



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 207 OF 2016

BONIFACE MUHATIA.....CLAIMANT

VERSUS

UBA KENYA BANK LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Statement of Claim dated 15th February 2018 suing the Respondent for unfair dismissal. He avers that he was employed as a Driver by the Respondent on 6th July 2009 and his starting salary was Kshs. 18,461.54 per month, later increased to Kshs. 35,000/- a month. The Claimant averred that during his employment with the Respondent, he never went for annual leave; never rested on any weekday and/or public holidays; worked from 6.30am to midnight on all days and only rested for at most two days in a month when his immediate boss travelled out of the country. He further avers that he diligently performed his duties before the Respondent's MD purported to verbally dismiss him from employment on 15th May 2013 after accusing him of reporting to work late (6.40am) and leaving work early the previous day at 10.30pm. That the MD alleged he had gotten late for a meeting because of the Claimant's said lateness which shocked the Claimant as he had not been informed about the alleged meeting. That in any event his contract required him to arrive at work by 7.30am and that his arrival time of 6.40am on the material day was therefore well within the contractual terms. That he had a clean employment record since he had never been served with any warning letter or have any disciplinary action taken against him by the Respondent.

2. The Claimant avers that he was never given a fair hearing and due process was never followed before he was summarily dismissed. Further, that the allegations against him had no factual basis and that the truth is the Respondent looked for an excuse to get rid of him since he was directly employed by it and it wanted an outsourced driver like all the other drivers in the company. He further avers that the Respondent's acts are unjust, malicious and unlawful and that he only secured a job 25 months after his summary dismissal by the Respondent. He thus seeks damages for unlawful dismissal, one month's salary in lieu of notice, severance pay, overtime and payment in lieu of leave days not taken all totalling to Kshs. 4,270,655.30 as well as a Certificate of service. He also prays for costs of these proceedings and any other relief that this Honourable Court may deem fit and just to grant.

3. The Respondent filed a Response dated 22nd April 2016 averring that the suit herein is an abuse of the process of the court, incompetent and time barred pursuant to section 90 of the Employment Act. It denies that the Claimant's salary was Kshs. 35,000/= and avers that the Claimant was entitled to one-month termination notice or one-month salary in lieu of such notice. It further avers that the Claimant deserted its employment in March 2010 without notice to it and that he had only worked for it for only 9 months between 6th July 2009 to 31st March 2010. The Respondent averred that it later established that the Claimant had been employed by the Respondent's MD at that time and the successor MD thereafter, both of whom directly paid him salary without any reference to the Respondent. The Respondent avers that the Claimant regularly received his salary from the said MDs for the period 2011, 2012 and 2013 through private bank accounts held by the two MDs in the Respondent's bank. It averred that the Claim herein is thus made in bad faith, is unwarranted, based on lies and material non-disclosure and an abuse of the court process. That the Claimant was never dismissed from service but that he deserted its employment for better pay and that his claims as particularised should only be dismissed with costs to the Respondent.

4. The Respondent also filed a Witness Statement made by its HR Officer, Evelyn Kariuki on 24th January 2020. She deponed that the employment relationship between the Claimant and Respondent came to an end on 31st March 2010 when the Claimant deserted the Respondent's employment for better pay.

5. The Claimant filed his Reply to the Response dated 13th May 2016 denying that his claim is statute barred and further denies that he left his employment with the Respondent without notice and was in the personal employment of the MD as alleged. He avers that he was continuously in the employment of the Respondent assigned to drive the Respondent's CEOs with two (2) motor vehicles alternately in the years 2009 to 2013. That he was at all times paid his monthly salary by a direct transfer to a bank account he held with the Respondent Bank and that it is therefore an afterthought, deceitful and fraudulent scheme for the Respondent to purport to rely on the alleged source of his monthly salary when he was never at any time given notice of the same by the Respondent. He prays for the Respondent's response to be

dismissed with costs and judgment be entered against the Respondent as prayed in the Statement of Claim.

6. In his testimony in court, the Claimant relied on his statement of claim, his List of Documents dated 15th February 2016 and his Witness Statement filed on 16th February 2016, which he relied on entirely as his evidence in chief. He further adopted his Supplementary List of Documents and his Supplementary Witness Statement both dated 13th May 2016, as his supplementary evidence in chief. He at the same time amended his Supplementary witness statement, without objection, at Paragraph 19 to reflect the correct years of "2013" instead of "2015" and "2010" instead of "2013". The Claimant further testified that in 2012 and 2013, he attended and participated in all the Respondent's social events and on cross-examination he explained the photos he had taken during those events.

7. In re-examination, the Claimant stated that he was a stranger to the bank account statements produced by the Respondent which are confidential account statements of the Respondent's Managing Directors and there is no way he would have known whether the salary he was receiving was being paid by the Respondent and/or the Respondent's MDs. Further because the bank account through which he used to receive his salary from the Respondent has never changed.

8. The Respondent's witness, Miss Evelyn Kariuki admitted into evidence the Respondent's List of Documents dated 22nd April 2016 and relied on the Witness statement dated 24th January 2020 as her evidence in chief. She stated that they were not involved in the termination which issue was between the Claimant and MD in their personal capacity. On cross-examination, she stated that she did not witness the Claimant's dismissal having been employed in 2017 and reiterated that the Claimant was not a member of staff between 2010 and 2013. She further stated that the letter of final dues annexed at page 14 of the Supplementary List dated 27th May 2013 was an advisory response to an inquiry made by the Claimant on his terminal dues and that the same is for payment for 2010.

9. In his written submissions the Claimant submitted that he was all along at the at the Respondent's premises during the entire period of his employment engaged by the Respondent to drive its Managing Directors in the Respondent's motor vehicles registration numbers KBF 111H - Toyota and KBK 224J, assigned to the said Managing Directors. That if the Respondent opted to change his mode of payment in any manner as alleged, then such change did not in any way affect and/or terminate his contractual duties with the Respondent, as there was no communication and/or notice from the Respondent as to his execution of his duties as a driver for its Managing Directors. He further submitted that the Respondent's Witness' statement on cross-examination was that she could not tell who was paying the Claimant and/or the position of the alleged payments by the Respondent's MDs as alleged by the Respondent. That the Respondent's witness confirmed to the court that the motor vehicles referred to by the Claimant indeed belonged to the Respondent. That the said Respondent witness could not however answer most questions asked by the Claimant's counsel such as why the Respondent issued him with a termination letter in 2013 yet it alleges his employment ended in 2010. That Respondent's witness cannot thus purport to give any evidence in relation to the matters in question since all she stated are hearsay. That he has proved his case to the balance of probability but the Respondent has not provided any proof to support its allegation that he was not its employee in the contested period. That as such, the court should find that he was in the Respondent's employment for the entire period between 6th July 2009 and 15th May 2013. He submitted that he was never given an opportunity to answer to the allegations levelled against him by the Respondent and that none of his rights under the employment law were observed. That as under Section 43(1) of the Employment Act, since the Respondent has failed to prove the reason or reasons for the termination, the termination of his employment should be deemed unfair within the meaning of Section 45. He further relies in the case of **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR** on the court's view on the legal requirements of procedural fairness under Section 41 of the Employment Act. He submits that the termination of his employment was unfair and unprocedural and urges this Court to find as such. The Claimant submits that in terms of Section 51 of the Employment Act, the Respondent is under a duty to issue him with a Certificate of Service to cover the entire period of employment and that he is thus entitled to a correct Certificate of Service from the Respondent. That since he has shown to this Court that the termination of his employment was unlawful, he is entitled to damages as prayed in his claim. He urges the Court to award him the maximum amount as under section 49(1)(c) of the Employment Act on account of the defiant demeanour of the Respondent and the inconvenience and mental distress he has been subjected to. He further submits that since the Respondent did not produce an evidence to support its case or to rebut his claim for notice pay, this Court should find that Notice was never issued upon him and to award him payment of one month's salary in lieu of Notice. The Claimant submits that his employment was terminated on account of redundancy and not for the alleged "lateness and/or work desertion" as claimed by the Respondent. That he is therefore entitled to severance pay for the period he served the Respondent as under Section 40(1)(g) of the Employment Act. He further submitted that he produced as evidence, in his Supplementary List of Documents, the excerpts of exit and entry register of the Respondent's premises at Westlands, Nairobi and which register shows that he worked beyond the normal working hours. That this Court ought to award him for the overtime worked as calculated in his Claim and further because his letter of employment dated 25th June 2009 provided for "working hours between 7.30am to 4.30pm with a one-hour lunch break". Further, that since the Respondent's witness failed to prove whether or not he had taken his leave days, he urges the Court to find that no leave days were taken by him and that he is entitled to payment in lieu of leave days. He submits that since costs follow the event and having proved his claim against the Respondent to the required standard, he is entitled to the costs of the proceedings herein.

10. The Respondent submits that the Claimant was never confirmed as its employee since he never received confirmation of his appointment in writing or at all at the end of the probation period, as provided in his letter of appointment dated 25th June 2009. That there is further consequential evidence to show that the Claimant never received a salary from the Respondent from around March 2010 and it invites the Court to examine the cheque attached by the Claimant at page 14 of his documents, drawn in his favour in the sum of Kshs. 35,000/-. It notes that the drawer is one Tunji Adeniyi who was the MD of the Respondent Bank at the time and that it has further attached the former MDs' statements of accounts showing that the Claimant was paid out of the personal account of the MD and not the Respondent on various dates between 2010 and 2013. That the evidence imputes the employer-employee relationship was between the Claimant and the MD to the exclusion of the Respondent and that since the documents speak for themselves, it is clear the Claimant was not its employee as at the date of the alleged termination. That since the Claimant's employment with the Respondent ceased in March 2010, a cause of action does not arise against the Respondent but against the Managing Director in his personal capacity and that it could therefore not have terminated the Claimant's employment. That consequently the amount sought by the Claimant in his claim cannot be awarded against the Respondent and that if this Court is inclined to award notice pay, then it ought to use his monthly salary of Kshs 18,461.54 to compute the same. That this is because the Claimant has not demonstrated that the Respondent ever paid Kshs. 35,000/- per month or that it increased his salary. It further submits that the claims for overtime and payment in lieu of leave days not taken are statute-barred under Section 90 of the Employment Act and cannot be granted because they were not brought within twelve months after the alleged cessation of employment in May 2013. It cites the decision in **Peter Asuka v Mutungati Farmers Co-operative Society [2015] eKLR** where Radido J. dismissed a claim for overtime and

stated that the same constitutes continuing injury which should have been claimed within 12 months which position was affirmed by the Court of Appeal in **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR**. It further relies on the court's decision in **Samuel Ochieng Atinda v Nakuru Express Supplies & Services Ltd [2015] eKLR** that the claim for leave should have been claimed within 1 year of cessation and was thus statute barred. The Respondent submits that the document adduced by the Claimant highlighting an entry to show his leaving of the Respondent's premises does not in itself demonstrate that the Claimant worked overtime for 17 ½ hours every day for 3 years and 10 months. This is because it is firstly an entry for one day out of the entire employment period and secondly, the entry does not indicate with clarity the time in and whether the time out was 10.00am or 10.00pm. The Respondent submitted that this Court should dismiss this claim for overtime as the Claimant has not proved the same on a balance of probabilities as was similarly found by the court in **David Ambuli Ngota v Universal Newspapers Distributors Limited & Another [2020] eKLR**. It submitted that the Claimant's case is untenable both in law and in fact and thus urged its dismissal with costs.

11. The Claimant asserts employment by the Respondent which employment is denied by the Respondent who asserts the Claimant was not confirmed in employment. The Respondent in a letter dated 27th May 2013 indicated the Claimant was entitled to terminal dues of Kshs. 34,153.86 which included a sum of Kshs. 10,000/- as severance pay. The letter in *parri materia* read as follows:-

Further to your inquiry about your terminal dues early this month following your disengagement with the Bank in March 2010 when a decision was taken by the Bank to outsource all the services offered by drivers of the Bank, we shall proceed to make the following payments that had accrued to you up to March 2010.

12. The Respondent thus seemed to have handed the Claimant over to another as employer in a classic case of outsourcing Kenyan style. In the case of **Wrigley Company (East Africa) Limited v Attorney General & 2 Others & Another [2013] eKLR Petition No. 22 of 2012** the Court (Nduma, Ndolo, Nzioki JJ.) defined the parameters for a credible outsourcing program as follows:-

- i. Ordinarily employers are not expected to outsource their core functions;*
- ii. An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;*
- iii. An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and*
- iv. Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.*

The Respondent did not demonstrate the adherence to the best practice and it seems the Claimant was unaware of his services being outsourced. The alleged outsourcing did not absolve the Respondent from obligations to the Claimant. The act of outsourcing without securing the Claimant's terms and conditions as agreed with the company to whom he was outsourced was tantamount to a termination. The Respondent was bound to ensure that the Claimant was notified and paid his terminal dues at the time and not 3 years later when he sought clarity upon termination by the agency he was outsourced to or by his supervisor. The long and short of the foregoing is that an unlawful termination took place and the Respondent is liable for it.

13. As to the remedies the Claimant is entitled to, the Court is minded that he would have been entitled to one month's notice, severance pay, pay for leave days not taken and overtime pay if any. The Claimant sought a blanket sum on overtime asserting he worked for 18½ hours every day without a break year on year. This was not proved in evidence and as such the claim as framed would fail with the Court only awarding him overtime for one month at the rate of 15 hours overtime in the entire month. He is therefore entitled to the following reliefs:-

- i. One month's salary in lieu of notice – Kshs. 18,461.54
- ii. Severance pay @15 days for each year worked – 36,923.08
- iii. 15 hours overtime – Kshs. 769.23
- iv. Compensation for unlawful dismissal – 6 months Kshs. 110,769.24
- v. Costs of the suit
- vi. Certificate of service for the years 2009-2013
- vii. Interest at Court rates on the sums in i), ii) and iii) above from date of filing suit till payment in full;
- viii. Interest at Court rates on the sum iv) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi this 24th day of February 2021

Nzioki wa Makau

JUDGE