



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 196 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**RUDOLF SHITANDI DARAJA.....CLAIMANT**

*Versus*

**ZABLON JUMA ATULO T/A**

**Z.J. ATULO & COMPANY ADVOCATES.....RESPONDENT**

**J U D G E M E N T**

The claimant, Rudolf Shitandi Daraja, brought this claim dated 15<sup>th</sup> July 2014 against Zablon Juma Atulo trading in the name and style of M/S Z J Atulo & Company Advocates in Kakamega town. In his claim, the claimant alleges that he was employed by the respondent as a clerk on or about 23<sup>rd</sup> March, 2009 with a starting salary of Kshs. 4,000/- and later increased to Kshs. 7,000/- per month. The claimant avers that on or about 30<sup>th</sup> July, 2013 the respondent unlawfully terminated his services without notice or payment of salary in lieu of notice. The claimant contends that the respondent contravened the provisions of the Employment Act in that the respondent did not accord him a chance to be heard and the termination was thus wrongful and without a basis. The claimant sought orders as summarised below:

- a. A declaration that the claimant's dismissal was wrongful;
- b. The claimant be paid special damages particularized in the claim of Kshs. 99,680/-;
- c. The respondent be ordered to compensate the claimant for wrongful dismissal at the equivalence of twelve months gross salary;
- d. Any other relief that the court may deem fit; and,
- e. Costs of the suit.

The respondent opposed the claim in his statement of defence dated 17<sup>th</sup> September, 2014 and amended on 17<sup>th</sup> October, 2014. In his defence, the respondent denied all the allegations made by the claimant and more specifically that he wrongfully terminated claimant. He averred that the claimant absconded duty of his volition and later sought employment elsewhere.

The respondent further averred that following acts of gross misconduct on the claimant he asked the claimant to do a written apology but the claimant absconded duty and sought employment elsewhere. The respondent accused the claimant of impersonating an advocate, stealing client money, participating in

forgery of a sale agreement, converting the respondent's clients, absconding duty, lateness and drunkenness during working hours. That in view of his misconduct, the claimant is not entitled to the remedies sought.

When the matter came up for hearing the claimant testified on his own behalf and called one other witness. In his testimony, the claimant stated that he was employed by the respondent in his law firm in the position of clerk on 23<sup>rd</sup> March, 2009. It was agreed that his starting salary would Kshs. 4,000/- all inclusive. He was paid that amount for nine months after which his salary was increased to Kshs. 5,000/- and was increased by Kshs. 1,000/- every year after that. At the time of his termination he was earning Kshs. 7,000/- all inclusive.

The claimant testified that in the respondent's office they were working with one Eunice Ariyo(RW5) who was a secretary. In the course of duty, some clients who knew RW5 from her former place of work came to the office in need of a sale agreement. She prepared the sale agreement and went to the firm of Elungata & Co Advocates where she previously worked and had it stamped. Four days later RW5 got another job and left the firm. On 15<sup>th</sup> July, 2013 the said clients returned with sale agreement and requested that the office to file a succession matter in regard of the land they had bought. The respondent summoned RW5 into office and enquired about the sale agreement. RW5 confirmed that she had prepared the sale agreement and she was paid Kshs. 3,500/-. The claimant testified that RW5 claimed that she gave him Kshs. 1,000/- which he knew nothing about. He testified that the respondent blamed him for not informing him of what was happening in the office and consequently on 15<sup>th</sup> July, 2013 the respondent suspended him verbally for two weeks and later terminated his services on 30<sup>th</sup> July, 2013.

The claimant averred that the respondent refused to pay his salary for that month and salary in lieu of notice. On 7<sup>th</sup> August, 2013 the claimant wrote a letter to the respondent in which he demanded his salary, gratuity, a certificate of service and accumulated leave but the respondent did not respond to the same.

Kennedy Kwerakho(CW2) testified that when the claimant was terminated from his employment, he approached him(CW2) and requested him to negotiate with the respondent on his behalf so that he could be paid his dues. He went to the respondent and they had a discussion. The respondent refused to pay the claimant any dues and told him that the claimant was free to go to court. CW2 stated that he was the one who assisted the claimant in arriving at special damages of Kshs. 99,680/- that the claimant was seeking. He testified that the figure included NSSF payments for 53 months that the claimant worked for the respondent, NHIF at the rate of Kshs. 160/- per month for 53 months, one months' salary in lieu of notice and severance pay at Kshs. 3,150 per month. During cross examination however, CW2 stated that he was not a registered accountant and he also admitted that he was not aware whether the claimant was a contributor towards NSSF and NHIF.

The respondent too testified on his own behalf and called other witnesses. In his testimony, he confirmed that indeed the claimant was his employee. That at the time he gave the claimant the job, he explained all the rules and they agreed that he was entitled to go on leave in the month of December when the firm closes for the festive season. He testified that they also agreed on a starting salary of Kshs. 4,000/- all inclusive.

The respondent testified that in the course of his employment the claimant was involved in various incidents of misconduct such as illegally drafting documents, drunkenness at work and absconding duty but that he was always lenient. That before 14<sup>th</sup> July, 2013 he received a lot of complainants from his clients such as Dr. Jacob Maleche(RW4) who claimed that he gave some money to the claimant but was never issued with receipts. He warned the claimant about the same.

The respondent further testified that on 14<sup>th</sup> June, 2013 at around lunch time, he was in the office when three elderly clients came to the office and asked to see advocate Rudolf. He decided to interrogate them to ascertain why they stated they were back. They informed him that they had on 7<sup>th</sup> July, 2013 dealt with an "advocate" known as Rudolf Daraja who assisted them and told them to come with Kshs. 40,000/- for

filing of a succession matter. They also informed him of the sale agreement the "advocate" had prepared for them at a fee of Kshs. 7,000/-.

The respondent testified that he waited for his staff to return from lunch and also called RW5 who had since left the office so as to clarify on what the three clients were talking about. RW5 confirmed that the clients came to the office and the claimant prepared a sale agreement for them and RW5 assisted in typing it. RW5 retrieved the agreement from the computer. When the respondent pressed the claimant to tell the truth, he admitted that he prepared the agreement and later used the stamp of Mr. Elungata Advocate (RW6) to stamp it. He also admitted having been paid Kshs. 7,000/- for the agreement. The respondent told the court that he asked the claimant to take two weeks off and to write an apology. During the time the claimant was away, the respondent discussed the issue with the Human Resource Officer at the firm and they resolved to change the claimant's duties from a court attending clerk to an in-house clerk. After the two weeks the claimant returned but after being informed of his new roles, refused to report back to work. The respondent contended that he also met with RW6 who stated that he knew nothing about the sale agreement. The respondent testified that he was later to receive an inquiry from the firm of John Shilenje Advocates where the claimant was seeking employment.

Linda Akhonya (RW2) corroborated the testimony of the respondent. She testified that at the material time she was a Human Resource Officer at the Respondent's office. That on 14<sup>th</sup> July, 2013 she was in the office at lunch time when an elderly client walked in and stated that he was back and he wanted to see an advocate by the name Rudolf. RW2 informed him that there was no such advocate in that firm. The client produced an agreement which he alleged was prepared by the claimant. He became agitated and she decided to refer him to the Respondent. RW2 confirmed that the claimant was suspended for two weeks but he refused to take up his new role as an in-house clerk when he returned to work. He opted to leave work.

James Ashikoyo Okoko(RW3) told the court that on 7<sup>th</sup> June, 2013 he went to the office of the respondent because he needed an agreement. He met the claimant who prepared the agreement. The claimant later went out with the agreement and when he returned the agreement was signed and stamped. The claimant charged them Kshs. 7,000/- but did not issue a receipt. They discussed an issue of succession of the land and the claimant requested them to come back with Kshs. 40,000/- for the succession matter. On 14<sup>th</sup> June, 2013 he came back to the office armed with the fees. On reaching the offices he called the claimant who told him to wait outside but he was adamant and went inside the office where he met the Respondent and RW2. It was then that RW2 informed him that the claimant was not an advocate.

Dr. Jacob Maleche (RW4) confirmed that he gave the claimant Kshs. 4,000/- which was money owing to the respondent in fees and that the claimant never issued a receipt for the money and neither did he give the money to the respondent as requested.

PW5 was Eunice Ariyo, testified that at the material time she was an employee of the respondent working as a secretary. She told the court that on 7<sup>th</sup> June, 2013 the claimant who was her superior asked her to type an agreement. She confirmed that the agreement she typed was the one produced in court as an exhibit because she still could remember the names of one of the parties that is "Andika". She further confirmed that the font on the agreement was the one they used in the respondent's office and that when the respondent summoned her in his office she was able to retrieve the agreement from where she had saved it in the computer. She told the court that after typing the agreement she gave it to the claimant and she did not know what the claimant did with it thereafter.

Mr. Shem Elungata confirmed that the respondent called to enquire about the agreement and after cross checking the agreement realised that the stamp used was his but the signature was not his and that it was forged.

At the close of the hearing parties filed and exchanged written submissions.

In his submissions, the claimant reiterated the contents of his statement of claim and submitted further

that the evidence of the respondent did not prove any particulars of gross misconduct and all that the respondent and his witnesses did was to confirm that he was wrongfully dismissed and that the person who was responsible for the alleged sale agreement was RW5 who had since left the office.

The respondent in his written submissions argued that the claimant failed to produce evidence that he was indeed unfairly dismissed. The respondent argued that under section 45(5) of the Employment Act, the claimant bore the burden of establishing wrongful dismissal. The respondent submitted that the claimant absconded duty as supported by the evidence of RW5 who testified that the claimant did not return to work when he was informed that his duties had been changed. The respondent was of the view that once the claimant absconded duty and sought employment elsewhere the contract was repudiated and there was no way he (the respondent) would force the claimant to work for him. The respondent concluded by urging this court to dismiss the claimant's suit with costs.

### **Findings and Determination**

It is not in dispute that the claimant was employed by the respondent as a court clerk and that he left employment of the respondent on 30th July 2013. The issue for determination is therefore whether he absconded duty or was dismissed and if he is entitled to the remedies sought.

According to the claimant he was suspended by the respondent for two weeks but when he went back to work he was dismissed. The respondent on the other hand testified that he suspended the claimant for gross misconduct but when the claimant reported back and found that he had been re-designated to work as an in-house clerk he went to look for work elsewhere.

It is trite law that he who pleads must prove. Section 107 of the Evidence Act specifically provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It is also a rule of evidence that in civil matters the standard of proof is on a balance of probability. Section 47(5) of the Employment Act provides that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination or wrongful dismissal has occurred shall rest in the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

From the evidence on record the claimant has not discharged the burden of proving that the respondent unfairly terminated his employment or wrongfully dismissed him. It is his word against the evidence of the respondent that is supported by the evidence of RW2. Where there are two sets of probable evidence on the same issue the court must find against the person who bears the burden of proof, in this case, the claimant. For these reasons I find that the claimant has failed to prove that he was wrongfully dismissed by the Respondent.

### **Remedies**

The claimant prayed for compensation for wrongful dismissal. Having found no proof of wrongful dismissal the claim cannot succeed and is dismissed.

The claimant further prayed for pay in lieu of notice. Having failed to prove unfair termination he is not entitled to the same and the claim is dismissed. The claim for leave is also not proved as the Respondent's evidence that he closed his office every year in December until the second week of January when all employees take annual leave was not controverted by the claimant.

The claimant is however entitled to a certificate of service as provided under section 51 of the Employment Act. He is also entitled to salary for July 2013 which the respondent did not contest that he did not pay. The respondent also testified that he did not pay NSSF for the claimant who is therefore entitled to service pay under section 35(5) as read with section 35(6) of the Employment Act. The statutory minimum wage of the claimant as a general clerk should have been shs.13,772.70 excluding house allowance of 15% at shs.2066 amounting to a consolidated wage of 15,838.60. This is the wage

that the claimant should have been paid from May 2013 while the wage from May 2012 should have been a minimum of 12081.30 excluding 15% house allowance. Had the claimant prayed for underpayments he would have been entitled to the same as he was consistently underpaid for the entire period he worked for the respondent. Unfortunately he did not pray for the same.

I award the claimant shs.31,677.20 on account of service pay for the 4 completed years of service that he worked for the respondent at the rate of 15 days pay per year worked based on the minimum statutory wage that he was entitled to at the time of termination of employment. I further award the claimant shs.15,838.60 as salary for July 2013. I further award the claimant shs.10,000 on account of reasonable expenses and disbursements.

In conclusion I enter judgement for the claimant in the total sum of shs.57515.80. The respondent shall also issue a certificate of service to the claimant. The amount should be paid within 30 days failing which interest shall accrue on the entire sum at court rates.

**Dated, signed and delivered this 24th day of November, 2016**

**MAUREEN ONYANGO**

**JUDGE**