



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 988 of 2012

BARACK ODHIAMBO MANGO.....CLAIMANT

VERSUS

M/S. TAWFIQ KENYA LIMITED.RESPONDENT

JUDGMENT

By a memorandum of claim dated 11th June 2011 and filed in court on the same day the Claimant **BARACK ODHIAMBO MANGO** prays for the following orders against the Respondent **MS. TAWFIQ KENYA LIMITED**:

- [a] An order that the Respondent do issue certificate of employment to the Claimant;
- [b] An order that the Respondent do pay the Claimant a sum of Kshs. 1,102,282.60;
- [c] Costs of action;
- [d] Interest at courts rates;
- [e] Any other relief the court may deem fit to grant.

The case came up for mention on 12th July 2012 when there was no appearance by either the Claimant or the Respondent. The case was again mentioned on 25th July 2012 when the Claimant was present but there was no appearance for the respondent. The case was then fixed for hearing on 18th September 2012 with directions that the Claimant serves a hearing notice upon the Respondent.

On the hearing date on 18th September 2012, the Claimant was present in person but there was no appearance for the Respondent. After ascertaining that the Respondent was properly served and an affidavit of service filed, the court heard the claimant ex parte.

The Claimant testified that he was employed by the Respondent on 30th April 2003 as a shop assistant at a salary of Kshs.9000/- per month which was later increased to Kshs.12,000/- without house allowance. He testified that he worked from 8.00 am to 6.00 pm from Monday to Friday and from 8.00 am to 12.00 noon on Saturdays. He also worked from 8.00 a.m to 6.00 p.m on public holidays but was not paid at double rate. He testified that he was terminated from employment on 9th November 2011 without being given any reason. The letter of termination was given to him at 4.30 pm. He testified that he went on leave from 3rd to 28th April 2011.

He asked the Court to grant him severance pay for the period worked, 1 months' salary in lieu of notice inclusive of house allowance, salary compensation of 12 months all totaling Shs.1,102, 282.60 [one million, one hundred and two, two hundred and eight two and sixty cents only]. He further prayed for payment of his expenses amounting to Kshs.16,500 [sixteen thousand, five hundred only]. He said he did not have a letter of appointment while his work identification card was burnt when his house burnt down.

The Court has read the Memorandum of Claim and considered the testimony of the claimant and notes that there is absolutely no evidence to prove that there was an employment relationship between the claimant and the respondent. Although the claimant testified that he was given a letter of termination of his employment on 9th November 2011, none was produced. The claimant alleges his employment identification was burnt in his house when the house burnt down but has also not produced any evidence to that effect. A police abstract would have been helpful.

In **Githinji Karoki versus Egerton University Nakuru Civil Appeal No.47 of 2006**, the Court of Appeal observed as follows:-

“The failure by the respondent to call any evidence was inconsequential as under Section 108 of the Evidence Act, **“The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side”**. In this case, that person was the appellant”.

In **Stephen Wasike Wakhu & another V Security Express Limited Nairobi HCCC No.292 of 2002**, Mugo J. held as follows:-

“With due respect to counsel, I find that this suit was not properly prosecuted and counsel did not assist the Court in a manner that would lead the court to determining the questions or issues for determination with a view to arriving at a property considered judgement. A party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that **“he who alleges must prove”**. Without evidence as to the terms of the agreement allegedly giving rise to the Plaintiffs' claim the court is unable to establish a basis or foundation for the same”.

In the circumstances the Court has no evidence to connect the claimant to the Respondent. The Court is left with no option but to dismiss the case on the grounds that the claimant has not proved his case against the Respondent.

Orders according.

DATED AND DELIVERED IN NAIROBI THIS 26TH DAY OF OCTOBER 2012

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

For Claimant _____

For Respondent _____