



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO. 153 OF 2013**  
**(Originally Nairobi Cause No. 995 of 2011)**

**JOHNSTONE LUNDU MATERE**

**CLAIMANT**

**v**

**VALLEY TRADING CYCLE MART LTD**

**RESPONDENT**

**JUDGMENT**

1. Johnstone Lundu Matere (Claimant) commenced legal proceedings against Valley Trading Cycle Mart Ltd (Respondent) on 22 June 2011 and he stated the issues in dispute as

*1. Unfair termination*

*2. Underpayments.*

2. The Respondent was served and it filed Preliminary Objection on 20 July 2011 and a Reply to Claim around 25 July 2011. The objection was that the Respondent was non-suited and that the suit was statutorily time barred. The same objection was repeated in the Reply to Claim.
3. After several false starts, Nduma J ordered in 2013 that the Cause be transferred to Industrial Court Nakuru for hearing and disposal.
4. Again there were several false starts in Nakuru until 13 October 2014 and 23 October 2014 when the hearing proceeded. In the meantime, the firm of Ndeda & Associates filed a Notice of Change of Advocate on 4 December 2013.

**Claimant's case**

5. The Claimant pleaded that he was employed by the Respondent on 24 May 2005 as a Shop Assistant helping with the selling of bicycles and other items until he was arrested on 3 December 2009 and released on 6 December 2009.
6. Upon release he reported back on duty on 7 December 2009 and despite the Respondent knowing where he had been, the Respondent's owner unfairly and unlawfully terminated his services by directing him to go home because there was no work for him.
7. The Claimant further pleaded that he was not issued with an employment contract and was earning Kshs 6,000/- per month and did not go on leave during the duration of the employment.
8. The Claimant testified. He stated that at the time of hearing he was unemployed and that the

- Respondent had employed him as a Shop Assistant at a monthly wage of Kshs 6000/- from 24 May 2005, but did not give him a written contract.
9. On the termination, the Claimant stated that he was arrested by the Police on 3 December 2009 on complaints not related to the employment and was detained until 6 December 2009.
  10. On 7 December 2009, he reported back to work and when the Respondent's Managing Director David Gachoka came in, he ordered him to leave because he did not want him anymore. He stated he was not given any notice and he reported a trade dispute to the Ministry of Labour and his Union, but Mr. Gachoka refused to pay him as agreed.
  11. He also stated that he used to report to work at 8.00 am and work until 6.30 pm or even 9.00 pm and also used to work during public holidays. His duties included cleaning.
  12. In cross examination the Claimant stated that his name in the identity card was Johnstone Lundu Omaterra and that he went upto standard 1.
  13. He admitted that his pleadings variously referred to the Respondent as *Valley Cycle Matt* and or used the word *limited* or omitted it in certain instances but insisted that the Respondent existed. He insisted he had not sued the wrong party.
  14. On his duties, he stated that he would talk with customers, take money from the customers and hand over the cash to the employer to write receipts but he was not maintaining records or doing reconciliation. At times he would carry purchased items for customers up to the stage and that he was not a general labourer.
  15. Prior to 2005, he was working with the Respondent's father James Gachoka but the shop was closed in 2004 and that he was a member of the National Social security Fund and joined a union in 2007.
  16. Regarding the termination, the Claimant stated that he was in the cells for about 4 days but did not inform the Respondent in writing of his whereabouts.
  17. He denied taking a loan of Kshs 13,000/- from the Respondent.

### **Respondent's case**

18. In the Reply to Claim, the Respondent pleaded that the Claimant deserted duty, was arrested on allegations of criminal activities but did not inform the Respondent, was abusive and used insulting language and was thus dismissed for gross misconduct or for suspicion of committing a criminal offence to the substantial detriment of the Respondent.
19. It was further pleaded that the Claimant was a general labourer and not Shop Assistant; the claim was statute barred and that the dismissal was not unlawful.
20. The Respondent called David Gachoka to testify on its behalf. He stated that he had never heard of *Valley Trading Cycle Mart Ltd* or *Valley Trading Cycle Matt* but that he was a director of *Valley Trading and General Supplies (Nku) Ltd*, branded as *Cycle Mart* which was incorporated in 2006.
21. He confirmed that the Claimant was an employee but under the name of Caleb Lundu and that he engaged the Claimant as a loader/cleaner and not a Shop Assistant, the Claimant having previously worked for his dad for 18 years.
22. On the separation, he stated that the Claimant was arrested by the Police and when he reported back to work he was asked to explain in writing where he had been but he did not. The Claimant disappeared from his work station without permission or explanation.
23. In cross examination, the witness stated that he did not keep any records in respect of the Claimant and that he did not operate under the name of the Respondent and that the Claimant worked from 8.30 am to 5.30 pm and on Saturdays until 4.30 pm.
24. He further stated the Claimant worked for him for two and a half years and that he granted him annual leave from 20 December 2007 to March 2008.
25. The witness denied knowing where the Claimant was and he stated that he asked him to bring OB records to show why he had been arrested. He stated he was ready to pay the Claimant dues but as a casual labourer.
26. The Claimant filed written submissions on 3 November 2014 while the Respondent filed its submissions on 10 November 2014.

### **Issues for determination**

27. From the pleadings, testimony and submissions, the Court identified the following issues as arising for determination, whether the Respondent is the correct party, whether the Claimant was a Shop Assistant or general labourer, whether the Claimant was dismissed or deserted duty, whether there was unfair termination and appropriate relief.
28. For clarity, some of the relief sought by the Claimant are contractual or statutory entitlements and are not affected by the unfairness of any termination.

#### ***Whether the Respondent is the correct party.***

29. The Memorandum of Claim filed on 22 June 2011 by the firm of Gordon Ogolla & Associates Advocates was against *Valley Trading Cycle Mart Ltd*. The verifying affidavit referred to *Valley Trading & Cycle Matt*.
30. But the difficult question arises when David Gachoka who testified on behalf of the Respondent denied knowing or being associated with the Respondent. He stated he was a director of Valley Trading & General Supplies (Nku) Ltd.
31. It is true that the Claimant was put on notice as to the correct and proper party right from the start. But he never bothered to clarify the issue by carrying out a little bit of due diligence.
32. Has the Respondent or the entity associated with David Gachoka suffered any injustice? David Gachoka admitted that the Claimant who testified in Court (despite the issue with names) was his employee.
33. The relationship between the parties started during a different statutory framework. From 2 June 2008, a new statutory framework commenced. Pursuant to sections 9 and 10 of the Employment Act, 2007, David Gachoka as the face behind *Valley Trading & General Supplies (Nku) Ltd* or the Respondent for that matter, was under a statutory obligation to issue the Claimant with a written contract, stating the name of the employer.
34. For failing to issue a written contract to the Claimant, the Respondent cannot be heard to cry that the wrong party had been sued. Were it not for the statutory obligation placed upon employers, the objection taken by the Respondent could have been sound in law.
35. I therefore decline to apply the conclusions reached in Nairobi Cause No. 928 of 2010, *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Ltd*
36. There was some tardiness in the drafting. All things remaining equal, no prejudice or injustice was occasioned to any of the parties.

#### ***Whether Claimant was a Shop Assistant or general labourer***

37. Similarly, section 10 of the Employment Act, 2007 has placed a statutory obligation upon an employer to explicitly state in the employment contract the *name of the employee, the job description of the employment, date of commencement of employment, hours of work* among other terms.
38. In so far as the Claimant was not issued with a written contract after 2 June 2008, and further pursuant to the provisions of section 10(7) of the Employment Act, 2007, I have no alternative but to find as a fact that the Claimant was a Shop Assistant.

#### ***Dismissal or desertion of duty***

39. The Claimant contends that when he reported back on duty after a stint in custody, he was turned away.
40. The Respondent on the other hand has advanced a multi pronged case. One, that the Claimant could not explain in writing or otherwise where he had been.
41. It was also pleaded that the Claimant had used abusive or insulting language. Thirdly, the Respondent advanced the arrest of the Claimant on suspicion of having committed a criminal offence. The latter two prongs were not seriously advanced.
42. The suspicion of having committed a criminal offence can be a valid ground only if the employee is not released within 14 days. The Claimant was released within 4 days.
43. The Respondent also alleged the Claimant used abusive language. No evidence of the words used or the nature of the abuse was disclosed to the Court.

44. The Claimant's testimony that David Gachoka told him to leave was not controverted or challenged in cross examination. On a balance, I do find that the Claimant was dismissed.

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

45. Pursuant to section 41 of the Employment Act, 2007 an employer is required to inform an employee of reasons for contemplated dismissal. An employee should also be allowed to make representation.

46. The Respondent did not disclose *what* charges or allegations were put across to the Claimant. The Respondent did also not disclose *who* confronted the Claimant with the charges or *when/how* a hearing was held.

47. The Respondent did not comply with procedural fairness safeguards before terminating the services of the Claimant. The termination of services was unfair.

48. Because of the conclusion, it is not necessary for the Court to examine whether the Respondent has met the burden expected of it by sections 43, 45 and 47 of the Employment Act, 2007.

### ***Appropriate relief***

#### ***One month pay in lieu of Notice***

49. By dint of section 35(1) (c) of the Employment Act, 2007, the Claimant was entitled to be given one month written notice. This was not done. The Claimant has made a case for an award of one month wages in lieu of notice.

#### ***Underpayments***

50. Evidence before Court is that the Claimant was earning Kshs 6,000/- per month.

51. The Claimant sought under this head of claim, Kshs 100,130/- based on Legal Notice No. 70 of 2009. Under the Legal Notice, the prescribed minimum wage for a Shop Assistant outside Nairobi, Mombasa and Kisumu was Kshs 7,636/- exclusive of house allowance. When 15% house allowance is factored, the gross was Kshs 8,781/- per month.

52. But this was effective from 1 May 2009. The Claimant served until December 2009. He was thus underpaid for the 7 months by Kshs 19,467/-.

53. No basis was laid for pre 1 May 2009 underpayments.

#### ***Annual leave***

54. Under this head, the Claimant sought Kshs 16,035/- but based on the 2009 minimum wage.

55. Section 28 of the Employment Act provides that an employee is entitled to a minimum of 21 days annual leave with full pay.

56. The Court would award the Claimant Kshs 7,636/- on account of accrued leave for 2009.

#### ***Overtime***

57. Pursuant to section 10(1)(g) and (7) of the Employment Act, 2007, the Court finds for the Claimant in the sum of Kshs 79,200/- as claimed and not the Kshs 584,640/- indicated in the submissions.

58. The Court notes that in the written submissions, the Claimant submitted on what was referred to in the submissions as overtime on Saturday. This head of claim was not pleaded.

#### ***Public holidays***

59. No evidential foundation for this head of claim was laid.

#### ***Compensation***

