



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 271 OF 2013**

**ADRIANO LUYIAKHA**

**CLAIMANT**

v

**BONO DRY CLEANERS**

**RESPONDENT**

**JUDGMENT**

1. Adriano Luyiakha (Claimant) commenced legal action against Bono Dry Cleaners (Respondent) on 20 August 2013 and he stated the issues in dispute as

1. Unfair termination
2. Overtime.

2. The Respondent filed a Statement of Response on 2 May 2014 and this prompted the Claimant to file a rejoinder to the Response on 13 May 2014.

3. The Cause was heard on 23 November 2015 and 5 May 2016 when the Respondent closed its case.

4. The Claimant filed his submissions on 17 May 2016 but did not serve the same upon the Respondent forcing the Respondent to file submissions on 28 July 2016 (Respondent made the explanation in a letter to the Deputy Registrar).

5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *competency of the pleadings, whether there was continuous service by Claimant from 1997 to 2013 (whether there is any legal nexus between Bora Dry Cleaners and the Respondent), whether the Claimant resigned or had his employment terminated, if termination whether the same was unfair, whether the Claimant was underpaid, whether the Claimant worked overtime and appropriate remedies.*

**Competency of Claim**

6. In the submissions, the Respondent urged that the Cause was incompetent because the Cause was not intitled either as a Memorandum of Claim or Statement of Claim contrary to the Court's Rules.

7. The Respondent also took objection to the fact that the Claimant lodged the Cause as a Trade Dispute.

8. In my view, a Cause ought not to be defeated merely on a matter of Form.

9. The pleading filed by the Claimant although showing tardy and dilatory drafting set out the substance of the Claimant's cause of action sufficiently to enable the Respondent know the case to meet.

## **Continuous service/legal nexus between Bora Dry Cleaners and Respondent**

10. The Claimant pleaded case was that he was employed by the Bora Dry Cleaners on 1 March 1997, a sister business and was transferred to the Respondent in April 2010.

11. The Respondent appeared to admit the same save that according to it, Bora Dry Cleaners was a separate legal entity.

12. In examination in chief, the Claimant stated that he was employed by the Respondent on 1 March 1997.

13. Amos Nyaribo who testified on behalf of the Respondent stated that he was one of the directors of the Respondent and that the Respondent employed the Claimant in 2010.

14. More relevant to the issue at hand, the director stated that prior to 2010, the Claimant was employed by his other company called *Bora Dry Cleaners* sometime in 1997 as a trainee initially and was therefore not an employee of the Respondent.

15. In cross examination, the witness admitted that Bora Dry Cleaners was a sole proprietorship owned by himself and was sister company of the Respondent.

16. The statutory regime in Kenya currently does not provide for the status of employees when there is transfer of business.

17. However, in the present case, there are at least 2 common denominators from which the Court can draw inferences.

18. One, *Bora Dry Cleaners* and the Respondent had a common face, Amos Nyaribo. He was the sole proprietor of Bora Dry Cleaners and a director of the Respondent.

19. Two, the witness was privy to the transfer of the Claimant from Bora Dry Cleaners to the Respondent and under what circumstances and on what conditions the transfer was effected.

20. It is instructive that none of the parties so it fit to delve a little bit more on relationship between *Bora Dry Cleaners* and the Respondent which necessitated the transfer of the Claimant and on what terms, but what is clear is that the definition given to *employer* in section 2 of the Employment Act, 2007 is so wide and considering the common denominators, the Court can conclude that for purposes of the instant Cause, the Claimant had continuous service for which the Respondent would be liable in terms of employment entitlements and rights.

## **Resignation or termination of employment**

21. This question does not need a scientific analysis to be answered.

22. The Respondent's director testified in examination in chief that the Claimant indicated a (verbal) intention to resign and he asked him to give him time to look for an alternative/replacement, and that when he got an alternative, he gave the Claimant formal notice of termination of employment on 1 May 2013 and asked him to proceed on leave during the notice period.

23. In cross examination, the witness stated that he requested the Claimant to put his intention to resign in writing on 19 April 2013 but he failed thus the notice of termination dated 1 May 2013.

24. There is no statutory provision on the essentials of a resignation.

25. The common law backed by precedent from comparative jurisdictions has outlined and developed the test for what amounts to a valid resignation.

26. In *Nancy Jesang Sorgor v Kenya Women Finance Trust* (2016) eKLR, I reviewed the test and noted that

In a decision from South Africa, *Quinn/Singlehurst Hydraulics (SA) Ltd* (2005) 6 BALR 673, the test was stated thus the test for determining whether an employee resigned or not is that an employee has to, either by word or conduct, show a clear and unambiguous intention not to go on with his contract of employment in that he has to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract.

In *Southern v Franks Charlesly & Co.* (1981) IRLR 278 and *Sovereign House Security Services Ltd v Savage* (1989) IRLR 115, the Court of Appeal (England) held that words used by an employee when resigning should be unambiguous.

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A resignation should exhibit unambiguous intention and should be specific as to when it takes effect or the effective date should be ascertainable from the facts. A statement of general intention would not meet the test.

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27. In the present case, there is nothing on record to remotely suggest that the Claimant evinced an unambiguous intention either by conduct or word.

28. My conclusion is fortified by the letters dated 24 May 2013, 3 June 2013 and 12 June 2013 (Claimant's exhibits 4, 5 and 6) in which the Claimant was querying the Respondent to clarify his employment status.

### **Whether termination of employment was unfair**

29 Having disposed of that limb, attention must now turn to an examination whether in terminating the services of the Claimant, the Respondent complied with the statutory procedural fairness requirements of section 41 of the Employment Act, 2007 (lateness and go slow were given as reasons).

30. The Respondent did not lead any evidence to demonstrate that the said requirements were complied with and on that account its action was procedurally unfair.

### **Underpayments**

31. The Respondent's witness admitted in testimony that it was possible that the Claimant could have been underpaid.

32. The Claimant on his part pleaded the relevant Regulation of Wages Orders prescribing the minimum wages during the period 1997 to 2000, and the Court finds that the Claimant has proved that he was underpaid.

### **Overtime**

33. The Claimant's testimony was that he used to report at 8.00am and work until 6.00pm and that on Saturdays he worked 8.00am to 3.00pm, and that attendance records were not kept.

34. The Respondent's witness confirmed that attendance records were not kept but stated that production staff worked 8.00am to 5.00pm. But in the same breathe he stated that laundry was closed at 6.00pm.

35. On Saturdays, he stated that working hours were from 8.00am to 2.00pm.

36. There are prescribed maximum daily and weekly working hours for various sectors/industries beyond which an employee would be entitled to overtime pay.

37. Working hours can also be agreed contractually.

38. However, the Claimant did not cite or draw the attention of the Court to any particular Legal Notice or Regulation of Wages Order prescribing the working hours within the sector the Respondent was operating.

39. In this regard, the Court is unable to determine whether the claim for overtime pay is merited.

### **Appropriate remedies**

#### ***1 month pay in lieu of notice***

40. The Claimant was given notice and therefore he cannot legally claim pay in lieu of notice.

#### ***Underpayments***

41. Under this head of claim, the Claimant sought Kshs 20,686/80.

42. For the reasons stated above, the Court finds this relief merited.

#### ***Overtime***

43. This head of claim is declined for the reasons outlined above in the body of this judgment.

#### ***Compensation***

44. The Claimant served the Respondent for about 16 years and at the time of separation, he was earning Kshs 12,800/-.

45. Considering the length of service, the Court is of the view that the maximum compensation equivalent to 12 months gross wages would be fair.

#### ***Certificate of Service***

46. A certificate of service is a statutory right and the Respondent should issue one to the Claimant.

47. Before concluding, the Court orders the Respondent to pay the adjournment fees as directed on 17 December 2014 as there is nothing on record to indicate that the same were paid.

### **Conclusion and Orders**

48. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(a) Underpayments	Kshs 20,686/80
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(b) Compensation	Kshs 153,600/-
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TOTAL	<b>Kshs 174,286/80</b>
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49. Respondent to issue a certificate of service to the Claimant within 14 days.

50. Because the Court has agreed with the Respondent that the Claimant's originating pleading was tardy and the Claimant served his submissions outside agreed timelines, the Court denies the Claimant costs.

**Delivered, dated and signed in Nakuru on this 19<sup>th</sup> day of September 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mrs. Ndeda/Mr. Maina instructed by Ndeda & Associates

For Respondent Mr. Ndubi instructed by Ndubi & Co. Advocates

Court Assistant Nixon/ Mwangi S