



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 242 OF 2017

JAMES TSUMA BENDORO.....CLAIMANT

VERSUS

UNIK DRIVING SCHOOL.....1ST RESPONDENT

IQRA DRIVING SCHOOL (MSA) LIMITED.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 31.03.2017 through Otiena Otwerere & Company Advocates. The claimant filed the amended memorandum of claim on 03.10.2017. The respondents are operators of driving schools. The claimant alleges that the 1st respondent employed him as an instructor with offices located along Moi Avenue in Mombasa from 16.06.2000 to 26.02.2016 when he was unfairly terminated. The claimant's further case is that the 1st respondent used to assign him duties to drive or instruct learners how to drive using the sister company vehicles being the 2nd respondent herein but payment of salary was by the 1st respondent. The claimant's case is that the 1st respondent terminated him unfairly after serving it diligently for 16 years and without warning or complaint. The claimant states that he was a heavy commercial vehicle instructor and he worked from 8.30am to 7.30pm under supervision of Zulfikar Yusuf Mithwani and his brother one Ahmed. His further case is that he was underpaid at Kshs. 10, 000.00 per month. The contract was oral and payment was by cash and a petty cash voucher was signed whenever salary was paid.

The claimant's further case is that due to under payment and unpaid overtime the claimant expressed his intention to retire at the end of year 2015. The respondent did not allow him to retire but allowed him to continue working until 26.02.2016 when he suffered a stroke while still in the 1st respondent's service. The 1st respondent rushed him to Coast General Hospital where he was admitted for 3 days. The claimant's further case is that the 1st respondent failed to pay the medical bills, he was not given sick off or paid for the same. After discharge the claimant continued on treatment and after his doctor's advice he resumed work but the respondent refused to assign him duty and instead chased him away.

The claimant alleged that the respondents breached the contract of service by failing to give termination notice or pay in lieu of notice; failure to comply with provisions of the Employment Act, 2007 on employee sickness, failure to give the claimant leave, failing to issue certificate of termination and to pay terminal dues, failure to afford him fair hearing prior to termination, deducting and failing to remit NHIF and NSSF, failure to issue a certificate of service, and underpayment. The claimant claimed for:

- a) Notice pay Kshs. 10, 000.00.
- b) Salary for February to October 2016 Kshs. 90, 000.00.
- c) 16 years leave pay Kshs. 160, 000.00.
- d) Gratuity at half month pay for 16 years Kshs. 80, 000.00.
- e) 12 months' pay for unfair termination Kshs.120, 000.00.
- f) Underpayment of Kshs. 10, 000.00 instead of Kshs. 18, 595.20 per month and plus house allowance Kshs. 2, 221, 440.00.
- g) Total claim Kshs. 2, 681, 440.00.

- h) General damages on grounds of discrimination due to an occupational disease.
- i) Certificate of service.
- j) Costs plus interest.
- k) Any other relief as the Court may deem just.

The 1st respondent filed the response to the amended memorandum of claim on 17.10.2017 through A.O. Hamza & Company Advocates. The 1st respondent denied the claimant's case and denied that it employed the claimant as alleged for the claimant or at all. Further a photo of the claimant standing next to the 1st respondent's vehicle cannot be evidence of employment. The 1st respondent's further case was that the claimant was in fact employed by the Glory Driving School, Wings Driving School and Iqra Driving School over the years.

The 2nd respondent filed on 02.02.2018 the response to the amended claim and a counterclaim. The 2nd respondent stated that it is not affiliate or sister company to the 1st respondent as pleaded for the claimant. Further the 2nd respondent employed the claimant from 2011 to 2015 having worked for the 2nd respondent for 5 years. The claimant deserted duty in the year 2015 without notifying the 2nd respondent or giving the 2nd respondent notice. Further the claimant has made a claim against the 1st respondent and no claim against the 2nd respondent and the claim was in bad faith and meant to mislead the Court. There being no claim against the 2nd respondent, it was unfair to enjoin the 2nd respondent in the suit and the claimant's suit should be dismissed with costs.

The 2nd respondent counterclaimed that the claimant was its employee from 2011 to 2015 and knowing that he had no valid instructor's licence or driving licence at the time of the accident, he never reported for duty after his employer advised him to meet the costs of repair involved amounting to Kshs. 150, 000.00. The 2nd respondent prayed for Kshs. 10, 000.00 being pay in lieu of termination notice when the claimant left duty without notice.

Final submissions were filed for the parties.

The **1st issue** for determination is whether the claimant and the 1st respondent were in a contract of service. The claimant testified that he was employed by the 1st respondent on 16.06.2000. The claimant in cross examination stated that there were no records exhibited in Court showing that he was employed by the 1st respondent. He further testified that there were no search records exhibited showing that the respondents were related or sister companies. He also testified that he had not filed his NSSF statement and he was not calling any of his learners from the 2nd respondent as witnesses that he instructed them. He further testified that the 1st respondent paid him by cash and he signed vouchers but which were not exhibited in Court. The 1st respondent's witness No. 1 (1RW1) was the Director one Sulfiker. His evidence was that he knew the claimant as an employee of the 2nd respondent and he had never employed the claimant. Further 1RW1 testified that the claim was malicious because the claimant's friends who worked for the 1st respondent had been paid terminal dues such as Sammy Kilonzi (CW3) and Nyawa Nyae Nyawa (CW2) both having worked for the 1st respondent and testified that they had been paid full terminal dues. 1RW1 testified thus, **"His claim is malicious. He is wrongly pursuing UNIK because his friends were paid by UNIK. He worked for 2nd respondent. His 2 witnesses were our employees. I paid them per their statements. Dismiss the claim. The 1st respondent we have paid our employees. We cannot pay claimant because he never worked for us. For claimant James we totally disagree he worked for us. We never assigned our employees to instruct at 2nd respondent's business. We are separate businesses and management."**

The Court has considered the evidence. While alleging that the 1st respondent employed him on 16.06.2000, the claimant has not pleaded the particulars and circumstances of the alleged employment and provided the relevant evidence. While alleging that he was deducted NSSF and NHIF but the 1st respondent failed to remit the same, he has failed to exhibit the relevant NSSF and NHIF records to support his claim. Further he alleged he signed vouchers when he was paid but there was no notice to produce the same and the Court finds that the assertion was empty. It is not in dispute that CW2 and CW3 worked for the 1st respondent and they had been fully paid. On the other hand, the 2nd respondent admitted employing the claimant but the claimant denied the same. The 1st respondent exhibited check-in records for its employees for part of the period the claimant said he worked for the 1st respondent but the claimant's name was nowhere in the register. 1RW1 testified that the 1st respondent received the demand letter but did not reply because the claimant was not its employee. The Court has no reason to doubt the evidence by 1RW1. The court finds that the 1st respondent and the claimant were never in a contract of service and the claimant's claims made against the 1st respondent and memorandum of claim in its entirety will collapse as unjustified. It is liable to dismissal with costs. While making that finding and as submitted for the 1st respondent, the claimant never exhibited medical records about his ill-health and subsequently sick off and alleged lock out. The claimant's case is found to have been based upon empty allegations that were not established by necessary evidence. It must therefore fail.

To answer the **3rd issue**, while the 2nd respondent admitted employing the claimant, the claimant pleaded that his employer was the 1st respondent and denied in his testimony that the 2nd respondent had been his employer. The claimant made claims and prayers mainly against the 1st respondent and as against the 2nd respondent, though the Court finds that there existed employment relationship as admitted for the 2nd respondent, the memorandum of claim will fail as no claim and relief was sought by the claimant against the 2nd respondent. The Court further finds that the claimant failed to exhibit official search records from the registrar of companies to establish that the respondents were sister or otherwise related companies. The relationship between the respondents per evidence was that the 1st respondent would hire its motor vehicles to the 2nd respondent along with the 1st respondent's instructors and the claimant was not one of such instructors. The claimant's suit against the 2nd respondent must therefore fail.

To answer the 3rd issue for determination, the Court finds that the claimant did not file a defence to the counterclaim. The counterclaim is for special damages. Such must be pleaded and then be strictly proved. The 2nd respondent was required to show that it owned the motor vehicle in issue and which was assigned to the claimant to drive resulting in an accident attributable to the claimant's negligence and, damage to the motor vehicle actually occurred and whose repair expenses are now claimed. The Court finds that the 2nd respondent failed to provide the necessary evidence to establish the counterclaim and the same is declined.

In conclusion judgment is hereby entered for:

- a) Dismissal of the claimant's suit against the 1st respondent with costs.
- b) Dismissal of the suit against the 2nd respondent and dismissal of the counterclaim with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE