



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 379 OF 2018

KENNEDY ODHIAMBO ANYIKO.....CLAIMANT

VS

MINI BAKERIES (MSA) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Kennedy Odhiambo Anyiko filed his claim against his former employer, Mini Bakeries (MSA) Limited on 8th June 2018.
2. The Respondent filed a Response to the Claimant’s Memorandum of Claim on 7th November 2018 to which the Claimant responded on 4th April 2019.
3. The parties appeared before me on 28th September 2020 and consented to dispense with the matter by their pleadings and written submissions. This judgment is therefore based on the pleadings, supporting documents and submissions filed by the parties.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent on 20th April 2012. He earned a daily wage of Kshs. 896.
5. The Claimant claims to have worked for a period of 4 years until 11th November 2016, when his employment was terminated without notice.
6. The Claimant’s case is that the termination of his employment was without justifiable cause and was effected outside due procedure. He therefore claims the following:

- a) One month’s salary in lieu of notice.....Kshs. 21,504.00
- b) Unpaid annual leave for 4 years.....43,818.80
- c) 12 months’ salary in compensation.....258,048.00
- d) Service pay.....54,773.50
- e) Costs plus interest

The Respondent’s Case

7. In its Response dated 30th October 2018 and filed in court on 7th November 2018, the Respondent states that the Claimant was a casual employee whose first engagement with the Respondent was in July 2013.
8. The Respondent adds that the Claimant worked on intermittent basis, over a period of 4 years, and was paid Kshs. 896 at the end of each day worked.
9. The Respondent avers that the Claimant, as a casual employee, reported to work as and when he pleased, without any consequences whatsoever. The Respondent further avers that it was nevertheless duty bound to make statutory deductions for the periods the Claimant

worked for it.

10. The Respondent denies that the Claimant's employment was terminated as alleged and states that the Claimant left employment at his own instance, as all casual employees are entitled to, and never came back, only to issue a demand letter claiming unlawful termination.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

12. In his Memorandum of Claim, the Claimant pleads that his employment was terminated on 11th November 2016. He however does not give any details as to the circumstances leading to the termination.

13. Section 47(5) of the Employment Act provides the following:

(5) For any complaint of unfair termination or wrongful dismissal the burden of proving that an unfair termination or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

14. My reading of this provision is that an employee alleging unlawful termination of employment bears the primary responsibility of laying before the Court facts in support of their allegation. Only then is the employer put on their defence, to justify the grounds of termination.

15. This position was affirmed by the Court of Appeal in its decision in ***Premier Construction Limited v Josephat Bwire & 5 others [2017] eKLR*** where it was held that since it was the employees who had first gone to court alleging that their employment had been unfairly terminated, the said employees were duty bound to bring evidence to prove their allegation.

16. In this case, the Claimant simply states that his employment was unlawfully terminated but does not give any details as to what he considers to have been unfair or wrongful. The Court could not therefore tell what action was taken by the Respondent so as to give rise to a claim of unlawful termination.

17. What is more, in the demand letter sent to the Respondent by the Claimant's Advocates, the date of termination is given as 5th November 2016; a different date from the one pleaded in the Memorandum of Claim being, 11th November 2016. No attempt was made to explain this material discrepancy.

18. In its decision in ***Bakari Abdalla Mwangazi v Kwale International Sugar Company Limited [2020] eKLR*** this Court held that an employee who prevaricates on the date of the termination complained of cannot be said to have discharged the evidential burden imposed by Section 47(5) of the Employment Act.

19. In the submissions filed on behalf of the Claimant on 25th November 2020, a lot of effort was expended in attacking the Respondent's line of defence that the Claimant was a casual employee, working on intermittent basis. I think however that the primary duty on the part of the Claimant was to establish a case of unlawful termination and thereafter debunk the Respondent's defence. A weak defence, without more, cannot save an unsubstantiated claim.

20. In light of the foregoing, I find and hold that the Claimant has failed to prove a case of unlawful termination of employment. The claims for compensation and notice pay are therefore without basis and are dismissed.

Other Claims

21. The Claimant did not adduce any evidence to support his claims for leave and service pay. These claims therefore also fail and are disallowed.

22. In the ultimate, the Claimant's entire claim fails and is dismissed.

23. Each party will bear their own costs.

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mr. Onduso for the Claimant

Mr. Kongere for the Respondent