



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1244 OF 2015

MOHAMMED ADEN MOHAMUD.....CLAIMANT

VERSUS

CARE INTERNATIONAL IN KENYA.....RESPONDENT

JUDGMENT

Introduction

1. In his Memorandum of Claim dated 15th July 2015 and filed in court on 16th July 2015, the Claimant, Mohammed Aden Mohamud cites the issues in dispute as discrimination in employment, unfair labour practices, unfair remuneration practices, non-payment of incentive arrears and reduced terminal dues/benefits. The Respondent, Care International in Kenya, filed a Memorandum of Defence on 12th August 2015.

2. At the trial, the Claimant testified through a court appointed Somali Interpreter, Aden Ibrahim. The Respondent called its former Deputy Human Resource Manager, Kenneth Murage Njama. Thereafter, the parties filed written submissions.

The Claimant's Case

3. The Claimant states that he secured employment with the Respondent as a Loader in 2003. He accuses the Respondent of employing him as a refugee on half pay as opposed to other fellow Kenyans.

4. The Claimant states that the Respondent deliberately employed him as a refugee, to avoid paying him his full pay as a Kenyan, and took advantage of the Claimant's literacy level.

5. The Claimant states that after he complained to the Respondent, he received a letter dated 26th April 2010, employing him as a Kenyan at a monthly salary of Kshs. 8,000 as opposed to the half pay which he had received for 7 years.

6. The Claimant further states that he entered into an incentive worker agreement with the Respondent on 1st January 2009 by which he was to be paid a monthly incentive of Kshs. 97.34 per ton, besides his salary.

7. The Claimant adds that he and his 9 colleagues used to offload between 20 and 25 trucks with a capacity of 25 tons per day, totalling to an average of 12,500 tons per month.

8. The Claimant claims that he used to offload 1389 tons per month and was entitled to a pay of Kshs. 135,195. He was however paid Kshs. 23,000 all inclusive, which he states, was 17% of the total pay due to him. The Claimant states that this situation persisted for 4 years.

9. The Claimant avers that on 22nd February 2012, he was injured in the course of duty whereby he lost one tooth but was not compensated.

10. The Claimant states that after terminating his services, the Respondent paid him Kshs. 70,000 as opposed to Kshs. 150,000 paid to his colleagues.

11. The Claimant therefore claims the following:

- a) General damages for infringement of his fundamental rights;

- b) Kshs. 6,489,360 being unpaid arrears and incentive;
- c) Kshs. 200,000 being compensation for injuries sustained;
- d) Kshs. 336,00 being unpaid half salary;
- e) Costs plus interest

The Respondent's Case

12. In its Memorandum of Defence dated 10th August 2015 and filed in court on 12th August 2015, the Respondent states that the Claimant was engaged as a Loader in 2007, under the Refugee Assistance Program, within terms set by the United Nations High Commission for Refugees (UNHCR) for its partners, based on a Harmonization Policy for Recruitment and Wages of Refugees.

13. The Respondent denies the Claimant's accusation that it deliberately employed him as a refugee and states that the Claimant presented himself as a refugee under a fake UNHCR Registration/Ration Card Number 0xxxxxxx and it is on that basis that he was engaged under the aforesaid Program.

14. The Respondent states that the Claimant signed a Refugee Agreement, which was renewed in 2008 and 2009.

15. The Respondent further states that in 2010, owing to pressure from the local community, it advertised for the first time, vacant positions for Loaders and the Claimant, undetected, applied for the said position and attached a Kenyan Identity Card Number xxxxxxxx. The Claimant was successfully recruited as a National Staff in the position of a Loader.

16. The Respondent asserts that at the time of the Claimant's appointment as a National Loader, the Respondent was unaware that the Claimant had previously been engaged as a refugee incentive worker. The Respondent points out that owing to the large number of refugees hired, the Claimant managed to go through the recruitment process undetected as a former refugee worker.

17. The Respondent contends that no arrears are payable to the Claimant for the period that he served under the Refugee Assistance Program as he falsely presented himself as a refugee.

18. The Respondent states that the anomaly in the Claimant's employment was only detected upon the Claimant being declared redundant.

19. The Respondent contends that the Claimant perpetuated a fraud and his claim is therefore tainted with illegality. The Respondent sets out the following particulars of fraud against the Claimant:

- a) Falsely presenting himself as a refugee while knowing that he was a Kenyan National;
- b) Uttering a fake and/or falsified UNHCR Registration/Ration Card Number xxxxxxxx;
- c) Non-disclosure of Kenyan identity;
- d) Receiving remuneration under a false identity.

20. Regarding the claim for compensation for injuries sustained, the Respondent states that the Claimant was treated for the injuries to full recovery and the matter forwarded to its insurers for consideration.

21. The Respondent states that the Claimant was declared redundant in accordance with procedural requirements and was paid all his dues under the law.

22. The Respondent reiterates that the Claimant's termination was lawful, valid and in full compliance with the requirements of the law.

Findings and Determination

23. The Claimant bases his claim on an assertion that the Respondent unlawfully employed him as a refugee and thus denied him the benefits accruing to National Staff. In Response, the Respondent accuses the Claimant of falsely presenting himself as a refugee in order to get employment as a Loader, under the Refugee Assistance Program.

24. The Claimant wavered in his testimony before the Court, even denying his own documents filed in court. The said testimony, being contradictory, was of no probative value. What is more, the Court was unable to understand why the Claimant did not complain about his employment status while still in the Respondent's employment. The only logical conclusion to make in the circumstances is that the Claimant cheated his way into employment as a refugee being fully aware that he was not a refugee but a Kenyan National. As fate would have it, he was later employed as a National Staff and it was not until the termination of his employment, on account of redundancy, that his double status was discovered.

25. Ironically, the Claimant now seeks to use his own unlawful conduct to seek remedies against the Respondent. He who comes to equity must come with clean hands (see *Arthur Njuguna Karogi v National Government Constituencies Development Fund Board [2018] eKLR*).

The Claimant's hands are soiled, not only by his initial fraud by which he procured employment under the Refugee Assistance Program but also in giving false testimony thus perjuring himself.

26. As a result, the Claimant's entire claim, which he bases on his own unlawful conduct is dismissed.

27. Each party will bear their own costs.

28. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH 2022

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JUDGE

Appearance:

Mr. Ayora for the Claimant

Mr. Orina for the Respondent