



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NO. 739 OF 2017

WILLIAM MATAKATAKA MAKUTANO.....CLAIMANT

VERSUS

MOMBASA MAIZE MILLERSRESPONDENT

J U D G M E N T

1. Vide a statement of claim dated 11th September 2017, the Claimant sued the Respondent and pleaded, *inter alia*, as follows:-

- a. that the claimant was at all material time an employee of the Respondent working as a motor vehicle electrician from 8th October 2008 to 13th June 2015 when his services were terminated.
- b. that the Claimant was not issued with an employment contract by the Respondent, and was earning a monthly salary of ks.18,000.
- c. that the Claimant's working hours were 08.00 hours to 1700 hours seven days a week, though at times he worked till 20.00 hours.
- d.that the Claimant diligently performed his duties over the years until 13th June 2015 when his services were terminated; upon his acquittal by the Resident Magistrate in Criminal Case No. 181 of 2012.
- e. that the Claimant had been linked to the loss of the Respondent's two motor vehicle batteries and a winder all valued at ksh.25,000 on 27th December 2011, and had on 13th January 2012 been led to Makupa Police Station by his Supervisor (Mr. Abdul Karim) whereat the Claimant was detained and subsequently charged at Mombasa Law Courts and later released on bail .
- f. that on being acquitted by the Court, the Claimant went to the Respondent's premises but was verbally told by the Respondent's gate security guard to go home and not to report back to work as he was no longer an employee of the Respondent Company.
- g. that the Claimant did not receive any communication from his supervisor.
- h. that the Claimant was not accorded an opportunity to be heard, that his services were unfairly terminated, and that the Respondent failed and/or declined to pay the Claimant's terminal dues.
- i. that termination of the Claimant's services was unfair, unlawful, without lawful justification and was not done in accordance with fair procedure and justifiable cause as envisaged in the Employment Act and (other) labour laws.

2. The Claimant prayed for the following reliefs:-

- a. a declaration that the termination was unfair.
- b. one month salary in lieu of noticeksh.18,000
- c. salary for days worked in the month of December 2011....ksh.18,000

d. compensation for unlawful termination ...ksh.216,000

e. certificate of service.

f. costs of the suit and interest at Court rates.

3. The Claimant also filed a witness statement, duly recorded by himself and filed together with the Memorandum of Claim on 13th September 2017. Also filed by the Claimant was a list of documents dated 11th September 2017, listing some six (6) documents. Documents listed by the Claimant and copies thereof filed with the Memorandum of Claim included the Claimant's Identity Card, copy of NHIF Card, Claimant's Certificate of fitness dated 14th October 2009 judgment in (Mombasa Chief Magistrate's Court) Criminal Case No. 181 of 2012 dated 12th June 2015 and a demand letter dated 10th April 2017.

4. The Respondent, Mombasa Maize Millers Limited, entered appearance on 28th September 2017 and subsequently filed a Response to the Claimant's Memorandum of Claim dated 23rd October 2017, and:-

a. denied having employed the claimant as a motor vehicle electrician from 8th October 2008 to 2015; and pleaded that under the circumstance, the Respondent could not have issued the claimant with an employment contract or paid NHIF for him.

b. pleaded that the Respondent entered (into) an outsourcing agreement with Ready Consultancy Company Limited (the Third Party herein) from 1/1/2012, whose terms were, *inter alia*, that the said company would take over all the provision of staff to the Respondent together with all legal requirements for smooth running of the Respondent's operations,

c. that the Respondent did not have any records on the claimant having worked with the Respondent from October 2008 to June 2015.

d. that the Respondent was unaware of criminal Case No. 181 of 2012, the charges or the complainant therein, and the acquittal

e. that the Respondent would seek to enjoin Ready Consultancy Company Limited in the claim.

5. On 3rd November 2017, the Respondent filed a Notice of Motion dated 24th October 2017, seeking leave to serve a Third Party Notice against Ready Consultancy Limited and to seek contribution or indemnity from them. The application was allowed.

6. Ready Consultancy Company Limited (the Third Party herein) entered appearance on 19th July 2018 and subsequently filed the Third Party's Response to Memorandum of Claim on 15th July 2019. The Third Party pleaded:-

a. that the Claimant was an employee of the Respondent and that the averments made by the Claimant were solely between the Claimant and the Respondent and the Third Party was not privy to the same.

b. that the Third Party had an outsourcing agreement with the Respondent. However, the Respondent was incharge of all the employees including the Claimant.

c. that it was the Respondent who terminated the Claimant's employment, and should be held solely liable.

d. that the suit against the Third Party should be dismissed.

7. The Third Party also filed a list of witnesses and a witness statement of one **IBRAHIM BOCHA** dated 9th July 2019.

8. The Respondent filed an additional list of documents on 29th July 2020, listing outsourcing agreements between itself and the Third Party from 1st January 2009 to 31st December 2019.

9. When the suit came up for hearing on 12th October 2021, the Claimant adopted his filed witness statement and further testified, both in chief and under cross examination:-

a. that he was in the Respondent's employment from October 2008 to May 2015, but was not issued with a (written) contract.

b. that he was arrested on 13th January 2012 and charged with the offence of stealing the Respondent's two motor vehicle batteries and a winder, was remanded at Shimo La Tewa Prison for two weeks, prosecuted and was finally acquitted by the Court.

c. that the Respondent herein was the Complainant in the Criminal case, and that it was one Abdul Karim, an employee of the Respondent and the Claimant's Supervisor at work, who took the Claimant to the police station on 13th January 2012.

d. that on being released on bail, the claimant did not go back to work.

e. that the claimant was not paid his salary for the month of December 2011.

f. that on being acquitted by the Magistrate's Court on 12th June 2015 in Criminal case No. 181 of 2012, the Claimant went back to work on 13th June 2015, but was barred by the security guards from entering the Respondent's business premises, and was informed that he was no longer an employee of the Respondent.

g. that the Claimant did not know the Third Party.

h. that the Claimant's salary was being paid by the Respondent at the end of each month, and that the Claimant was signing for the salary in a book that was kept by the Respondent.

i. that the Claimant did not receive any notice (asking him) to explain himself.

10. The Claimant produced in evidence the documents listed on his list of documents referred to in paragraph 3 of this Judgment. Among the documents produced is a judgment of the **Chief Magistrate's Court at Mombasa in Criminal case No. 181 of 2012 (Republic –vs- William Makutano Matakataka)** dated 12th June 2015. The judgment shows that the Claimant had been charged in the said case with the offence of stealing by servant, that on the 27th day of December 2011 at Mombasa Maize Millers Limited in Mombasa District within Coast Province, being the Servant of Mombasa Millers Limited, stole two motor vehicle batteries and one winder all valued at ksh.25,000, the property of the said Mombasa Maize Miller Limited which came into his possession by virtue of his employment. The Court rendered itself as follows:-

“thus I go ahead and acquit the accused person.....because I am convinced that any conviction is unsafe and not merited”.

11. The Respondent's witness, Suleiman Lazaro Nangela, testified that he had worked in the Respondent Company for thirty years on the security side. He told the Court that he knew the Claimant as he was his workmate, being an electrician. He then adopted his filed witness statement dated 11th December 2017 and produced in evidence outsourcing agreements between the Respondent and the Third Party for the years 2012 to 2013, 2013 to 2015, 2016 to 2017 and 2018 to 2019.

12. The Respondent's witness further told the Court that the Claimant stopped going to work on 27th December 2011 until after two weeks, and Abdul Karim told them (the witness) to arrest the Claimant when he came to work. That the Claimant was arrested on 13th January 2012, and he (the witness) did not know whether the Third Party was aware of all this.

13. Cross examined by the Claimant's counsel, the Respondent's witness (RW1) told the Court:-

a. that he did not know who was paying the Claimant's salary.

b. that Abdul Karim, the Respondent's Workshop Manager, initiated the Claimant's arrest.

c. that the Third Party was not involved in the arrest of the Claimant.

14. The Third Party, Ready Consultancy Services Limited, called one witness, Ibrahim Bocha, who adopted his filed witness statement referred to in paragraph 7 of this Judgment and further testified :-

a. that he works with the Third Party, which is an outsourcing company dealing with manpower management, as a Manager.

b. that some employees were recommended to the Third Party by the Respondent, while the Respondent managed the others.

c. that the Third Party found the Claimant at the Respondent's Company.

d. that the Third Party was not involved in the stealing issue involving the Claimant, and that those involved in his arrest, Suleiman and Abdul Karim, work for the Respondent.

e. that the Third Party was not involved in termination of the Claimant's employment.

f. that the Claimant was never handed over to the Third Party, and that the Third Party therefore never assigned the Claimant any duties.

g. that in January 2012, the Respondent was supposed to give the Third Party a list of employees, but the Claimant was never handed over to the Third Party as he had an issue to sort out with the Respondent first.

h. that money to pay employees' salaries came from the Respondent, together with the Third Party's management fees.

15. Having considered the Pleadings filed by the Parties herein and the evidence adduced, and having seen separate lists of issues for determination filed by the Claimant and the Respondent on 31st May 2019 and 9th August 2019 respectively, the issues for determination appear to me to be as follows:-

a. whether the Claimant was an employee of the Respondent as from 2008 earning a monthly salary of ksh.18,000.

b. whether the claimant was at any given time an employee of the Third Party.

c. whether termination of the Claimant's employment was unfair.

d. whether the Claimant is entitled to the reliefs sought.

16. On the first issue, although the Respondent, in its Response to the Memorandum of Claim, stated that the Respondent did not have records of the Claimant having been its employee from October 2008 to 2015, and pleaded the existence of an outsourcing agreement between the Respondent and the Third Party as from January 2012, evidence on record, whose validity the Respondent never disputed, shows otherwise.

17. The Claimant testified and demonstrated that at the instance and instigation of his employer, the Respondent, the Claimant was in January 2012 arrested, charged and prosecuted in Mombasa Chief Magistrate's Court Criminal Case No. 181 of 2012 for the offence of stealing by servant for allegedly stealing the property of his employer (the Respondent), which came to the Claimant's possession by virtue of his employment. The said Court's Judgment acquitting the Claimant was produced in evidence, and the Respondent did not question its validity and/or authenticity. The Judgment is dated 12th June 2015.

18. The Respondent's witness, who told the Court that he is an employee of the Respondent and has so been for the last thirty years, testified that he knew the Claimant as he was his workmate, and that in January 2012 he was instructed by the Respondent's Workshop Manager (Abdul Karim)) to arrest the Claimant when he came to work. That the Claimant was arrested on 13th January 2012.

19. The Third Party's witness, Ibrahim Bocha, told the Court that the Claimant was an employee of the Respondent. That the Third Party found the Claimant as such employee in January 2012 when the Third Party entered into an outsourcing/management agreement with the Respondent; and that the Claimant was never handed over to the Third Party. The Respondent did not rebut and/or controvert this evidence.

20. Further, the Respondent did not rebut and/or controvert the Claimant's evidence that though duly employed by the Respondent since October 2008, the Respondent never issued him with a contract and that on payment of his monthly salary, which the Claimant stated was ksh.18,000, the Claimant used to sign a book retained by the Respondent. I find and hold that the Claimant has established, on a balance of probability, that he was an employee of the Respondent as from the year 2008, earning a monthly salary of ksh.18,000.

21. On the second issue, and as already stated in the foregoing paragraphs of this Judgment, the Respondent did not demonstrate that the Claimant was, at any given time, employed by the Third Party or handed over to the Third Party for employment or as an employee. No evidence was tendered by the Respondent in that regard.

22. The outsourcing agreements between the Respondent and the Third Party produced in evidence by the Respondent did not state that the employees of the Respondent as at the date of the first agreement (1st January 2012) would become employees of the Third Party. Further, the said agreements, all of which appear to be similar, state at paragraph 7 thereof that:-

“the contractor shall provide his own employees with identification cards and job cards which shall be submitted to the company when each employee enters the company”.

23. The foregoing provision corroborates the Third Party's evidence that the Respondent (the company) recommended to the Third Party (the contractor) some employees while the Respondent managed the others. That one of such employees who remained under the Respondent was the Claimant.

24. It is to be noted that the Respondent did not produce in Court a schedule and/or list of its employees whom it alleges were taken over by the Third Party. The Third Party's evidence that salaries of all the employees together with the Third Party's management fees was paid by the Respondent, was neither challenged, rebutted nor controverted by the Respondent.

25. It is my finding that the Claimant was never, at any given time, an employee of the Third Party. The Third Party is not liable in any way.

26. On the third issue, the date of termination of the Claimant's employment was pleaded by the Claimant to be 13th June 2015, a day after his acquittal by the Criminal Court. The Claimant testified to this effect, which evidence was neither controverted nor rebutted by the Respondent. The Respondent, at whose instance the Claimant was arrested and prosecuted from January 2012 to 12th June 2015 for an alleged offence of stealing by servant, did not tell the Court when the Claimant's employment was terminated. It is this Court's finding that on a balance of probability, the Claimant has established that his employment was terminated by the Respondent on 13th June 2015.

27. The Claimant's failure to report on duty after being released on bail on 29th January 2012 as stated in the Claimant's filed statement as the criminal trial dragged on, cannot be said to have amounted to either termination of employment or absconding of duty by the Claimant as submitted by the Respondent. The Respondent did not commence the process of terminating the claimant's employment, for whatever reason. The claimant remained an employee of the Respondent, though no salary was paid during the period of trial. The Claimant has not, however, claimed the salary payable to him during that period.

28. The Respondent denied the claimant entry into its premises on 13th June 2015, and send him away, hence terminating his employment. The Respondent did not deny turning the Claimant back at its gates on 13th June 2015 upon his acquittal by the criminal Court, and sending

him away. It is my finding that the effective date of termination of the Claimant's employment by the Respondent was 13th June 2015.

29. The Claimant pleaded and testified that termination of his employment was unfair. That prior to termination, the Claimant did not receive any communication from the Respondent, and that he was not accorded any chance to be heard. Section 41 of the Employment Act 2007 provides, in mandatory terms as follows:-

1. "Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination, and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

30. The Respondent is not shown to have complied with the compulsory procedural requirements in terminating the claimant's employment.

31. Section 45 of the Employment Act 2007 on the other hand provides that termination of an employee's employment shall be unfair if the employer fails to prove, *inter alia*, that termination was for a valid reason and that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

32. The Respondent did not demonstrate that termination of the Claimant's employment was for any valid reason; and did not, in terminating the claimant's employment, act in accordance with justice and equity. It is my finding that termination of the Claimant's employment by the Respondent was both unprocedural and unfair, and I so declare.

33. On the fourth issue, the Claimant pleaded and testified that he was not paid his salary for the month of December 2011, being ksh.18,000; and that he was not given any notice/communication before termination of employment. This was not controverted or rebutted by the Respondent. The Claimant is entitled to payment of ksh.18,000 being his salary for December 2011 and to payment of one month salary in lieu of notice. The Claimant is also entitled to payment of compensation for unfair termination of employment. The Claimant is also entitled to be issued with a Certificate of Service.

34. Consequently, judgment is hereby entered for the Claimant against the Respondent as follows:-

- a. Salary for the month of December 2011.....ksh.18,000
- b. One month salary in lieu of noticeksh.18,000
- c. Eight months salary being compensation for
unfair termination of employment.....ksh.144,000

Ksh.180,000

36. The Claimant is also awarded costs of the suit and interest from the date of this judgment until payment in full.

36. The Respondent is hereby directed to issue the Claimant with a Certificate of Service Pursuant to Section 51 (1) of the Employment Act 2007 within thirty days of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JANUARY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Egunza for Korir for Claimant

Okata for Respondent