



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 32A OF 2018

PETER AYOYI MACHIKA.....CLAIMANT

VERSUS

WINNIE MAOBE MUKHWANA

T/A MAOBE MUKHWANA & COMPANY ADVOCATES.....RESPONDENT

JUDGMENT

1. The suit was filed on 20/4/2018 by the claimant against the respondent dvocate praying for

- (a) Salary for six months totaling Kshs.120,000
- (b) Prorata leave; $20,000 \times 7/12 = 11666.67$.
- (c) N.S.S.F not remitted.
- (d) N.H.I.F. not remitted.
- (e) House allowance: $20,000 \times 15/100 = 3000 \times 7 = 21,000$.
- (f) Disturbance allowance as shall be awarded by the Court.
- (g) Costs and interest.

2. Statement of defence was filed on 29/7/2018 by the respondent who denies having employed the claimant at all and therefore denies all particulars of the claim.

3. C.W,1, the claimant adopted a witness statement filed on 11/4/2019 as his evidence in Chief. The claimant stated that he was Interim Secretary General of Kenya National Union of Paralegal Employees.

4. That on/or about mid-August, 2017, one Mr. Kundu T/A Wesustsa & Co. Advocates called the claimant to his office and requested if the claimant could work for the respondent M/s Winnie Maobe Mukhwana.

5. That the claimant agreed to work under the respondent as an office administrator as well as a sales and marketing officer at a monthly salary of Kshs.20,000 and 10% commission on every new business transacted by the claimant from 1/9/2017.

6. That since the office was leased in the claimant's name and the claimant paid Kshs.18,000 per month for six months (Kshs.108,000), that the office was to remain in the name of the claimant for a period of 3 years until the money paid to the landlord is refunded to the claimant then the office was then to be transferred to the respondent.

7. The agreement was to be drafted by Mr. Kundu and work started. It was also agreed that the office furniture of the claimant was to be paid Kshs.500 per month by the respondent.

8. Claimant stated that his duties included general office administration of staff who included peter Ayoyi, Lewin Munyuli and Forstus Shimenga who were secretary, cashier and general staff respectively.

9. That the respondent did not pay the claimant salary for two (2) months. In October, 2017, the respondent partly paid Kshs.15,000 only and Kshs.5,000 was paid later.
10. The claimant was not paid again until February, 2018 in respect of all the agreed dues. The claimant terminated his services to the respondent and gave the respondent on month notice for March, 2018 to April, 2018.
11. The claimant stated that the respondent used police to intimidate him and eject him from office. The respondent filed a suit to eject the claimant from office but she later withdrew the suit.
12. The claimant prays for the reliefs set out in the Statement of Claim.
13. The claimant called C.W.2 Forstus Jamuhuri Shimenga who testified that he relied on a witness statement dated 11/4/2011 as his evidence-in-Chief. C.W.2 testified that he was a pastor and also worked for Kenya National Union of Paralegal Employees situated at Nairobi Ngara Road Bhavesh Centre.
14. C.W.2 testified that on 10/8/2017 Mr. Kundu T/A K.N. Wesutsa and Co. Advocates called Mr. Machika, the claimant in his office and requested him if he could agree to work with the respondent. C.W.2 said he was present when the alleged conversation took place. C.W.1 stated that claimant worked for Imbenzi & Co. Advocates. That he used to take case to the claimant.
15. That the respondent paid commission to C.W.2 when he brought cases to her. That Imbenzi Advocate left the firm to the respondent.
16. C.W.2 under cross-examination by Counsel for the respondent stated that he did not know anything about salaries. That he had no relation with the claimant except work. That the office in which they worked belonged to the claimant. That the respondent was known to him as she was doing his succession case.
17. R.W. 1, the respondent testified that she was an advocate of the High Court of Kenya. R.W.1 adopted a witness statement dated 25/6/2018 as her evidence in Chief. She also produced list of documents marked exhibits '5' to '10'.
18. R.W. 1 testified that she leased office space at Kidula house from September, 2017 for a period of 3 years. That the office was before that occupied by Imbenzi & Co. Advocates who had employed the claimant. Imbenzi & Co. Advocates was allowed by the respondent to occupy part of the premises to run private affairs until end of December, 2017. This grace period was extended to February, 2018.
19. That the claimant abused the offence space and touted himself as practicing under the respondent.
20. That the respondent obtained Orders to evict the claimant from the office. That the claimant became aggrieved and assaulted her.
21. R.W.1 stated that she never employed the claimant at all in any capacity. That an advocate is precluded from sharing his/her earning with unqualified persons and could not have entered into an agreement purported by the claimant.
22. That the claimant did not generate any work for her. That R.W.1 had her own clerk and Secretary from the time she leased the office at Kidula house. R.W.1 stated she did not owe the claimant any money as claimed or at all.
23. Under cross-examination, R.W.1 insisted that she took over the space previously occupied by G.I. Imbenzi & Co. Advocates. R.W.1 denied that she had disagreement with Imbenzi and was allowed by the claimant to remain in the premises. R.W.1 stated that she got the office space from Imbenzi Co. Advocates and not from the claimant. R.W.1 stated she had a running tenancy alongside the claimant.
24. R.W.1 stated that C.W.2 was her client and C.W.2 had approached R.W.1 directly but not through the claimant. R.W.1 prays the suit be dismissed with costs.

Determination

25. In terms of Section 107, and 108 of the Evidence Act, Cap 80 Laws of Kenya, a plaintiff must prove what he/she alleges on a balance of probabilities. The plaintiff bears the burden of proving his case.
26. The claimant has alleged without producing any letter of employment and/or any written agreement between himself and the respondent that he had entered into an oral agreement with the respondent Advocate to work as an office administrator at a salary of Kshs.20,000 a month. That he was to receive 10% commission on all the work he brought into the law firm and that he was to be reimbursed Kshs.108,000 he had already paid for office space now occupied by the respondent Advocate. Furthermore the respondent had to pay the claimant Kshs.500 per month for the office furniture in the said office.
27. The respondent has denied having entered into any such agreement with the claimant or at all. The respondent has stated that he took over the office space at Kidula house from her former employer Imbenzi & Co. Advocates. That she had employed her own clerk and Secretary and did not employ the claimant and/or enter into any agreement with him as alleged or at all.
28. C.W.2 purported to have been present when the verbal agreement between the claimant and the respondent was entered into. However, when pinned under cross-examination C.W.2 was unable to give any credible details of what transpired between the claimant and the respondent.

29. It is apparent that the claimant and the respondent had at one point shared the space previously occupied by Imbenzi & Co. Advocates. There is no evidence however that the claimant was an employee of the respondent nor is there evidence that the respondent took over the premises from the claimant with agreement to refund rent paid by the claimant for six months and payment for use of office furniture.

30. Such an agreement must be proved by documentary evidence which the claimant failed to do.

31. The testimony by C.W.1 and C.W.2 appear not credible at all and the Court does not believe that the respondent would have entered into an illegal arrangement of sharing proceeds of her practice as an advocate of the High Court with the claimant who was not a qualified advocate.

32. As stated earlier the Claimant bears the onus of proving his case on a balance of probabilities. The claimant has failed to discharge that onus placed on him. The Court finds the case to be without merit and is dismissed.

33. The Court finds this a suitable case for each party to bear their costs of the suit.

Dated and delivered at Nairobi this 28th day of January, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 of the Civil 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Claimant in person

K.N. Wetsusa & Co. Advocates

Chrispo: Court clerk.