



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 2136 of 2011

JANE WAIRIMU KARIUKI.....CLAIMANT

VS

PEMA AUTOMOBILES CENTRE LIMITED.....RESPONDENT

AWARD

Introductio

1.By a Memorandum of Claim dated 30th November and filed in Court on 22nd December 2011, the Claimant sued the Respondent for unlawful termination of employment and failure to pay employee dues. The Respondent filed a Memorandum of Reply on 19th January and a Supplementary Memorandum of Reply on 6th August 2012.

2.The matter was heard on 7th December 2012 with Mr. Jaoko instructed by Nchoe, Jaoko & Company Advocates appearing for the Claimant and Mr. Mutia instructed by Mulwa, Isika & Mutia Advocates appearing for the Respondent. The Claimant testified on her own behalf and the Respondent called Mark Mbuvi Maundu as its witness. Both parties filed written submissions.

The Claimant's Case

3.According to the Claimant she was employed by the Respondent by oral contract in the position of Cashier/Pump Attendant at the Respondent's Petrol Station known as **Pema Service Station** in Machakos Town effective 23rd October 2003 until 7th December 2009 when her employment was terminated, without lawful cause and without notice. The Claimant's monthly salary was Kshs. 3,500. The Claimant claimed that her minimum salary ought to have been Kshs. 8,533.

4. In her sworn evidence, the Claimant testified that during the entire period of her employment with the Respondent she never went on leave nor was she paid in lieu thereof. She further testified that she would work from 4.00 pm to 8.00 am (night shift) and 8.00 am – 4.30 pm (day shift). She worked overtime and on public holidays without compensation.

5. The Claimant therefore claimed the following:

- a) One month's salary in lieu of noticeKshs. 8,533.00
- b) Annual leave.....5,973.10
- c) Overtime.....71,677.20
- d) Sundays and public holidays.....31,164.00
- e) Underpayment.....60,960.00
- f) Gratuity (severance pay) @ 15 days per year.....25,599.00
- g) Salary for 7 days in December 2009.....1,991.30
- h) Damages
- i) Costs and interest

The Respondent's Case

6. In its Memorandum of Reply the Respondent denied that the Claimant was its employee as alleged in the Memorandum of Claim. The Claimant further denied ever having run the business of a Petrol Station in Machakos Town. It was the Respondent's case that there was no contractual relationship between the Claimant and itself and that the Claimant's claim was therefore misconceived.

7. Mark Mbuvi Maundu, a Director of the Respondent, **Pema Automobiles Centre Limited** testified that the Company was engaged in the business of automobile repair and real estate. Mark Mbuvi Maundu further testified that **Pema Service Station** was a business owned by his late father, Josiah Maundu Munuka and that the Respondent, **Pema Automobiles Centre Limited** was not involved in this business. The late Josiah Maundu Munuka ran **Pema Service Station** until he passed away in September 2009. In support of its case, the Respondent produced a sub lease dated 23rd October 2000 between Josiah Maundu Munuka and Kenya Shell as well as statements of account from Kenya Shell on account of **Pema Service station**.

8. Mark Mbuvi Maundu went on to testify that following the passing away of his father, he stepped in for a short while to protect his father's business interests pending administration of the late Josiah Maundu Munuka's Estate. It was at this time that Mark Mbuvi Maundu terminated the Claimant's employment. Following completion of the administration process, the Estate of Josiah Maundu Munuka leased the petroleum business to Kobil.

Findings and Determination

9. The major issue for determination in this case is whether there existed an employment relationship between the Claimant and the Respondent to justify a cause of action. As stated by this Court in the case of **Mary Mmbone Mbayi Vs Chandubhai & Another (Industrial Court Cause No. 761 of 2011)**

The establishment of an employment relationship is a critical facet in cases of unfair termination of employment.

10. It was common cause that the Claimant worked for a business known as **Pema Service Station**. The Claimant set out to demonstrate that there was in fact no legal demarcation between **Pema Service Station** and **Pema Automobiles Centre Limited**, that the two entities shared a physical and a postal address. The Respondent on the other hand set out to show that **Pema Service Station** was a stand alone business and was not part of **Pema Automobiles Centre Limited**, that the fact that the two entities shared a physical and a postal address did not mean that they were not distinct.

11. The principle of incorporation is well settled in law. In the well known case of **Salomon Vs Salomon & Co. [1897] AC 22. H.L** the court stated that:

The company is at law a different person altogether from the subscribers.... and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act.

12. The Courts will generally respect the boundaries created by incorporation and will only break these

boundaries where incorporation is used to evade justice. In the case of **Aviation and Allied Workers Union Vs Kenya Aerotech Limited & Another (Industrial Court Cause No 1494 of 2011)** this Court affirmed this principle and stated that:

Only in cases where it has been demonstrated that the corporate veil is being used to defeat the ends of justice, would the Court allow lifting of the veil.

13.The Claimant did not adduce any evidence to show that the Respondent or any of its directors were hiding behind the corporate veil to defeat justice. Mark Mbuvi Maundu told the Court that he terminated the Claimant's employment in his capacity as an appointee of the Munuka family, pending administration of the Estate of Josiah Maundu Munuka. The role played by Mark Mbuvi Maundu in securing the business interests of his father did not shift any employment burden with regard to the Claimant to the Respondent Company of which Mark Mbuvi Maundu was a director. A legitimate claim could only lie against the Estate of Josiah Maundu Munuka who ran the business known as **Pema Service Station**.

14.In light of the foregoing, I find that the Claimant failed to establish an employment relationship between herself and the Respondent and her entire claim therefore fails.

Each party will bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF APRIL 2013

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JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**