



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 609(N) OF 2009**

*(Before D.K.N. Marete)*

**AUGUSTINO JOECH MATHAYO.....CLAIMANT**

Versus

**GURDEEP WALIA .....1ST RESPONDENT**

**NATIONAL RETREADERS LTD .....2ND RESPONDENT**

**JUDGEMENT**

By a memorandum of claim dated 9th September, 2009 this matter was brought to court. The issue(s) in dispute is therein cited as;

**“Unlawful termination.”**

The respondents in their Respondents Memorandum of Reply and submissions dated 23rd November, 2009 defend and explain their position and pray that this explanation be sustained and the claim rejected.

The claimant opens his case by submitting that he is a former employee of the 2nd respondent. That by a verbal agreement entered on 5th August, 1996 *inter parties*, it was agreed that the claimant would work for the respondents as a watchman at a monthly salary of Ksh.6,000.00. That on 14th March, 2007, the respondents terminated the employment of the claimant and did not pay his terminal benefits, pay in lieu of notice, leave for 210 days, severance pay, salary underpayment at Ksh.4,000.00 and 12 months compensation for loss of employment *et al* – see paragraph 5 of the claim.

He prays as follows;

1. **THAT** the respondent to pay the grievant terminal benefits as one month pay in lieu of Notice Ksh. 6,000.00 leave prorate for 10 years 210 days x 200= 42,000.00, severances pay for 10 years 150 days x200=30,000.00, salary underpayment @ 4,000x10years Ksh.480,000.00 12 months wages as compensation for loss of

*employment as provided for under section 15(c) of the labour institutions act 2007 for unlawful termination of employment*

*Ksh.72,000, Sunday o/t overtime 12hrsx2x4x12x10x30/= 345,600 weekdays overtime 12 hrs per week 12x1.5x6x10x30/=259,200/= and public holidays 12 hrs 12x2x10x30/=79,200.00 totalling **Ksh.834,400** (eight hundred and thirty four thousand and four hundred only).*

2. **THAT** the respondents to pay the costs of this application.

3. **THAT** the Honourable Court to consider this application and grant our prayers.

The respondents deny the claim and submit that the grievant was known to the 1st respondent and his family in 1964 as a painter and the said family engaged him once in a while (occasionally) as a such painter for which he was paid. The grievant also developed close friendly ties with the family resulting in his being offered free residence at their home in Westlands in 1999 on humanitarian basis. He was thereafter thrown out of the premises (quarters) for misconduct. He was thereon granted residence at the business premises of the 2nd respondent on request and he moved in in 2002. In such consideration, the grievant offered to feed the 2nd respondent's dogs for Ksh.1,200.00 per week out of which Ksh,200.00 was to buy dog feed and the net of Kshs.1,000.00 for the claimant. The claimant continued his trade as a painter and engaged various clientele.

On or about December, 2006, the 2nd respondent wound up and closed his business but the grievant continued living in the premises until March, 2007 when he was forcefully evicted after expiry of a four months notice to him. They deny employment to the claimant or any liability, or at all.

The respondents also plead limitation of actions, in the event that the court finds a case for employment of the claimant. They also submit that they are separate legal entities and therefore the misplacement of joinder of parties in this action.

The matter came to court severally until the 12th July, 2013 when it was heard. The claimant, CW1, Joech Mathayo Augustino testified and reiterated his claim. The respondents brought in Sativinda Singh Ahluwali who testified and claimed a disconnect with the 1st respondent. He also reiterated the defence. Upon completion of the hearing the parties agreed to dispose of their matters by written submissions which were later submitted and filed in court.

The issues for determination therefore are;

1. Was the claimant an employee of the respondents?
2. Is there a legal connectivity between the respondents?
3. Was there termination of employment between the claimant and the respondents?
4. Was the termination, if at all, of the claimant by the respondent wrongful, unfair and unlawful?
5. Is the claimant entitled to the relief sought?
6. Who bears the costs of this cause?

The parties did file their written submissions and reiterate their respective cases. In their written submissions the respondents go on to deny any employment relationship with the claimant, or at all. The claimant insists on having been so employed.

The claimant alleges an oral contract of employment by the respondents at Ksh.6,000.00 out of which he was to be paid Ksh.2,000.00 monthly and the cumulated balance being payable at the end of term. This is denied by the respondents. The claimant/grievant testified in support of his claim but this is the furthest the matter went. He does not adduce any further evidence of claim or call any other witness to back his evidence and claim.

Under such circumstances, these matters are decided on the principles of balance of probability and preponderance of evidence. This is on a scrutiny and ascertainment of the possible scenario as brought out in the evidence and pleadings of the parties.

The circumstances of this case tilt the matter in favour of the respondents. In the absence of a probable set-up of his case, the claimant/grievant's case collapses in a thunder. I therefore find that there is no established employment relationship between the parties and dismiss the claim with costs to the respondents. And the other issues in dispute are therefore overtaken and overshadowed by this finding. We need not belabor on spent issues.

The claim is therefore dismissed with costs to the respondents.

Dated, delivered and signed the 7th day of February, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances

1. Claimant in person.
2. Mr. Kariithi instructed by Wandabwa Advocates for the respondent.