



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 437 OF 2015**

***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**ALEX ADIKA KEHODO.....CLAIMANT**

**VERSUS**

**SCAN GRAPHICS KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant brought in a claim vide a statement of claim dated 18<sup>th</sup> March, 2015.

The Respondent put in a reply dated 27<sup>th</sup> May, 2015.

2. The Claimant's evidence is that he was employed by the Respondent on 1<sup>st</sup> August, 2008 as a machine operator.

He says his starting salary was Kshs.15,000/= but was increased to Kshs.20,000/=. He was to be paid house allowance as well.

3. The Claimant further states that on 31<sup>st</sup> March, 2014 he was involved in a work related accident where his small finger was cut by the machine and he ended having an amputation.

He says the accident was due to the Respondent's negligence as he had informed the Respondent the machine was faulty and that its safety guard was faulty.

4. The Claimant says the Respondent failed to service the machine.

Further the Claimant says the Respondent refused to compensate him and did not even bother to report the accident to the Directorate of occupational safety and health services.

5. The Claimant says that after the amputation and after he recovered he resumed work at the Respondent's premises. He says he met his medical bills at Kshs.13,845/=.

He says he worked for the Respondent from 12<sup>th</sup> May, 2014 upto 11<sup>th</sup> October, 2014 when the Respondent sent him on an indefinite unpaid leave.

6. The Claimant says that on 24<sup>th</sup> October, 2014 he went to inquire about the fate of his employment and salary. He says he was asked to report back on 25<sup>th</sup> October, 2014.

On 25<sup>th</sup> October, 2014 he was paid Kshs.10,000/= being his balance for September, 2014.

He says that on 7<sup>th</sup> November, 2014 he reported to the place of work but was asked to report on 8<sup>th</sup> November, 2014. He says that the Respondent told the Claimant he was stressed and would not talk to him.

He said he would call him later.

7. The Claimant avers that since 8<sup>th</sup> November, 2014 the Respondent has not called the Claimant or otherwise informed him the fate of his employment.

The Claimant says that this amounted to constructive termination. The Claimant says that the circumstances in which his employment was terminated was unlawful and in bad faith and so is entitled to compensation.

8. The Claimant says he did not get any notice of termination of service and he did not commit any offence to warrant being sent on indefinite leave.

He says he has not been informed of the fate of his employment.

9. He says he has not been paid his dues such as pay in lieu of notice and unpaid salary.

10. He says he has not been given certificate of service.

He prays for the following compensation:-

- (a) 12 months compensation
- (b) Salary from 1<sup>st</sup> August, 2008 to 11<sup>th</sup> October, 2014.
- (c) Service pay as he says the Respondent did not make remittances for 4 months to NSSF.
- (d) Salary for 11 days in October, 2014.
- (e) One month in lieu of notice Kshs.20,000/=
- (f) Pay in lieu of leave.....Kshs.96,923/=
- (g) Service pay 15 days x Kshs.20,000 x 26 Kshs.67.930.77
- (h) House allowance 12 months Kshs.222,000/=
- (i) 12 months' salary compensation Kshs.240,000/=
- (j) Medical expenses incurred at workplace
- (k) General damages under Works Injury Act.
- (l) Costs of the claim
- (m) Interest until payment in full
- (n) Issuance of certificate of service

Any other relief the court may deem fit to grant.

#### **RESPONDENT'S EVIDENCE**

11. The Respondent in its reply states he had not employed the Claimant under a contract of service at a monthly salary of Kshs.15,000/= on 1/8/2008 as a machine operator and in October, 2014 the salary increased to Kshs.20,000/=.

Instead he states that the Claimant in his employment form alleges he was employed by DAVID ARADI and so avers Respondent was not the employee of the Claimant.

12. The Respondent further avers that if Claimant was involved in any accident where he got injured it was by his negligence in handling the machine and so was the author of his misfortune.

13. The Respondent further says the accident having been reported to the Director of Occupational Safety and health services should be pursued under Section 53 of work injury benefits Act and not through these proceedings.

14. He states that not having employed the Claimant they are strangers to the prayers for compensation and so denies the same in total.

15. The Claimant during his cross examination by the Respondent's advocates says he was employed by the Respondent. He says when he got injured he was taken to hospital by the Respondent's driver and was given only Kshs.1000/= for his costs.

He says he was given a form by the Director of Safety and Health Services but when he gave it to the Respondent he was chased away.

16. He says that the Respondent told them the office was closing for some time and he would recall them but he never recalled the Claimant. He says some of his colleagues went back to work.

He said he was not rude because the salary was delayed.

17. Director David Aradi testified on behalf of the Respondent.

Mr. Aradi admitted he was a shareholder of the Respondent company. He admitted the Claimant was an apprentice of the Respondent.

He says the Claimant was to learn to use the printing machine for 3 – 4 years and was getting an allowance of Kshs.15,000/= but was increased to Kshs.20,000/=.

18. The Respondent says he had not given Claimant an appointment letter and has no records to show the claimant went on leave.

He says Claimant deserted his work and is not entitled to the prayers he has prayed.

### **ISSUES FOR DETERMINATION**

19. (1) Was Claimant employed by the Respondent.

(2) Was the Claimant unlawfully terminated.

(3) Is he entitled to the prayers claimed.

### **DETERMINATION**

20. On the question of whether the Claimant was employed by the Respondent the Respondent in his pleadings states he had not employed the Claimant. He therefore denies the prayer for declaration of unlawful termination and the attendant prayers.

However, the Respondent witness David Aradi admits the Claimant was employed by Scan graphic Kenya Limited the Respondent. He admits he is a shareholder and a Director of the said company where the Claimant was employed as an apprentice from 2010 at an allowance of Kshs.15,000/=. He says later around 2014 they increased his salary to Kshs.20,000/=.

21. The Respondent admits they had not given the Claimant a letter of appointment. He also said they did not terminate the Claimant's employment but rather the Claimant deserted his employment. He further added that they delayed Claimant's salary as they were going through financial difficulties and so the Claimant became rude and used abusive language. He then deserted his employment.

He says he paid Claimant Kshs.10,000/= in October, 2014.

22. It is unfortunate that the Respondent did not give the Claimant any contract and did not keep any records as provided in Section 9(1) Employment Act which states that a contract of service for a period or a number of working days which amount in the aggregate to the equivalent of three months or more shall be in writing.

Section (2) provides that an employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that contract is consented to by the employee in accordance with Subsection 3. Subsection 3 provides that the employee should sign the contract or put a thumb print.

23. In the absence of any written records the court can only go by the pleadings, evidence adduced in court and the submissions by the respective parties which I confirm I critically considered.

Going by the said evidence as above I am left with no doubts that the Claimant was employed by the Respondent for a lengthy period notwithstanding absence of any records by the employer.

24. Section 10(7) of Employment Act is candid that if in any legal proceedings where an employer fails to produce a written contract or written particulars prescribed in Subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

The case before me the employer did not provide any document. Having settled that the claimant was an employee of the respondent, I now tackle the issue of whether the Claimant was constructively dismissed from his employment or whether he absconded from employment as claimed by the Respondent.

25. Constructive dismissal according to the case of **COCA COLA EAST AND CENTRAL AFRICA VS MARIA KAGAI LIGAGA (2015) eKLR** the court of appeal held that in applying the principles of constructive dismissal the conduct of the appellant (the employer) is what is relevant and not the conduct of the Respondent.

The court noted that it is a fundamental term a contract of employment that an employee is engaged to work and not to idle around and be tossed from one station to another with no work to do.

26. In this case the Claimant says he was sent on unpaid indefinite leave on 4<sup>th</sup> October, 2014. He says he subsequently kept visiting the Respondent's premises to inquire on the fate of his employment. On 25<sup>th</sup> October, 2014 he was paid Kshs.10,000/= being balance for September salary. He says he reported to work several times and on 8<sup>th</sup> November, 2014 he was told by the Director to leave he would call him.

He says he was never called since that day and he was not paid his dues.

27. The court finds the Respondent treated his employee casually and so contravened the requirements of the Employment Act.

The Respondent did not produce any documents to establish the relationship of an employer and employee. Furthermore, if he wanted to terminate the Claimant's employment there is the rightful procedure to follow and is not fair to just send an employee home and keep quiet after that.

28. It is only fair and just to formally terminate the employment of an employee as provided in Section 40 and 41 of the Employment Act whatever the situation is. In this case it is not clear if the Respondent wished to declare the Claimant redundant or if he wanted to dismiss him under Section 41 of the Employment Act.

29. In the absence of any communication from the respondent the court finds the respondent created a case of constructive dismissal where the Claimant is left with no choice but to leave his employment.

The court therefore finds a case of constructive termination of the Claimant's employment has been proved and so proceeds to declare the Respondent unlawfully terminated the Claimant's employment by the route of constructive termination.

### **RELIEFS AWARDED**

30. Having ruled that a case of unlawful termination has been proved, I proceed to award the Claimant the following reliefs:-

- (1) Unpaid salary 2014 (11 days).....Kshs.7,333.33
- (2) One month salary in lieu of notice.....Kshs.20,000.00
- (3) Pay in lieu of leave.....Kshs.96,923.00
- (4) House allowance declined for lack of any evidence of entitlement
- (5) Compensation for 3 months .....Kshs.60,000.00
- (6) Service pay.....Kshs 67,930.77
- (7) Medical expenses as per receipts.....Kshs.13,845.00
- (8) General damages for work injury benefits act is in the wrong forum and so is declined.
- (9) Costs are awarded to the Claimant.
- (10) Interest is also to apply at court rates till full payment.
- (11) Certificate of service should be given to the Claimant right away.

### **CONCLUSION**

31. The effect of the award to the Claimant is a total of Kshs.266,032.01 plus interest and costs.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His

Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**