



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

**CAUSE NO. 1411 OF 2010**

**CALEB OKECH OTWOLI .....1<sup>ST</sup> CLAIMANT**

**WYCLIFFE LIVAMBULA .....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**YADAV CONSTRUCTION LIMITED .....RESPONDENT**

**JUDGEMENT**

1. On 11<sup>th</sup> November 2010, the claimants Caleb Okech Otwoli and Wycliffe Livambula filed the claim for wrongful dismissal and refusal to pay terminal benefits by the respondent Yadav Construction Limited. The respondent filed the defence on 29<sup>th</sup> November 2010 and denied the entire claim noting that the two claimants had never been in their employment as it was only incorporated by 30<sup>th</sup> March 2009 under certificate No. C.PR/2009/761 and therefore had no capacity to contract before coming into existence.

2. The Court has delved into the issue of the respondent's incorporation by adjourning the reading of the judgement to enable the parties seek clarification with the Registrar of Companies. The Court noted that while the Claimants were keen to have this issue resolved, the respondent has since remained out of court despite mention and follow up directions being taken in the presence of the respondent advocate. The Certificate of Incorporation by the registrar of Companies indicate the respondent company was registered on **30<sup>th</sup> March 2009**.

**Claimant's case**

3. The 1<sup>st</sup> claimant Caleb Okech Otwili was employed by the respondent on 15<sup>th</sup> August 2006 as a Heavy Commercial Driver at a monthly salary of kshs.10, 500.00 which excluded house allowance while the 2<sup>nd</sup> claimant, Wycliffe Livambula was employed as a Turn-Boy at the respondent's school on a salary of kshs.6, 000.00 per month. Both claimants continued to serve the respondent until 19<sup>th</sup> August 2010 when they were terminated without notice or payment of any dues.

4. The 1<sup>st</sup> claimant is therefore seeking the following;

- i. Notice pay of one month at Kshs.10,400.00
- ii. Salary arrears for august 2001 at kshs.10,400.00
- iii. 12 months compensation for unlawful termination all at kshs.124,800.00
- iv. Service gratuity at Kshs.2,800.00
- v. House allowance at 44,812.50

- vi. Certificate of service
- vii. Underpayments (to be ascertained).

5. The 2<sup>nd</sup> claimant is seeking;

- i. Notice pay at Kshs.6,000.00
- ii. Salary arrears for august 2010 at kshs.6,000.00
- iii. 12 months compensation at kshs.72,000.00
- iv. Service gratuity at kshs.12,000
- v. House allowance at Kshs.12,000.00
- vi. Underpayments (to be ascertained)

6. In evidence, the 1<sup>st</sup> claimant stated that he was employed as a driver of the respondent from 15<sup>th</sup> August 2006 and no contract was issued. His work was at the respondent offices at industrial Area behind House of Manji. He carried respondent staff at the construction sites and would pick the director from his home. Salary was paid in two instalments each after two weeks. The claimant was resident at Kibera and no house allowance was provided or accommodation paid for him. on 19<sup>th</sup> August the director terminated him without notice or payment of his terminal dues for overtime as he commenced work at 6 am and ended at 3pm working for over 6 or 7 days in a week.

7. The 2<sup>nd</sup> claimant also gave evidence that he was employed by the respondent but was never given a written contract. He received kshs.6000.00 a month which did not include house allowance and was never provided with accommodation. He was terminated on 19<sup>th</sup> august 2010 without notice or payment in lieu of such notice and thus the claim.

### **Respondent's case**

8. The respondent stated that they never employed the claimants as they were incorporated on 30<sup>th</sup> March 2009 under Certificate of incorporation No. C.PR/2009/761 and therefore could not have had the capacity to contract before coming into existence. The claimants are denied especially the outlined non-paid dues.

9. No evidence was called in support of the defence as filed.

### **Determination of the issues**

#### **Whether there was an employment relationship between the parties**

#### **Whether there was unfair termination**

#### **Whether there are any remedies**

10. Both claimants state in their statement of claim and in evidence that they were both employed by the respondent on 15<sup>th</sup> august 2006 and were terminated on 19<sup>th</sup> august 2010. There is admission by the respondent that they are a registered company incorporated on 30<sup>th</sup> September 2009 and thee is a certificate issued to this effect which evidence the claimant did not challenge. The certificate of incorporation attached by the respondent is also confirmed by the claimant through the inquiry with the Registrar of Companies.

11. The respondent therefore only came into being as of 30<sup>th</sup> September 2009 and not before. Any claims that lie against the respondent can only take effect as at that date and not before the 30<sup>th</sup> of September 2009. Where the claimants had an ongoing relationship with the persons behind the respondent company, such persons are not parties to this claim and noting in can be inferred by the court with regard to any such person that are not respondents herein.

12. That said, where the respondent enjoyed the labour services of the claimants after incorporation, such service became subject of the applicable law; the Employment Act. Any relationship as between the respondent and the claimants with regard to their labour and or employment should have been reduced into writing as of the date of information. I do not find such evidence.

13. The critical issue for determination is whether there was an employment relationship between the parties. Indeed this is the central issue and taproot of this cause. That a determination of this issue is basically an analysis of the evidence of the parties is not in dispute. The Claimants in their Claim at paragraph 1 and 2 advance their case that they were working for the respondent as Heavy Commercial Driver and Turn-Boy respectively. The 1<sup>st</sup> claimant was working at Industrial Area ferrying respondent workers from construction sites. The 2<sup>nd</sup> claimant was working at the respondent's school and was the personal driver of the director of the respondent. In Defence, the respondents state that they had no employment relationship with the claimants.

14. The 1<sup>st</sup> claimant in the claim state that he was employed as a Heavy Commercial Driver at the respondent construction site. He ferried workers from various sites. He was underpaid, his overtime hours not paid and while he remained an employee of the respondent, he was not given any house allowance or provided with any housing.

15. The second claimant on his part pleaded that he was employed as a Turn-Boy at the respondent's school. He was terminated in circumstances similar to the claimant. In evidence, the 2<sup>nd</sup> claimant testified that he was employed by an Indian Lalji as his personal driver. He knew Lalji as the owner of the respondent. That if there were other directors of the respondent, he never got to know.

16. I have scrutinised the evidence of claimants, the pleadings and the documents as submitted, I do not see an employment relationship of the respondent at the 2<sup>nd</sup> claimant. The relationship the 2<sup>nd</sup> claimant describes between him and the respondent is not supported by his own pleadings and his sworn evidence. This is because ordinarily, employment relationships are established by mutuality of agreement *inter-parties*. This incorporates the agreement of terms and conditions of service. The law requires that this be in writing and section 10 of the Employment Act mandates the employer to reduce this into writing, but this need not necessarily be the case. Courts have inferred, interpreted and discerned employment even in the absence of written contracts of employment. It would be fair to all at all times to deem the relationship between the parties to this litigation as amorphous. I therefore find no employment relationship between the respondent and the 2<sup>nd</sup> claimant. Where he was the personal driver of the director of the respondent, that linkage could have been established in pleadings or in evidence and where there was such distinction, the joinder of the director or Lalji, the person he drove as a personal driver was necessary herein. The 2<sup>nd</sup> claimant further describes himself as a Turn-Boy employed at the respondent's school but his evidence is that he was the personal driver of Lalji. It has to be one way and not both.

17. The 1<sup>st</sup> claimant, is however clear to the extent that he remained at the respondent premises at incorporation on 30 September 2009. Any rights that arise can only take effect from this date. Where the respondent was incorporated under any other name or entity that entity or person should have been enjoined herein as such. No claim can lie before the respondent came into being.

18. On the remedies sought, where there is no written contract or evidence that one was issued as per section 10 of the Employment Act, the same tilts to the advantage of the employee. Failure to issue termination notice by an employer is the worst catastrophe that can happen. This is more so as there is no information as to the reasons of termination for the employee to know the best cause of action to take and for the court to examine and relate to the defence made. Where there is a claim for wrongful and unlawful termination, such notification for termination becomes much more crucial. In the absence of this notice, what is left to be inferred is an unfair procedure was applied. I find no contract or notice issued to the claimant on employment or at the point of termination. The respondent must take responsibility and this is due and will be awarded at Kshs.10, 400.00 in lieu of notice and three month's pay in compensation at Kshs.31, 200.00.

19. Salary arrears by the 1<sup>st</sup> claimant are claimed from 2001. This cannot be as there was no respondent in existence at such a time, 2001. This will be declined.

20. Service is payable where an employee social security is not paid based on the number of years served. Where employment commenced with the respondent on 30<sup>th</sup> September 2009 and ended on 19<sup>th</sup> August 2010, the claimant had not concluded the one year period within which service pay becomes due as under section 35(5) of the Employment Act. This will be declined.

21. House allowance where not provided is payable. For the 11 months served the 1<sup>st</sup> claimant is entitled to kshs.9, 858.64.

22. No underpayments were ascertained in evidence. This will not be awarded. Certificate of Service is due as under section 50 of the Employment Act, this will be granted.

23. I note the various efforts the claimant has put into this matter to get the respondent attend court and resolve the issues with regard to the incorporation. The respondent was not helpful at all. Costs will therefore be granted.

**In conclusion, the 2<sup>nd</sup> claimants claim is hereby dismissed and Judgement entered for the 1<sup>st</sup> claimant as against the respondent in the following terms;**

- a. **Compensation awarded at 3 month's pay kshs.31, 200.00;**
- b. **Notice pay at kshs.10, 400.00;**
- c. **House allowance at kshs.9, 858.64;**
- d. **Certificate of service be issued within 14 days; and**
- e. **Costs of the suit**

Delivered in open Court at Nairobi this 7<sup>th</sup> Day of October 2014.

**M. Mbaru**

**JUDGE**

In the presence of;

Lilian Njenga: Court Assistant

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