



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2522 OF 2012**

JOSEPH MUSYOKA KIKUVI.....CLAIMANT

VERSUS

IMPALA GLASS LIMITED.....RESPONDENT

**JUDGMENT**

1. The dispute before me is framed as the wrongful and unlawful termination of the Claimant's services and failure by the Respondent to pay terminal benefits to the Claimant. The Claimant averred that he was employed by the Respondent as a glass cutter in 1997 on weekly wages of Kshs. 3,200/- and was later employed in 1998 on a monthly salary of Kshs. 16,326/- but did not give him a letter of appointment. The Claimant averred that he was employed as a machine operator on 16<sup>th</sup> July 2007 and that at the time of dismissal on 8<sup>th</sup> May 2012 the salary was Kshs. 21,410/- a month. The Claimant averred that the Respondent refused to pay his terminal benefits being overtime for 14 years, Kshs. 1,510,689.60, service for 14 years Kshs. 179,844/-, holidays for 14 years Kshs. 47,958/-, annual leave for 14 years Kshs. 229,740/- and salary notice for one month Kshs. 48,978/-.
2. The Respondent filed a Statement of Defence on 15<sup>th</sup> April 2013 and in the defence averred that the Claimant was employed as a glass cutter on 2<sup>nd</sup> June 1999 and earned Kshs. 11,167/- and a house allowance of Kshs. 2,100 as per his appointment letter dated 2<sup>nd</sup> June 1999. The Respondent averred that the Claimant performed his duties until 30<sup>th</sup> April 2012 when he remained absent from duty without justifiable reasons for more than 4 days and a letter dated 4<sup>th</sup> May 2012 was written to the Claimant at his last known address requesting him to report to work immediately. Another letter was written on 17<sup>th</sup> May 2012 and the Claimant never reported to duty. The Claimant's counsel wrote a letter on 28<sup>th</sup> November 2012 claiming that the Claimant had been unlawfully terminated from employment. The Respondent denied that the Claimant never went on leave and produced his leave applications duly approved by the Respondent. The Respondent thus sought the dismissal of the Claimant's claim.
3. The Claimant testified on 16<sup>th</sup> March 2015. He testified that he was employed by the Respondent and worked as a glass-cutter. He testified that there was a powder used in the glass cutting which

affected him and he went to hospital and was given a sick off and he produced a sick off sheet which was torn and he was told to go wherever he wanted.

4. In cross-examination he testified that he was not presently employed and that he had a chest problem. He testified that he went to hospital and that he left the documents at the Respondent. He stated that he was never paid overtime and was referred to a payslip he had annexed to the Memorandum of Claim as appendix 1. He confirmed that the payslip indicated an item OT which is overtime of 3,470/- which was paid. He testified that he used to clock in when reporting to work.
5. In re-examination he testified that the documents from the hospital were filed in his file and he was given bed rest. He stated that he communicated with the shop steward.
6. The Respondent called Shabir Hussein Mohamedali Hakimji the HR Manager. He testified that he knew the Claimant who he readily identified in Court. He testified that the Claimant was in the glass cutting department and that after 30<sup>th</sup> April 2012 the Claimant disappeared for 6 months without informing the employer. He testified that when a person wants to go on leave he has to get in touch with HR and fill a form. No leave form was filled by the Claimant and he never saw any application for leave or off from the Claimant for the period of absence. He testified that he was not aware that the Claimant was unwell and that if one is unwell the staff or a family member could just call and inform the office. He testified that he wrote a letter and reminder to the Claimant asking the Claimant to resume work and the Claimant did not report to work. He testified that the Claimant went on leave and was paid overtime as shown by the leave forms and the payslips.
7. In cross-examination he testified that the Claimant had joined the Respondent before he did and that he wrote to the Claimant who did not return to work. He stated that if the Claimant was terminated he should produce a termination letter. He denied tearing the Claimant's papers. He testified that the letter from the chief was to demonstrate how the Claimant ran from here to there. He testified that the Claimant's mobile phone was off and that the Claimant resurfaced after 6 months.
8. In re-examination he testified that the HR file was up to date and that he never received any documentation from the Claimant on hospitalization. He stated that if there was a letter from a doctor he would have written a different letter.
9. Parties were to file submissions and the Claimant filed submissions on 16<sup>th</sup> April 2015 while the Respondent filed submissions on 7<sup>th</sup> May 2015. The submissions rehashed the testimony of parties and the law.
10. The Claimant pleaded one thing and sought to prove another. Nowhere in his claim did he advert to any occupational illness or a medical condition. He did not plead hospitalization as cause of his absence. He stated on oath that he never had a contract and that he never received overtime or go on leave. The documents he himself attached to the claim controverted this position on overtime. He had overtime payments which he acknowledged were received in payment. The Respondent produced payslips and the proof was that the Claimant had a contract which prescribed the terms of service. The Claimant was absent from work for a long period prompting the employer to seek to know his whereabouts. The Claimant did not report to work for months. This is desertion of employment and is not a cause of action against the employer.
11. From the evidence on record and the testimony of witnesses, it is amply clear that the Claimant has failed to prove his case and the same is dismissed with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of July 2015**

**Nzioki wa Makau**

**JUDGE**