



**REPUBLIC OF KENYA**  
**INDUSTRIAL COURT OF KENYA**  
**CAUSE NO. 1054 OF 2012**

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

**JUSTUS KAVISI MAKOSI.....CLAIMANT**

**VS**

**WEMA TECHNICAL SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

By a Claimants Memorandum dated the 14th June, 2012, this matter was brought to court. The issue in dispute is cited as;

**Unlawful termination of employment and wrongly dismissal without notice**

The respondent in a statement of response dated the 20th September, 2012 opposes the claim and prays that the same be dismissed with costs.

The claimants case is that by a contract of employment on 1st February, 2010, the claimant was employed by the respondent as an accountant/storekeeper and as a messenger at a monthly salary of Kshs.22,000.00, but out of this, an amount of Kshs.2,000.00 was deducted every month for remission to the NSSF, NHIF and PAYE but this was not done. Payment of salary was by cash and Mpesa but not a bank account.

On 8th May, 2012, the claimant was not only assaulted by the Director of the respondent but the said director also terminated his services as employee.

The claimant further submits that the termination of employment failed to comply with section 41, Employment Act, 2007.

He prays as follows;

- a. Failure and/or refusal by respondent to explain orally or in writing and in a language understandable to the claimant, the reasons for which the respondent was considering termination of the employment of the claimant on the purported grounds of summary dismissal.

- b. Failure and/or refusal by the respondent to allow another employee of the claimant's choice to be present at the meeting where the explanations in (a) above were tendered if at all.
- c. Failure and/or refusal by the respondent to allow or accept any representations to be made by the claimant if at all on the reasons in (a) above made in connection with the purported grounds of summary dismissal.

He prays as follows;

1. The respondent has refused and/or neglected to pay the following lawful dues amounting to Kenya Shillings Four Hundred and twenty five thousand and eight hundred only (Kshs.425,800) owed to the claimant.
  - a. Salary in Lieu of 1 month notice Kshs.22,000.00
  - b. Other deduction and not remitted to N.S.S.F, N.H.I.F and PAYE Kshs.56,000.00 (Kshs.2,000 every month).
  - c. Salary for the month of March, April and May 2012 not paid Kshs.31,000.00.
  - d. Severance pay from 2010 – 2012 Kshs.22,000.00
  - e. Payment in Lieu of 42 leave days Kshs.30,800.00
  - f. Twelve months salary based on the gross monthly salary at the time of dismissal Kshs.264,000.00 as per section 15C of Labour Institutions Act, 2007.

The respondent denies the claim and asserts that he has never employed the claimant for any period or at all.

When the matter came for hearing on 22nd May, 2013 the claimant testified and reiterated his case as per the claim. He submitted that he was an employee of the respondent from 1st February, 2010 at a salary of Kshs.22,000.00. He was sacked by the respondent's Director, one Raphael. He came to his place of work and was asked to leave after a scuffle and thereafter the said director assaulted him at the gate. Both parties were charged in court but the same was withdrawn. He prayed for payment as prayed in the plaint.

This is repeated in cross-examination.

The other claimant's witness, Daniel Musyoka Mutua, CW2 testified that the claimant was his colleague in the respondent's employment. He also restates the facts of the claim in evidence. His evidence is summed up as follows;

- That he is currently unemployed.
- That he knows the respondent.
- The respondent was his employer from September, 1998 to 9th June, 2012.
- That he has an NSSF card as indication of his employment (produced as exhibit JKM3).
- Produces an NSSF statement marked JKF4.
- He knows the claimant who was his colleague and co-worker at the respondent's firm.
- The claimant joined employment on 1st February, 2010.
- That the claimant was an accountant, storekeeper and to some extent a messenger/courier.
- They were paid by cash or Mpesa by the Director, Mr. Kamau.
- The Director's cell phone is [Particulars Withheld].
- The claimant was not a casual and was paid on a month to month basis.
- On 8th March, 2012, the Director called and said he was coming to pay the workers.
- He reported at 1530 hours and headed for the store where the claimant was.
- The claimant came out of the office angry and reported that he had been beaten by the director.
- The Director later came out and ordered the claimant to leave for good.
- He requested us (staff) to throw out the claimant but we were hesitant.
- He went away and brought two police officers who carried away the claimant.
- The director also threatened us (staff).

- I have never gone on leave and nobody ever took leave.

In cross-examination, CW2 stated as follows;

- That there were many employees in 1998.
- At the time of his employment there were about six employees.
- He is not aware that the claimant does not have an NSSF statement.
- He was employed as a driver and was a field officer.
- The claimant worked as an accountant and paid staff salaries on instructions.
- That he has filed suit/a claim against the respondent.
- He has no special interest in this matter.
- I did not witness the beating of the claimant.
- The director reported the incident to the police and came with them.
- I do not know that he was charged at Makadara.
- I do not know when the other employees were employed.
- The claimant was specially introduced.

On re-examination, the witness testified that there was no other accountant during the claimant's tenure of office and that the employer met the workers NSSF contributions. He reiterated that he had sued the respondent from his benefits and also that the claimant was a senior employee and therefore conspicuous and outstanding.

The claimant in support of his case calls *inter alia*, the following documents;

- Demand letter dated 29th May, 2012.
- Documents marked JMK 1 – Payments through Mpesa.
- Documents marked JMK 2 – Medical examination report and Kenya Revenue Authority VAT payment slips.
- NSSF registration card No. 503263923/original Emp. No. 924415 for Daniel Musyoki Mutua – CW2.

The issues for determination therefore are;

1. Was there an employment relationship between the parties to this action?
2. Is the employment relationship proven in evidence to warrant a finding for the claim?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is whether there was an employment relationship *inter parties*. The claimant's position and evidence is that this existed and that he was employed as an accountant cum storekeeper cum messenger in his evidence and written submissions. He is silent on documentation for this employment relationship save that he earned a salary of Kshs.22,000, Ksh.2,000.00 of which was deducted on a monthly basis for remission towards statutory deductions. In support, the claimant adduces the aforelisted documents in support of this relationship. The Mpesa account of the claimant as exhibited displays the following transactions relating to Raphael Kamau, the director of the respondent ranging between years 2011 to 2012.

- |    |                               |                        |                                            |
|----|-------------------------------|------------------------|--------------------------------------------|
| 1. | 2012-04-12 15:01<br>Completed | CE71QB369<br>18,000.00 | Funds received from [Particulars Withheld] |
|----|-------------------------------|------------------------|--------------------------------------------|

Raphael Kamanu

- |    |                               |                       |                                            |
|----|-------------------------------|-----------------------|--------------------------------------------|
| 2. | 2012-03-14 15:23<br>Completed | CC66WF938<br>5,000.00 | Funds received from [Particulars Withheld] |
|----|-------------------------------|-----------------------|--------------------------------------------|

Raphael Kamanu

3. 2012-03-07 16:45 CC17EC844  
Completed 15,000.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
4. 2012-02-24 11:11 CB28KY732  
Completed 4,851.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
5. 2012-02-21 9:17 CB07PN334  
Completed 900.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
6. 2012-01-06 10:36 BY03ZP943  
Completed 2,600.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
7. 2011-12-22 14:36 BX03NM651  
Completed 100.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
8. 2011-12-12 9:21 BW33SF206  
Completed 2,000.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
9. 2011-12-03 12:16 VV70YN597  
Completed 1,480.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
10. 2011-11-26 1:54 BV24NM138  
Completed 3,600.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
11. 2011-11-24 9:43 BV10JM810  
Completed 1,560.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
12. 2011-11-16 12:08 BU59CW340  
Completed 4,500.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
13. 2011-11-16 8:46 BU57PB762  
Completed 880.00  
Funds received from [Particulars Withheld]  
Raphael Kamanu
14. 2011-11-15 13:08 BU52UW694  
Funds received from [Particulars Withheld]

Completed	3,950.00	
		Raphael Kamanu
15.2011-11-15 10:08 BU51LI133		Funds received from [Particulars Withheld]
Completed	200.00	
		Raphael Kamanu
16.2011-11-01 12:23 BT55QL391		Funds received from [Particulars Withheld]
Completed	7,600.00	
		Raphael Kamanu
17.2011-10-27 11:22 BT23KM144		Funds received from [Particulars Withheld]
Completed	3,270.00	
		Raphael Kamanu
18.2011-10-27 11:20 BT23KE481		Funds received from [Particulars Withheld]
Completed	3,280.00	
		Raphael Kamanu
19.2011-10-27 11:18 BT23JW804		Funds received from [Particulars Withheld]
Completed	3,300.00	
		Raphael Kamanu
20.2011-10-17 12:52 BS62IW476		Funds received from [Particulars Withheld]
Completed	200.00	
		Raphael Kamanu
21.2011-10-0 17:08 BR97ML178		Funds received from [Particulars Withheld]
Completed	11,095.00	
		Raphael Kamanu
22.2011-09-17 19:39 BQ73NV484		Funds received from [Particulars Withheld]
Completed	200.00	
		Raphael Kamanu
23.2011-09-06 11:18 BQ01OY212		Funds received from [Particulars Withheld]
Completed	11,100.00	
		Raphael Kamanu
24.2011-09-05 15:57 BP97DF952		Funds received from [Particulars Withheld]
Completed	775.00	
		Raphael Kamanu

25.2011-08-30 12:31 BP59QT689 Completed 2,000.00	Funds received from [Particulars Withheld]  Raphael Kamanu
26.2011-08-30 10:08 BP58QK654 Completed 2,024.00	Funds received from [Particulars Withheld]  Raphael Kamanu
27.2011-08-23 13:34 BP20LE692 Completed 424.00	Funds received from [Particulars Withheld]  Raphael Kamanu
28.2011-08-17 13:44 BO86QB214 Completed 200.00	Funds received from [Particulars Withheld]  Raphael Kamanu
29.2011-08-12 120:42 BO57FN719 Completed 3,000.00	Funds received from [Particulars Withheld]  Raphael Kamanu
30.2011-08-12 12:39 BO57FB967 Completed 3,050.00	Funds received from [Particulars Withheld]  Raphael Kamanu
31.2011-08-05 18:12 BO17TN778 Completed 200.00	Funds received from [Particulars Withheld]  Raphael Kamanu
32.2011-07-26 9:00 BN53KN160 Completed 230.00	Funds received from [Particulars Withheld]  Raphael Kamanu
33. 2011-07-26 8:56 BN53JY097 Completed 5,800.00	Funds received from [Particulars Withheld]  Raphael Kamanu

Except from the oral evidence of the claimant and his witness, there is no other evidence indicating the nature of business on payments transacted through Mpesa between the claimant and Raphael Kamau. Nothing whatsoever links these transactions to a concrete employment relationship, or at all.

The other piece of evidence, the KRA, VAT payment forms in respect of the respondent company were, on the face, completed by the claimant but again, this is the furthest they go. They are also not clearly indicative of an employment relationship. The same also applies to the first limb of annexure JMK 2 – the medical examination report, in as much as it links to the testimony of the claimant and his witness on the assault, this is only in so far as dates are concerned. There is no linkage of this to the respondent or an employment relationship.

Section 9(1) Employment Act, 2007 provides for the element of writing in relationships lasting these months.

9 (1) *A contract of service –*

- a. *For a period of a number of working days which amount in the aggregate to the equivalent, of three months or more; or*
- b. *Which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months;*

*shall be in writing.*

There was not had in the present case and circumstances and therefore this confusion. In as much as the law provides and binds the employer to this write up of employment contracts, employees should be especially cautioned to partake to the formality of writing in employment contracts. This makes it easier for parties to decipher their bargains in the contract when need arises. The employee has a duty should on this and should not be seen to sit on his rights.

I find that there is no evidence of employment in the present circumstances. A case of an employment contract is not demonstrated, or at all. I therefore find that there was no employment relationship between the parties. This seems more consistent and agreeable with the submissions by the respondent that he would at times be engaged to perform private part time jobs like delivery of mails (sic) and parcels on behalf of the officer of the respondent – paragraph 4 of the statement of response and written submissions.

The other and 2nd issue is whether the employment relationship is proven so as to warrant a finding for this claim. From the finding an issue No. 1 above, this falters and fails *in toto*. The claimant has miserably failed to establish a case of employment and therefore the claim fails.

The last issue as to whether the claimant is entitled to the relief sought fails and falls with a thunder. The first two issues having failed to hold ground, this one becomes unsustainable and untenable. It fails. The claimant therefore is not entitled to the relief sought.

The claimant therefore falls prey on the issue of costs and this concludes my findings on the matter.

I am therefore inclined to dismiss the claim with cost to the respondent.

**Dated, delivered and signed this 23rd day of July, 2013.**

**D.K. Njagi Marete**

**JUDGE**

**Appearances:**

**1.Mr. Maingi instructed by Musili, Mbiti and Associates, Advocates for the claimant.**

**2.Mr. Kamotho instructed by W.K. Mugo & Co. Advocates for the respondent.**