



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT MOMBASA**  
**CAUSE NO. 326 OF 2013**

**EBRAHIM JOHN AMWAYI ..... CLAIMANT**

**=VERSUS=**

**MABATI ROLLING MILLS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a suit claiming Kshs.888,667.00 being the accrued employment benefits plus compensation for unfair and wrongful dismissal of the Claimant from employment by the Respondent. According to the Claimant, he worked for Respondent as a casual employee until 31<sup>st</sup> August 2007 when he was appointed to work as Wages Clerk on permanent basis effective 1<sup>st</sup> September 2007. On 31<sup>st</sup> September 2007 [sic], the Respondent accused him of stealing Kshs.19,000,000 from her prompting the Claimant to be arrested and charged with Criminal Case Number 1071 of 2007. He averred that the said charges ended up with his acquittal on 19<sup>th</sup> April 2013. According to him he was never served with any notice for dismissal or termination and terminal dues were never paid to him since the charges were commenced against him.

2. The Respondent denied liability for the alleged termination of the Claimant's employment. To the contrary, she accused the Claimant for absconding work from September 2007. According to the Respondent the Claimant was given one week off in September 2007 but never returned to work until he was arrested in 2008 for the theft. In addition to the foregoing the Respondent pleaded that the suit was time barred.

3. The suit was heard on 9<sup>th</sup> June 2014 and 25<sup>th</sup> June 2014 when the Claimant testified as CW1 and Antony Mwinga Kungu testified for the defence as RW1.

**Claimant's case**

4. CW1 explained that he was employed by the Respondent from December 2004 to August 2007 as a casual labourer. That, on 31<sup>st</sup> August 2007 he was given a letter appointing him as a Wages Clerk on permanent basis with effect from 1<sup>st</sup> September 2007. His pay was consequently charged from Kshs.350 per day to Kshs.10000 per month. He never went for leave during his service but on 30<sup>th</sup> September 2007 he was given a 7-days off and travelled to his rural home at Butere.

5. He was, however, later arrested while still at Butere and brought to Mariakani where he was charged,

remanded for 14 days and later released on bond. He denied ever absconding work and instead contended that he was arrested and charged while away on a lawful off duty. After 6 years trial, CW1 explained that he was acquitted of all the charges.

6. He never returned to work after the acquittal because he was waiting for a letter from the Respondent calling him back to work. He however confirmed that he was never served with any dismissal letter and he contends that he was dismissed unfairly. He explained that he has since never secured another employment and prayed for salary for the period between 30<sup>th</sup> September 2007 when he was arrested and 30<sup>th</sup> August 2013 being Kshs.710000. He prayed for one month salary in lieu of notice being Kshs.10,000 and Kshs.23,667 being pay in lieu of accrued leave for the period between 30<sup>th</sup> September 2009 and 31<sup>st</sup> August 2013. He prays for Kshs.25,000 being gratuity pay. Lastly he prayed for Kshs.120,000 as the damages for wrongful dismissal.

7. On cross examination by the defence counsel, CW1 confirmed that he was to commence work as permanent staff on 1<sup>st</sup> September 2007. He contended that he had worked as a permanent employee for one month before going for the off duty but did not return to work after hearing that he was being sought for charges of theft. He confirmed that he was arrested on 8<sup>th</sup> June 2008 while still at Butere and charged with 2 other colleagues at work. That he was however later acquitted with his colleagues in April 2013. He prayed for salary between September 2007 and August 2013 because he never received any dismissal letter. He however admitted that he never attended work at all during the said period.

### **Defence case**

8. RW1 is the Respondent's Corporate Affairs Legal and Compliance Manager since 2005. He admitted that CW1 was casual employee of the Respondent from 2004 until 31<sup>st</sup> August 2007 when he was given a letter for permanent employment effective 1<sup>st</sup> September 2007. RW1 explained that in September 2007, CW1 successfully sought one week off duty. While he was away investigations were done in CW1 department which revealed a loss of Kshs.19 million. The investigation report implicated CW1 and the Respondent waited for CW1 to return from his off duty to clarify some issues but he never returned to work.

9. In June 2008, CW1 was arrested from Butere and brought to Mombasa where he was charged in court. CW1 never returned to work after the one week off duty or after the acquittal from the criminal case. According to RW1, CW1 was still an employee for the Respondent because he was never dismissed and cleared by the Respondent. RW1 denied the claim for salary for the period between September 2007 and 31<sup>st</sup> August 2013 because CW1 never worked. He also denied the prayer for notice pay because it is CW1 who absconded work. He also disputed the claim for leave from the period between 30<sup>th</sup> September 2007 and 31<sup>st</sup> August 2013 because CW1 was not working. According to RW1, leave only accrues after working for 12 consecutive months. RW1 also denied the claim for gratuities by arguing that CW1 did not serve under the contract for permanent employment. According to RW1, CW1 went away before commencement of the new contract. On the other hand RW1 denied the claim for damages for unfair termination by contending that CW1 was to blame for the absconding duty. In addition, RW1 argued that the claim herein is governed by the repealed Employment Act which did not provide for that relief.

10. On cross examination by the Claimant's counsel, RW1 stated that he went to look for the CW1 at Mwavumbo, Mariakani but never saw him. He only saw CW1 in June 2008 after CW1 was arrested by the police. RW1 denied that CW1 was dismissed and maintained that he still considered CW1 as employee of the Respondent.

11. After the close of the hearing the parties filed written submissions which the court has carefully considered in making this opinion.

### **Analysis and determination.**

12. It is not in dispute that at all material times CW1 was employed by the Respondent starting December 2004. It is also not in dispute that on 31<sup>st</sup> August 2007, CW1 was given a letter by the Respondent appointing him to serve as Wages Clerk on permanent basis. It is also not in dispute that in or about September 2007, CW1 sought for a 7 days off duty and travelled to his rural home at Butere. It is also not in dispute that after the 7 days off duty, CW1 never returned to work as required. It is also not in dispute that RW1 went to Mwavumbo, Mariakani to look for the CW1 but he never saw him. It is likewise not disputed that in June 2008, CW1 was arrested by the police while still at Butere and was brought to Mariakani where he was charged with Criminal Case No. 1071 of 2007, jointly with his 2 other colleagues, with theft of Kshs.19,000,000 from the Respondent. It is not also in dispute that the CW1 and his colleagues were all acquitted by the court after a trial which took 6 years to conclude. It is also not in dispute that CW1 neither returned to work after the lapse of the 7 days off nor did he do so during the pendency of his criminal case or after his acquittal on 19<sup>th</sup> April 2013. Lastly it is common knowledge that none of the parties herein was served with any resignation or dismissal letter. The issues for determination however are:

**(a) Whether the CW1 resigned from employment or was unfairly and wrongfully dismissed.**

**(b) Whether the prayers sought ought to issue.**

### **Resignation or wrongful dismissal**

13. As earlier observed, none of the two parties herein served a written notice to terminate the contract or any dismissal letter to the other. The court is therefore left to consider the oral testimonies given by the witnesses during the trial. The court has been persuaded by the defence evidence that CW1 absconded from work when he failed to return to work from a 7 days off duty given to him in September 2007. Indeed CW1 admitted on oath that he never returned to work after his 7 days off. He also never returned to work after or during the period of his criminal trial and even after his acquittal. Instead between September 2007 and June 2008, he remained away from work after he got information that he was being sought to face criminal charges connected to theft of his employer's money. After his acquittal he remained away from work waiting to be called back by the Respondent but he was never called back. From the foregoing summary of facts, the court finds on a balance of probability that CW1 absconded from work. He did so by failing to return to work without any good cause or permission from the Respondent.

14. It is not good cause for the CW1 to say that he was prevented from resuming work due to his arrest and arraignment to court. It is also neither here nor there for CW1 to state that he was never called back to work after his acquittal. The arrest came after 8 months after CW1 had absconded from work. Likewise it was not the obligation of the employer to look for the CW1 to resume duty either during the pendency of the criminal charges or after acquittal. In any case, the Respondent has so far not commenced any disciplinary action against the Claimant. The answer to the first question herein is therefore that CW1 was never dismissed by the Respondent but he is the one who terminated the contract of employment wrongfully when he absconded from work after the 7-days off duty given to him in September 2007.

### **Relief**

15. The prayer for salary for the period between September 2007 and 31<sup>st</sup> August 2013 and the leave for the same period is dismissed. As admitted by the CW1 during cross-examination, he never worked during that period and as such no right to any salary or leave accrued. The prayer for gratuity is also dismissed because no evidence was adduced to prove that CW1 was entitled to the said benefit. Lastly, as correctly submitted by the defence, the cause of action herein arose in 2007 and is governed by the repealed Employment Act which did not provide for any compensation for unfair termination. The prayer for 12 months salary as compensation for unfair termination is therefore dismissed. Lastly, the prayer for one month salary in lieu of notice is dismissed in view of the court's finding, above, that CW1 is to blame for the termination of his employment.

**Disposition**

16. For the reasons above stated, the suit is dismissed with no order as to costs.

**Dated and delivered in Mombasa this 10<sup>th</sup> day of October 2014.**

**O.N. Makau**

**Judge**