



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 169 OF 2017**

**ELPHAS OKINDA.....CLAIMANT**

**VERSUS**

**KHALSA MOTORS.....RESPONDENT**

**JUDGMENT**

1. The Cause was heard on 13 February 2019 when Elphas Okinda (the Claimant) testified and 2 March 2021 when Khalsa Motors (the Respondent) presented 2 witnesses.

2. The Claimant filed his submissions on 29 April 2021, and he identified the Issues for determination as:

- i. Whether the Claimant was an employee of the Respondent?
- ii. Whether the Claimant's prayers should be granted?

3. The Respondent filed its submissions on 20 May 2021, and it adopted the Issues as proposed by the Claimant.

4. The Court has considered the pleadings, evidence and submissions.

**Nature of employment relationship**

5. The Claimant testified that he was employed by the Respondent as a mechanic in 2012 but was not issued with a written contract. He asserted that he served until 2016, when he left because of an injury leading to an amputation of his toe.

6. However, the Respondent contended that the Claimant was engaged as a general labourer/trainee in August 2015 and deserted in May 2016.

7. The Court has 2 inconsistent versions on the nature of the contractual relationship between the Claimant and the Respondent.

8. Under section 2 of the Employment Act, 2007, an employee is defined to include an apprentice and indentured learner.

9. With the admission by the Respondent that the Claimant was a trainee, the Court has no hesitation in finding that he was an employee for purposes of the Employment Act, 2007.

**Commencement of relationship**

10. The next question is, when did the relationship start, in 2012 as asserted by the Claimant or in 2015?

11. Section 9(1) of the Employment Act, 2007 requires the employer to issue a written contract under certain circumstances.

12. The Claimant qualified for the issuance of a contract because his engagement with the Respondent extended beyond 3-months.

13. In light of section 9(1) as read with section 10(3) & (7) of the Employment Act, 2007, the Court finds that the contractual relationship between the Claimant and the Respondent started in February 2012.

### **Breach of contract**

### **Unpaid house allowance**

14. The Claimant sought Kshs 86,400/- on account of unpaid house allowance from 2012 to 2016 at a monthly rate of Kshs 1,800/-.

15. Section 31 of the Employment Act, 2007 obligates the employer to provide an employee with housing or pay an allowance to cover rent. However, the provision does not set the formula for computing house allowance.

16. The Court, therefore, finds that as a matter of legal principle, the Claimant was entitled to housing allowance in lieu of the provision of housing.

17. The Claimant founded this head of the claim on a collective bargaining agreement. The agreement was not produced in Court.

18. The Court, therefore, declines to award the relief sought.

### **Underpayments**

19. An underpayment of wages may occur where an employer pays below the contractually agreed rates or the prescribed minimum wage.

20. The Claimant contended that he was underpaid by Kshs 386,208/-.

21. However, he did not disclose in the evidence or submissions the prescribed minimum wage, which applied to his occupation or the sector the Respondent operated in.

22. The Court declines to grant the relief as prayed for in the Statement of Claim.

### **Medical allowance**

23. On account of medical allowance, the Claimant pleaded a figure of Kshs 21,936/-.

24. Despite pleading such a precise figure, the Claimant did not provide either an evidential, contractual or legal foundation to the head of the claim, and relief is again declined.

### **Gratuity**

25. Similarly, the Claimant did not provide an evidential or legal anchor to this head of the claim. If by gratuity, the Claimant meant *service pay* as envisaged under section 35(5) & (6) of the Employment Act, 2007, the two do not mean the same benefit. Relief is declined.

26. Before concluding, the Court wishes to note that the Claimant's case was casually drafted and pleaded. If a little bit more effort had been made, the findings might have been different.

### **Conclusion and Orders**

27. From the foregoing, the Court finds no merit in the Cause, and it is dismissed with no order on costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 16<sup>TH</sup> DAY OF JUNE 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Claimant Amondi & Co. Advocates

For Respondent Owiti, Otieno & Ragot Advocates

Court Assistant Chrispo Aura