14,000 and the Respondent was entitled to a refund of the same.

15. These special damages were proved on a balance of probability in the absence of any contradictory evidence from the Appellant and the learned Magistrate made a correct finding accordingly. It is not enough for the Appellant to fault the finding only on the basis that the claims were not substantiated by documentary evidence.

16. In conclusion, the court further refers to the Decision of **Justice Madan** (as she then was) in **CMC Aviation Ltd Vs Cruisar Ltd (No. 1) [1978] KLR 103 at 104** and quoted with approval by **Chemetai J.** in **Robert Ghonzi Kimani Vs David Bire Khise and Another (2013) eKLR**, when he observed that;

***“The pleadings contain the averments of the three parties concerned. Until they are proved or disapproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”***

17. The learned trial Magistrate correctly found that all the material aspects of the case had been sufficiently proved by either the admission of the Appellant and/or the failure by the Appellant to adduce evidence in rebuttal of the oral testimony by the Respondent.

18. Accordingly, the Appeal lacks merit and the same is dismissed with costs.

**Dated and delivered in Nairobi this 6<sup>th</sup> day of May, 2016.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**