



REPUBLIC OF KENYA



Thumbi v Tim Sales Company Limited (Employment and Labour Relations Cause 252 of 2017) [2023] KEELRC 1427 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 252 OF 2017**

**HS WASILWA, J
JUNE 15, 2023**

BETWEEN

BEN KARANJA THUMBI CLAIMANT

AND

TIM SALES COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this suit by a memorandum of claim dated 8th June, 2017, alleging that he was unfairly terminated and seeking to be compensated for the unfair termination. In the claim he sought for the following reliefs;
 - a. A declaration that the claimant's dismissal was unlawful, unjust and discriminative and same amounts to unfair dismissal.
 - b. An order compelling the Respondent to settle the outstanding benefits as enumerated at paragraph 20 of this claim.
 - c. Costs of the suit and interest thereof at Court rates.
 - d. Any other relief that this Court may deem fit to grant.

Claimant's case.

2. The claimant stated that he was employed by the Respondent as a machine operator with effect from March, 2011 on a daily wage of Kshs 261. That he served the Respondent well till November 2014 when his services were terminated.
3. He stated that his services were terminated after he sustained work related injury and could no longer rendered his services as a machine operator as he used. That he was not paid his terminal dues to date which he now claims.



4. It is the claimant's case that throughout his employment he was underpaid, being that he was paid Kshs 261 throughout his employment instead of 454.15 from March, 2011 to April, 2012, Kshs 513 from May, 2012 to April, 2013, Kshs 585.50 from May, 2013 to November, 2014 as per regulations of wage orders relevant for the said Period. The underpayments sum up to Kshs 341,494.50.
5. The claimant stated that he did not take his leave days, neither was he paid for the same, therefore he prayed to be paid in lieu for the 3 years 8 months worked adding up to Kshs 40,815.25.
6. It is his case that during the pendency of his employment, he worked for 7 days a week without any off day contrary to section 27(2) of the provisions of the Employment Act. He thus prayed for 16 off days worked for the 3 years 8 months of Kshs 91,489.20.
7. He contends that his termination was not preceded by any notice as required under the Employment Act, neither was he subjected through Disciplinary hearing as required under the law. Moreover, that he was not paid his terminal dues or issued with a certificate of service on termination contrary to the dictates of the Employment Act and ILO Convention number 158.
8. During hearing, the claimant testified as CW-1 and adopted his witness statement of 8/6/2017 which reiterated the contents of the claim and in addition testified that he lives in Elburgon and currently does casual job to fend for himself. He produced the documents filed on 19th July, 2022 which were marked as Exhibit 1-3 respectively.
9. On cross examination he testified that he was a machine operator. That he did not have any certificate to confirm that he was a machine operator. He told this Court that his supervisor was called Simon. He testified that when he got injured he was first given first aid at the company before going to Nyayo hospital in Elburgon town. That he recuperated then went back to work after 2 weeks. He admitted that the job card he produced does not have his name. He also stated that he was paid cash per day and earned Kshs 235.
10. On re-examination, he testified that he was given the said card for the purposes for clocking in and out of the Company premises. He also stated that his treatment documents were taken away by his supervisor.

Respondent's case.

11. The Respondent Entered appearance and filed a defence denying the entire claim and in particular denied any employment relationship between the claimant and Respondent and stated that the claimant is unknown to it.
12. The Respondent prayed for the claim herein to be dismissed with costs because the claimant was never their employee therefore there did not have any obligations towards him.
13. During hearing the Respondent called one of its employees, Philip Ouma Abuto, who testified as RW-1 and adopted his witness statement of 21.11.2018. He reiterated that the claimant has never worked for the Respondent, neither does the Respondent have any records regarding his employment therefore that the Respondent has been wrongfully sued. He testified that when an employee is injured, his name and type of injury is entered in accident book and the medical records filed with the Respondent, which the claimant did not do in this case. He also told this Court that the records produced might have been doctored because it does not show any identification. Furthermore, that there is no record showing that the claimant applied for the alleged position or that he was interviewed for the Job. He maintained that the claimant is a stranger to the Respondent.



14. In cross-examination the witness testified that he is the Human Resource officer at the Respondent having worked for the Respondent from September, 2006. He stated that he is based in Elburgon office and supervises employees. He stated that he has never interacted with the claimant. He told this Court that casual employees are not issued with documents but only listed in the master Roll which they do not sign save for when receiving wages. He testified that all machine operators are Permanent and Pensionable employees and non is on casual basis or contracted on piece rate. He stated that the card produced in court is doctored though they have not yet raised the issue with the police.
15. He testified that when an employee is injured the Company does first aid and if the issue is serious, the Respondent takes the employee to hospital and books the issue in the accident book. He testified that they have no such records for the claimant. He also testified that they pay NSSF for all its employees however that none was made for the claimant confirming that he was not their employee.
16. On re-examination, he testified that there is no evidence that the claimant was their employee and the fact that he operated a machine. He also stated that the Biometric card produced does not have the name and picture of the employee like all other cards issued to its employees.

Claimant's Submissions.

17. The claimant submitted on two issues; whether the claimant was unfairly terminated from employment and whether the claimant is entitled to the reliefs sought.
18. The claimant submitted that before an employee is terminated the ingredients under section 41 of the *Employment Act* must be complied with that is the employer should explain to employee the reasons for termination and subject the said employee to disciplinary hearing. However, that in this case the claimant was not given any reason for termination or subjected to disciplinary hearing therefore that the termination was unfair as per the provisions of section 45 of the *Employment Act*. In this they relied on the case of *David Gichana Omuya V Mombasa Maize Millers Limited* [2014] eKLR where the Court held that;-

“The requirements of section 41 of the *Act* have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness.

19. The claimant also relied on the case of *Kenya Union of Commercial Food and Allied Workers Union v Meru North Farmers Sacco Limited* [2014] eKLR where the Mbaru J held that; -

“Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair.”

20. On the second issues, the claimant submitted that they have made out a case against the Respondent and urged this Court to grant the reliefs as prayed in the claim.

Respondent's Submissions.

21. The Respondent on the other hand submitted on two issues; whether the claimant has established existence of employment relationship with the Respondent and whether the claimant is entitled to the reliefs sought.



22. On the first issue, the Respondent submitted that the claimant has never worked for the Respondent. It was argued that the claimant alleged that he was employed in March, 2011 following a competitive recruitment process, however that the master roll provided for the entire year of 2011 does not have the name of the claimant as one of a Respondent's employees. It was argued that the proof tendered by the claimant suggesting any employment relationship is a biometric card and a medical legal report which were highly disputed by the Respondent and cannot be used to claim employment relationship because, firstly, the said biometric card was a forgery that did not have the employment details such as name of the claimant and the passport photo, while the the medical-legal report relied purely on the word of the claimant as such could not ascertain the accident or that the claimant was the Respondent's employee.
23. It was submitted that Rule 4(1)(d) of the *Employment and Labour Relations Court (Procedure) Rules* require that a party instituting a claim shall set out the facts and grounds of claim, failure to which the claim will be rendered inadequate and be dismissed. On that note, it was argued that the claimant has alleged that he was a machine operator but did not give details of the type of machine or the purpose of the said machine to shed more light to his case and aid the Respondent to mounting its defence in order for the Court to arrive at a just conclusion. In this they relied on the case of *KUDHEIHA Workers v Esther Njoroge* [2021] eKLR where the Court held that failure by the claimant to provide concrete evidence in support of its case to the required standard will cause the claim to fail.
24. The Respondent submitted that the allegation by the claimant that he was injured at the Respondent's employ is not backed up with any evidence, infact that the accident book maintained by the Respondent, which was tendered in evidence in this case, does not have any report by the claimant affirming that indeed no accident occurred involving the claimant, and the allegation that he was an employee is a fabrication. Additionally, that the allegation that the medical documents were taken by the Respondent is far from the truth because the Respondent only requires such documents when computing compensation in accident claimant and in any event the medical documents required are copies not the originals. He added that if indeed the claimant had been injured at the Respondent as alleged and taken to Elburgon Hospital, he ought to have called the record office of Elburgon Hospital as witness or at the very least request for copies of the medical records to support the allegations herein.
25. On the Biometric card produced, the Respondent submitted that the said card does not contain name, identification number and picture of the clamant to ascertain the genuiness. Further that the original card was not tendered in evidence in court, when the copy produced is not legible, rising question on its authenticity.
26. On the reliefs sought, the Respondent submitted that the claimant is not the Respondent's employees and therefore the claim is not founded. On the overtime claim, the Respondent submitted that the claimant alleged that he reported to work at 7 am and clocked off at 3 pm, therefore never worked for any overtime. Furthermore, that the muster roll adduced herein shows the employees therein were entitled to off days, rests days and public holidays.
27. It was submitted that the claimant was never candid in his claim when he stated in his pleadings that he was earning Kshs 261 but during hearing he claimed that he earned 235. Having varied position regarding the employment, the claim should be dismissed on that grounds alone as was held in *Alfred Kogo and another v Eldomatt Supermarket Limited* [2015] eKLR.
28. In conclusion, the Respondent urged this Court to find that the claim herein without merit and dismiss it with costs.
29. I have examined all evidence and submissions of the parties herein.



30. The claimant has averred that he was an employee of the respondent from 2011 to 2014 working as a machine operator. He indicated that he was competitively recruited.
31. The respondents have denied employing the claimant herein and aver that they don't have any records showing he was in their employment and insisted that the employment card produced by the claimant was a forgery and didn't even bear the claimant's name.
32. Indeed the starting point in determining this case would be to ascertain if there is any employment relationship between the claimant and respondent. The claimant produced a docking card which he says is evidence of his relationship with the respondent.
33. The card herein does not bear his name.
34. He also indicated that he was treated at respondent's clinic after injury but these documents were taken away by the respondent.
35. Due to the nature of the defence raised by the respondent, it would have been prudent for the claimant to call more evidence to corroborate his case such as a fellow employee, evidence of how he was paid by the respondent, evidence of his application for the job and any other relevant material to ascertain he was an employee of the respondent.
36. The claimant however failed to explain he had an employment relationship with the respondent. He who alleges must prove, but the claimant fails to prove what he alleges and in the circumstances, his case must fail.
37. I will give no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF JUNE, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tanga for Claimant – present

Achieng for Respondent – present

Court Assistant - Edna

