



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2044 of 2016

JARED AMBANI ABAGUSE.....CLAIMANT

VERSUS

A.A.A. GROWERS LIMITEDRESPONDENT

J U D G M E N T

1. The cause herein was instituted by the Claimant vide a Memorandum of Claim dated 20/9/2016 and filed in court on 4/10/2016. The Claimant pleaded that he was on 3/2/2014 employed by the Respondent as a truck driver earning a monthly salary of ksh.20,000 which was later increased to ksh.23,000. That he worked for the Respondent from 3/2/2014 to 28/2/2015 when his services were terminated by the Respondent on allegations of stealing.
2. The Claimant pleaded that his termination was unlawful and prayed for a total liquidated sum of ksh.999,314.60 made up of his salary for February 2015, one month salary in lieu of notice, payment in lieu of leave, unpaid house allowance, service pay for one year, payment for holidays worked, twelve months salary being compensation for unlawful dismissal, damages for breach of contract and payment for overtime worked.
3. The Respondent filed a Memorandum of Reply and Counter-Claim on 19/12/2016. The same is dated 17/12/2016. The Respondent admitted having employed the Claimant as a truck driver as pleaded by the Claimant and further pleaded that the monthly salary paid to the Claimant was a consolidated amount and was inclusive of the claimant's house allowance.
4. The Respondent denied having terminated the Claimant's contract of employment, and pleaded that the Claimant simply vanished from his employment and deserted on 28/2/2015 after he was unable to account to the Respondent for some missing metal bars which the Claimant was supposed to transport to the Respondent's workshop, and upon apprehension that he would be arrested.
5. The Respondent further pleaded that the Claimant had not collected his salary for February 2015, which the Respondent had all along been ready to pay together with the Claimant's other dues, a total of ksh.34,518.
6. The Respondent counter-claimed a sum of ksh.69,000 against the Respondent, being three(3) months salary in lieu of notice.
7. The Claimant does not seem to have filed any response to the Respondent's counter-claim as there is none on record.
8. When the claim came up for virtual hearing on 10/8/2021, the Claimant and his counsel did not appear. Being satisfied that the claimant's counsel had on 3/8/2021 been served with a hearing notice and an affidavit of service duly filed in court, the court ordered the hearing to proceed; upon which counsel for the Respondent successfully applied for dismissal of the claimant's claim, which was dismissed with costs for non-attendance on the part of the Claimant.
9. In prosecuting its counter-claim, the Respondent called one witness (Nathaniel Noti) who adopted a witness statement which he had recorded and signed on 27/10/2020 as part of his testimony. The witness further produced in evidence the documents filed together with the Respondent's Memorandum of Reply and Counter-Claim.
10. It was the Respondent's testimony that under the Claimant's contract of employment, the Respondent was entitled to a three months notice in the event that the Claimant wanted to terminate the contract, or three months' salary in lieu of such notice. The Respondent prayed that judgment be entered in its favour for the sum of ksh.69,000 being three months' salary in lieu of notice.
11. The Respondent's said evidence was neither rebutted nor controverted because as I have preceded to point out in this judgment, the Claimant and his counsel did not appear for the hearing of the case, and did not, therefore, either cross-examine the Respondent's witness or

tender evidence in rebuttal of the Respondent's evidence.

12. I have looked at the contract of employment which the Respondent produced as its exhibit no.2. Curiously, the said document does not appear to have been signed by the Claimant. Only the Respondent's authorizing manager is shown to have signed it on 12/2/2014. Although the said purported contract of employment has as one of the terms of the claimant's employment a provision that the Claimant would give a three months' notice to the Respondent or pay three months' salary in lieu of notice should he wish to terminate his contract of employment, I decline to hold this provision, and indeed any other in the aforesaid document, against the Respondent as the same is not signed and/or consented to by the Claimant.

13. Turning to the Employment Act 2007, Section 9(2) thereof provides as follows:

“any employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub-section(3)

(3) for the purpose of signifying his consent to a written contract of service, an employee may

(a) sign his name thereof or

(b) imprint thereon an impression of his thumb or one his fingers in the presence of a person other than his employer”.

14. In view of the forgoing, the document exhibited by the Respondent as aforesaid and said to be a contract of employment does not meet the foregoing statutory threshold, and the purported terms and conditions therein cannot be held against the Claimant, who is not shown to have consented to the same.

15. I find that pursuant to Section 35(1) (c), of the Employment Act 2007 the contract between the claimant and the Respondent was one terminable by either party giving one (1) month notice or payment of one (1) month salary in lieu of such notice.

16. The only issue for determination is whether the Respondent is entitled to the reliefs sought in the counter claim. The reliefs sought by the Responded are:-

a) Dismissal of the claim with costs.

b) A sum of ksh. 69,000.

17. The first relief of dismissal of the Claimant's claim stands granted as the claim was on 10/8/2021 dismissed with costs for non-attendance on the part of the Claimant.

18. On the second issue, and having considered the Respondent's evidence and submissions by counsel for the Respondent, I hereby enter judgment for the Respondent against the Claimant for a sum of ksh.23,000 being one month salary in lieu of notice.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY of SEPTEMBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on 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.

AGNES M.K. NZEI

JUDGE

Appearance:

Mr. Shaban for the Claimant

No Appearance for the Respondent