



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 6 OF 2012

(Originally Nairobi Cause No. 481 of 2011)

MARTIN WEKESA WAMALWA

CLAIMANT

v

BARROW & GRUNDY (UKUNDA) LTD

RESPONDENT

JUDGMENT

1. Martin Wekesa Wamalwa (the Claimant) was employed by Barrow & Grundy (Ukunda) Ltd (the Respondent) through an employment contract made on 1 August 2010 but effective 30 August 2010 (Exh. 1). The contract at clause 1 made it clear that the employment formed part of a continuous period of employment which had begun on 1 September 2009.
2. The contract provided that the Claimant was entitled to a basic salary of Kshs 15,000/- per month, housing allowance of Kshs 2250/- per month, on call allowance of Kshs 1500/- per month, business travelling allowance of Kshs 1500/- per month, cell phone credit of Kshs 2000/- per month all totaling Kshs 22,500/- and deductible for tax.
3. On or around 13 September 2010, the Respondent wrote to the Claimant informing him that his services were no longer required with immediate effect and the reason given for the termination was stated to be the Claimant's attitude towards the Respondent's directors.
4. The termination letter informed the Claimant that he would be paid for days worked between 1 September to 13 September 2010 (10 days), 2 off days, 7 public holidays, 18 days annual leave days, pay in lieu of notice all totaling 38 days for which he would be paid Kshs 50,049/- less any debts.
5. The Claimant was not happy with this turn of events and on 15 June 2011, he filed a Memorandum of Claim against the Respondent claiming that the Respondent had his 11 month arrears of house allowance of Kshs 2250/- totaling Kshs 24,750/-, on call allowance at rate of Kshs 1500/- totaling Kshs 16000/-, travelling allowance at rate of Kshs 1500/- totaling Kshs 16,000/-, credit airtime at rate of Kshs 2000/- totaling Kshs 22,000/-, leave travelling allowance of Kshs 1900/-, underpayments of Kshs 7250/- per month, 18 days leave at Kshs 10,386/-, arrears between 3 December 2008 to August 2009 of Kshs 27,000/-, 45 off days of Kshs 25,965, 17 public holidays of Kshs 10,459/-, 10 days worked in September 2009 of Kshs 6635/- and pay in lieu of notice of Kshs 22,250/-. The grand total claimed was pleaded as Kshs 183,345/-.
6. The Respondent filed a Defence on 14 May 2012 stating that it had paid the Claimant by cheque, and that the Claimant was terminated for misconduct and failure to produce his certificates. There was a general denial of the Claimant's pleadings.
7. On 27 November 2012, the Respondent filed a Supplementary Response and this led the Claimant to seek leave to file a Supplementary Response to the Defence.
8. In the Supplementary Response the main issue raised was that the Claimant worked for only 10 days after the signing of the contract referred to in paragraph 1 herein above and was duly paid on

- termination.
9. On 6 February 2013 the Cause came up for hearing before me and I ordered the local Labour Officer to investigate/examine the Respondent's employment records in respect to the Claimant, the claims and make a report to Court.
 10. The County Labour Officer carried out investigations/examination and filed a report with the Court on 28 March 2013. I thereafter, on 11 April 2013 directed the parties to address me on the report which they did on 16 May 2013.

The County Labour officer's report

11. The County Labour Officer's report in effect confirmed that the claims made by the Claimant as regards the underpayments were true and that between 1 September 2009 to August 2010, it is only in August 2010 that the Respondent paid the Claimant the consolidated package of Kshs 22,250/- and that before that he was being paid only Kshs 15,000/- per month and thus he was being underpaid by Kshs 7250/- per month.

Claimant's submissions

12. The Claimant submitted that the report by the Labour Officer was correct and confirmed the claims he had set out in the Memorandum of Claim and further that the Respondent had failed to fulfill the terms of contract.
13. The Claimant also submitted that the Respondent had failed to pay him arrears of 45 off days, 17 public holidays, 10 days worked in September 2010 inclusive of house allowance and he also sought one month's salary in lieu of notice.
14. He also stated that the cheque for Kshs 42,049/- which the Respondent had drawn in his favour was stopped before payment.
15. The Claimant also submitted that his termination was in breach of contract, discriminatory and unfair.
16. The Claimant placed reliance on the documents attached to the Memorandum of Claim and Supplementary Response to Defence and submissions.

Respondent's submissions

17. For the Respondent, it was submitted that the Claimant had not been underpaid and that the employment contract issued to the Claimant only acknowledged that he was employed from 1 September 2009 and the gross salary of Kshs 22,250/- stated in the letter was not meant to be retrospective.
18. According to the Respondent, the all inclusive salary of the Claimant between 1 September 2009 to August 2010 was Kshs 15,000/- as evidenced through the letter offering him a three months' probationary period as Operation Manager/Trainer
19. It was also submitted that section 31(2) of the Employment Act was relevant.
20. The Respondent also submitted that all amounts payable to the Claimant were paid and it also relied on the documents annexed to the Defence filed in Court on 14 May 2012.

Issues for determination

21. From the pleadings, documents filed and submissions, the issues which emerge for determination are

- i. Whether clause 2 in the employment contract dated 1 August 2010 was retrospective
- ii. Whether the termination of the Claimant was unfair
- iii. If the answer to (ii) is in the positive appropriate remedies

22. I will discuss each of the issues in turn

Whether clause 2 in the employment contract dated 1 August 2010 was retrospective

23. The greater part of the Claimant's case was on the failure by the Respondent to pay him the full salary of Kshs 22,250/- set out in the employment contract dated 1 August 2010. According to the Claimant, because the letter indicated that it was part of a continuous period of employment which began on 1 September 2009, he was entitled to the gross salary of Kshs 22,250/- from 1 September 2009. But the Respondent would not have any of this argument.
24. In the Supplementary Response filed by the Claimant on 11 February 2013, the Claimant exhibited a letter marked *exht 11* which is a letter from the Respondent offering him a three month probationary period employment with effect from 1 September 2009 in the position of Operation Manager/Trainer. The salary set out in the letter was Kshs 15,000/- per month inclusive of a house allowance and Kshs 1000 phone credit.
25. To my mind, from 1 September 2009 up to 30 November 2009, this letter expressed the remuneration the Claimant was entitled to during the life of the 3 month contract. The agreed remuneration was Kshs 15,000/- per month.
26. The Claimant though was not happy with the term of the offer and penned a lengthy letter to the Respondent on 20 November 2009, which the Respondent replied to on 21 November 2009 setting a meeting for 26 November 2009. In a letter dated 26 November 2009 and marked as *exbt 14*, the Respondent wrote to the Claimant asking him to produce his missing certificates by 30 November 2009 or else he would be offered a 3 month probation contract again at his then current remuneration.
27. On 25 January 2010, the Respondent again wrote to the Claimant. This letter was acknowledged by the Claimant and it made reference to the meeting of 26 November 2009 and to the extension of the Claimant's contract by another three months'. He was also required to submit his documents to support his management skills by 24 February 2010. Relying on this letter, I would assume the Claimant's contract was extended with effect from 1 December 2009 to 28 February 2010. The letter is annexed to the Defence statement.
28. Another letter dated 8 June 2010 referred to a meeting between the parties on 24 May 2010 and it indicated that the Claimant's salary would be increased after he had finished his college studies. This letter indicates that even before the employment agreement made on 1 August 2010 the Claimant held the position of Assistant to the Operations Director and not Operations Manager.
29. The only thing I can say is that after 28 February 2010, the Claimant was serving the Respondent but the terms and conditions of the service were not embodied in a written document. Evidently the Respondent was not in compliance with the provisions of section 9 of the Employment Act. It had a statutory duty to draw up a contract specifying the prescribed particulars but it did not. That is an unfair labour practice.
30. And where an employer has failed to draw up a contract of employment setting out the terms and conditions of employment, then the provisions of section 10(7) of the Employment Act become implicated. The Respondent has not produced any document to show on what terms the Claimant was employed after the expiry of the second 3 month contract.
31. Because of the failure by the Respondent to show on what terms the Claimant was serving after 28 February 2010, the only inference I can draw is that the Claimant was entitled to the salary set out in clause 2 of the employment contract dated 1 August 2010 as from 1 March 2010.
32. It is not in dispute that between 1 March 2010 to the time of termination, the Claimant was being paid Kshs 15,000/-. The Claimant admitted that it is only in August 2010 that he got the full salary of Kshs 22,250/-. In the circumstances I would award him the balance between what he was getting and the remuneration stated in the employment contract of Kshs 7250/- for the months of March, April, May, June and July 2010 which I assess in the sum of Kshs 36,250/-
33. The Claimant had submitted that the cheque which the Respondent had drawn in his favour for Kshs 50,049/- as terminal dues was stopped. He did not produce his bank statement to confirm this.

Whether the termination of the Claimant was unfair

34. It is not disputed that the Respondent terminated the employment of the Claimant through a letter dated 13 September 2010. The termination was with immediate effect. The letter set out what the Respondent thought the Claimant was entitled to including one month salary in lieu of Notice. The reason given for the termination was stated as the Claimant's attitude towards the Board of

Directors. Several warning letters addressed to the Claimant were annexed to the Defence.
35. The legal burden placed upon an employee who complains of unfair termination or wrongful dismissal is found in section 47(5) of the Employment Act. The section provides that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

36. The Claimant annexed the letter terminating his services. The letter set out the reason(s) for the termination. But it was incumbent upon the Claimant to show or prove how and why the termination was unfair. The Employment Act at section 46 has mentioned several instances where termination will be deemed to be unfair. These include termination on the ground of a female employee's pregnancy or because of the union activities of an employee.

37. A termination could also be unfair because the employer did not give notice or failed to comply with any statutory requirement such as those set out in section 41 of the Employment Act.

38. The termination of the Claimant was a summary dismissal. Summary dismissals are also subject to the procedural fairness requirements of section 41 of the Employment Act. The Response did not even suggest that the Claimant was notified that his dismissal was under consideration or was invited to make any representations. The dismissal was not in compliance with the law. It was procedurally unfair.

39. The Claimant is therefore entitled to pay in lieu of notice which I assess in the sum of Kshs 15,000/- which was the basic pay at time of dismissal.

Conclusion and Orders

40. In conclusion I do find and hold that the dismissal of the Claimant was procedurally unfair and that Claimant was entitled to gross remuneration of Kshs 22,250/- with effect from 1 March 2010 until the time of termination and therefore he was underpaid to the tune of Kshs 36,250/-.

41. The Claimant is therefore awarded

- | | |
|------------------------------------|---------------|
| a. Underpayments | Kshs 36,250/- |
| b. One month pay in lieu of Notice | Kshs 15,000/- |

TOTAL

Kshs 51,250/-

42. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 28th day of June 2013.

Justice Radido Stephen

Judge

Appearances

Claimant in person

Mr. Esuchi instructed by Otieno Okeyo &

Co. Advocates

for Respondent