



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1843 OF 2015

MOSES OKOTH OKONGO.....CLAIMANT

VERSUS

HAGGAI MULTI CARGO HANDLING LTD.....RESPONDENT

JUDGEMENT

Introduction

1. Claiming that at all material times he was an employee of the respondent, the claimant, through a memorandum of claim dated 12th October, 2015, sued the former for various reliefs, upon basis that the latter dismissed him from employment unlawfully and unfairly.

2. The claimant in the reliefs section of his memorandum seeks;

(a) One month salary in lieu of notice ----- Kshs. 18,000

(b) June salary not paid ----- Kshs. 18,000

(c) Untaken leave days

@ 26 days per 52/26x1800 ----- Kshs.36,000

(d) Leave pay for 2 years

18,000x2 years ----- Kshs. 36,000

(e) Damages for unfair termination @ 12 months

gross salary ----- Kshs. 216,000

(f) Redundancy pay@ 20 days per year served

-20/26x18000x2 years-----Kshs. 27,692.30

(g) House allowance ----- Kshs. 64,800.00

(h) Overtime hours daily ----- 4hrsx684x18,000x1/26/1/8x1.5

Kshs. 355,153.85

Total claim ----- Kshs. 771,646.15

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3. Upon being served with the notice of summons, the respondent filed a memorandum of reply to claim dated 12th April 2016. The

respondent denied, that the claimant was ever its employee at any time, the claimant's cause of action and his entitlement to the reliefs sought.

4. With this, there was a joinder of issues and the matter therefore got destined for hearing on merit inter-parties.

5. The matter came up for hearing on the 9th August 2021, neither counsel for the respondent nor a witness of the respondent was present in court. Satisfied that a hearing notice had been duly served upon counsel for the respondent and absent of any explanation regarding their non-attendance of court, I allowed the matter to proceed their absence notwithstanding.

The claimant's case

6. At the hearing the claimant's witness statement was adopted as his evidence in chief. His documents –the NSSF statement, his job card, employees' contract form, personal information form, a letter dated 25th June 2015 and a demand letter dated 28th July 2015, were produced as exhibits 1 to 6.

7. The claimant was employed by the Respondent on the 20th September 2012 as a general worker and deployed to work at Kenafric Industries, Baba Dogo Industry.

8. The claimant alleged that on the 1st June 2015, in the course of their duty, City County officers found expired chemicals within the premises of the Respondent. One of his employer's Supervisors bribed the officers and induced them not to carry away the chemicals. The Inducement was courtesy of Kshs. 20,000/= that exchanged hands.

9. He claimed that on the 11th November 2015, a notice was issued to contracted workers to an affect that the sum aforestated was to be recovered from their dues. He was one of them. Kshs. 700 was to be deducted.

10. The claimant expressed dissatisfaction with the decision to the supervisor and one Mr. Juma, on an account that the workers had not been consulted. The two insisted that the scheme had to proceed as it was an order from "above."

11. He got constrained to request Mr. Juma for a gate pass to go to the Kenafric Headquarters, to seek that the issue be addressed. When he reported back to his station of work, he was shocked to learn that six (6) of the contracted workers, him included had been terminated.

12. He subsequently visited the respondent's offices to get the reason[s] for the termination of his services, however he was put off without being accorded any audience. He states that this was contrary to the principles of natural justice and the provisions of Article 47 of the constitution.

13. On the 25th June 2015, the claimant wrote a letter to his employer-the respondent, seeking for redeployment as a general worker. He succeeded in this. He started working on same day-25th June 2015. He was engaged at Kshs. 11,500/=. In a month he was to work for 26 days.

14. The claimant alleged that on the, 26th June 2015, and 27th June 2015, he was not assigned any work. On the 28th June 2015, he worked from 9:00 a.m. to 5:00 p.m., and thereafter he was never assigned work and would be marked absent despite reporting every day for work. He raised concerns over this situation to his supervisor Mr. Muli, who told him off.

15. Sometime in early July 2015, he was called to the respondents' offices, only to be given a termination cum recommendation letter purporting to retrospectively terminate his services with effect from 24th June 2015. The termination offended the provisions of the Employment Act, he contended.

16. At termination, he was not given a certificate of service pursuant to section 51 of the Employment Act.

The claimant's submissions

17. The claimant filed four paragraphed written submissions. They largely reiterate the factual contents of the memorandum of claim and the witness statement (turned evidence in Chief) of the claimant.

18. The claimant's counsel submitted that the claimant was summarily dismissed without due procedure and reason.

19. It was further submitted that despite the deductions of NSSF contributions by the respondent, the latter never remitted the deducted amounts to the relevant Government Agency. The deducted sums must be refunded.

20. The claimant's counsel submitted that the Respondent failed to present any witness in court to tender evidence in support of the defence to the claimant's claim. The claimant proved is case to the requisite standards, as a consequence. As regards the failure of present a witness to testify and the implication thereof, the claimant places reliance on the case of **North Trading Company Ltd** (carrying on Business under the registered name of **KENYA REFUSE HANDLERS LTD**) =VS= **THE CITY COUNCIL OF NAIROBI (2019)eKLR**, wherein it was stated;

"It is trite law that where a party fails to call evidence in support of its case, the party's pleadings are not taken as evidence, but the

same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleadings which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on a balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged and produced documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages."

DETERMINATION

21. From the material before me, the following issues emerge as issues for determination by this court.

- (i) What is the legal implication of the respondent's failure to present evidence in support of its defence?
- (ii) Was the claimant an employee of the respondent?
- (iii) Whether, if the answer to(ii) above is in the affirmative, the termination of the claimant's employment was procedurally fair.
- (iv) Whether, if the answer to (ii) above is in the affirmative, the termination of the claimant's employment was substantively fair.
- (v) What reliefs if any are available to the claimant?
- (vi) Who should bear the costs of this suit?

Of the implication of failure by the respondent to present evidence in support of the response to the claim.

22. I subscribe to the school of thought as expressed in the case of North End Trading Company Ltd (Supra) that where a party does not present evidence in court in support of his/her pleadings the contents of the pleading shall remain mere statements of fact with no probative value. Therefore, a statement of defence on which no evidence has not been called in justification and fortification, cannot be used to challenge a plaintiff's case.

23. However as regards whether in situations where the defendant does not call evidence to support his defence, the claimant's case is taken to be established as suggested in the above case, I hold a contrary view. The mere fact that the respondent did not place any evidence before court does not chip off the court's duty to interrogate the truthfulness of the claimant's evidence. A favorable judgment is not automatic.

24. And where it comes to the attention of court that a pleading is raising a point of law and more specifically one that attacks the court's jurisdiction on the matter, it will be an abdication of duty for the court to fail to consider that point, as was held in the case of **Lydia Moraa Obara vs= Tusker Mattresses Ltd (2021) eKLR**, by this court.

Whether the claimant was an employee of the Respondent

25. It has been alluded to hereinabove that in its pleading the respondent denied that the claimant was its employee. The respondent posted in the pleadings that only it recruited employees for Kenafric Industries ltd. The claimant was one of such employees. In light of the diametrically opposed positions taken by the protagonists herein regarding their relationship, I got constrained to check on whether the respondent did file a list of documents, and if so what document(s).

26. It only filed a form termed vigilance form dated 17th September 2012. There is no document that they would have at the end of the day relied on, as evidence to establish the alleged link between it, Kenafric Industries Ltd and the claimant, had it presented a witness to testify.

27. The action of scanning through the list of documents was prompted by this court's cautions approach in a situation where the respondent who has filed a response defaults in turning up to give evidence for one reason or the other, on the contents thereof. It helps the court to justly interrogate the truthfulness of the claimant's exparte evidence.

28. Through his letter dated 25th June 2015 the claimant specifically sought from the respondent to be **redeployed**, he testified that indeed he was. A person not an employee of another cannot be redeployed by the other, if that other person is not the employer. The contract form by the respondent dated 25/6/2015 shows his new station as Sammier Agriculture. The employee's contract form showed his wages as Kshs. 11,500/=. In content, it has no detail that can propel one to conclude otherwise than that the respondent was the employer.

29. The worker's identification card - EXH-1 boldly brings forth Haggai Contractors as **"contractor"**. The only reasonable conclusion that one can make and this court makes from this, and in absence of any demonstrated linkage like the one stated hereinabove, is that Kenafric Industries Ltd outsourced the services of the respondent.

30. In the upshot I find that the claimant was an employee of the respondent.

Whether the termination of the claimant's employment was procedurally fair

31. Having found that the claimant was at the material time an employee of the respondent, I now turn to determine whether or not the

termination was procedurally fair.

32. Section 41 of the Employment Act, 2007, supplies the procedure that should be followed by an employer contemplating terminating an employee's contract of employment. The procedure is mandatory. The procedure provided in this provision is what is termed fair procedure in section 45 of the Act.

33. According to section 45[2][c] of the Act, a termination is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure. The provision therefore places the burden of prove on the shoulders of the respondent.

34. Having failed to testify one cannot say that the burden was discharged. This coupled with the claimant's evidenced that he was not given any notice before termination, that he was not given any reasons for the termination and that he was not given any audience and a chance to defend himself, leads this court to conclude that the termination was procedurally unfair.

Whether the termination was substantively fair

35. Section 43 of the Employment Act places upon the employer an obligation to prove the reason or reasons for the termination, failing of which, the termination shall be deemed to have been unfair within the meaning of section 45. The respondent never testified in this matter. It cannot be said that it discharged the obligation.

36. The claimant testified that the termination was reprisal, following his stand against the unlawful deduction of his dues. This evidence was not rebutted. Retaliatory terminations equate unfair labour practices. I find that the termination was in breach of fair labour practices.

37. In the upshot, I have come to a conclusion that the termination was not substantively fair. It was not just and equitable. It was upon a reason that was not valid.

What reliefs are available to the claimant?

(i) One month's salary in lieu of notice

38. I am satisfied that the claimant was not given a one month's notice prior to the termination. Clause 3 of the contract document provided for the notice. Section 36 of the Employment Act enjoined the respondent to pay the claimant one month's salary in lieu of notice. Under this head the claimant is awarded Kshs. 11,500/=.

(ii) June Salary

39. There is no evidence that was brought forth by the Respondent to controvert the claimant's that he was not paid salary for the month of June 2015, or to demonstrate that for one reason or the other he was not entitled to the salary for that month or part thereof. Accordingly, the claimant is awarded Kshs. 11,500/=

(iii) Untaken leave

40. A careful look at the factual contents of the claimant's memorandum of claim, and his witness statement (turned evidence in chief), it cannot be discerned that the claimant has laid basis for this claim for leave pay for 2 years. The claimant wants to throw this court into the realm of speculation. He has not succeeded. The claims under the two heads related to leave payment are rejected.

(iv) Compensation for unfair termination

41. Pursuant to the provisions of section 49 of the Employment Act, 2007, this court awards the claimant Kshs. 69,000/= being 6 months gross salary, in arriving at the award, I've considered that the termination was reprisal, unfair both substantively and procedurally.

(v) Redundancy pay

42. I have struggled to see basis for this claim, from the material placed before me I see none. The plea for redundancy pay is therefore declined.

(vi) House allowance and overtime claim

43. These are claims that were just thrown to court. No evidence or material of any nature was placed before me tending to justify the claimant's entitlement to these reliefs. I am not persuaded that the claimant is entitled to the same therefore.

Costs

44. The respondent shall bear costs of the claim.

Conclusion

45. In the upshot, judgment is entered for the claimant as follows:

(a) Salary in lieu of notice ----- Kshs. 11,500/=.

(b) Salary for June, 2015 ----- Kshs. 11,500/=.

(c) Compensation pursuant to section 49[c] of the Employment Act, 2007 --Kshs. 69,000/=.

(d) Interest at court rates from date of filing the claim till full payment.

(e) Costs of the claim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021

KEBIRA OCHARO

JUDGE

DELIVERED IN PRESENCE OF

MR MUCHAI FOR THE CLAIMANT

.....FOR THE RESPONDENT