



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 915 OF 2017

NASON NYAMASYO KIETI..... 1ST CLAIMANT

AUGUSTINE JOTHAM TITI.....2ND CLAIMANT

VERSUS

BENSON MUTIE MAITHYA T/A TORNSON AGENCIES.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th November, 2021)

JUDGMENT

The claimants filed the memorandum of claim on 13.12.2017 through M/s Mune Katu & Associates Company. The respondent employed the claimants as field officers to collect rents from tenants, the respondent being in the enterprise of estate management. The 1st claimant was employed on 01.07.2008 and was a member of NSSF. The 2nd claimant was employed on 14.07.2016 by a letter of appointment of the same date and following an interview on the same date. As at termination or separation each claimant earned Kshs.12, 050.00 per month. The claimant's case is that they had clean record of service through their service and they worked hard.

The claimants' further case is that on 29.08.2017, the respondent terminated their services verbally on phone without any hearing or payment of August 2017 wages including the terminal dues. They further allege there was no letter to show-cause and there was no disciplinary hearing. They state that the termination was on phone by the respondent's branch manager one Catherine Mbadi. They also claim that they were underpaid wages per prevailing minimum wage orders and the respondent failed to honour the promises to pay the minimum statutory wages.

The 1st claimant prayed for judgment against the respondent for:

- a) The declaration the termination was procedurally unfair.
- b) Three months' salary in lieu of notice Kshs. 70, 374.90.
- c) Salary for August 2017 Kshs. 23, 458.00.
- d) Underpayment per 2017 Wages Order for May 2017 thus 23, 458 – 12050 x3months Kshs. 34, 225.00.
- e) Underpayment per 2015 Wages Order from 01.05.2015 to 30.04.2017 (24 months) 19879.90-12050 x24 months Kshs. 187, 918.40.
- f) Statutory deductions made for NSSF and NHIF at Kshs. 520 from 01.08.2008 to May 2012 (46 months) Kshs. 23, 930.00.
- g) Leave accrued for 3 years 23, 458.30/30 x 63 x 1.78 =Kshs. 86, 209.30.
- h) Maximum compensation for unfair termination Kshs.281, 499.60.
- i) Certificate of service.
- j) Total claim Kshs. 707, 615.50.

The 2nd claimant prayed for:

- a) The declaration the termination was procedurally unfair.
- b) Three months' salary in lieu of notice Kshs. 44, 131.50.
- c) Salary for August 2017 Kshs. 14, 710.50.
- d) Underpayment per 2015 Wages Order for 01.08.2016 to 30.04.2017 thus 9 months' basic salary plus house allowance Kshs.12, 466.60 -12, 050 x 9 =Kshs.3, 749.20.
- e) Underpayment per 2017 Wages Order from 01.05.2017 to 30.07.2017 (3 months) 14710.50 – 12,050 x3 months Kshs. 7, 981.40.
- f) Leave accrued for 1 year 14, 710.50/30 x 21 x 1.75=Kshs. 18, 020.40.
- g) Maximum compensation for unfair termination Kshs.176, 526.00.
- h) Certificate of service.
- i) Total claim Kshs. 265, 119.00.

The claimants also prayed for costs and interest at Court rates.

The respondent filed the reply to the claim on 16.01.2018 through Mutisya & Associates. While denying all the claimants' allegations, the respondent pleaded as follows:

- a) The claimants absconded duty thereby terminating the employment by themselves without due process and procedures. The respondent notified the labour officer and their claims are not payable.
- b) After the issue was put to the claimants they kept quiet and instead left stating they would revenge and parties to meet later.
- c) The claimants absconded or resigned without giving due notice.
- d) There was no underpayment and agreed wages were paid and as per the law.
- e) The suit is bad in law, utterly baseless and lacking merits and be dismissed with costs.

The 1st claimant testified to support his case. The 2nd claimant failed to testify. The respondent's witnesses were the respondent (RW1), the Manager Catherine Mbadi (RW2), and Moses Kilewe Chuphi(RW3).

The Court has considered the pleadings, the evidence and final submissions filed for the parties. The Court makes findings as follows.

To answer the 1st **issue** for determination, the Court returns that parties were in a contract of service. RW1 admitted that he employed the claimants but he did not recall the effective dates of employment and did not recall the attached monthly payment. The Court finds that the claimants were employed upon terms as pleaded for them as there is no reason to doubt their case in that regard. The respondent has not provided varying evidence to disturb the terms of the claimants' service as urged for them and as envisaged in sections 10(7) and 74 of the Employment Act, 2007.

To answer the 2nd **issue** for termination, the Court returns that the parties are in agreement that the employment relationship ended. What is in dispute is whether the claimants resigned from employment by walking away when confronted with allegations of absconding duty as per the respondent's letter dated 31.08.2017 or they were verbally terminated by phone on 29.08.2017.

The demand letters simply stated that the claimants were terminated procedurally and without fairness on 29.08.2017. The 1st claimant in his witness statement simply stated that on 29.08.2017 the respondent decided and terminated his services verbally without any hearing or payment of August 2017 wages and terminal dues. The 1st claimant testified orally in Court thus, **"On 29th March 2017, we reported and went on field. Manager called us. We returned to the office. Manager alleged we were asleep. Manager conferred with the Director. We were told to go home, there was no salary. We were not called for a hearing. No charges were placed before us...I have never seen the letter dated 31.08.2017 by the respondent. It's not true that we deserted duty..."** The 1st claimant further testified in cross-examination that the Manager Catherine told him to leave employment and he did not know if she was authorised to do so. He also testified that he never saw the respondent and the Manager consult and that he did not write a letter to the respondent. He admitted that he returned the respondent's bicycle voluntarily by the letter of 19.09.2017 in which he never mentioned unfair dismissal.

RW2 testified that she assigned the claimants duties on 29.08.2017 to visit and collect rents arrears from various clients but they refused and walked away and never returned to work and the letter dated 31.08.2017 was written to each claimant with a copy to the labour officer. When the claimants came to collect their respective letters dated 31.08.2017, they left and threatened by stating, **"Tukutane Mbele."**

The letter of 31.08.2017 stated as follows:

“RE: ABSCORD FROM DUTY

Strictly note that you are hereby required to report to the undersigned within the next three days from the date hereto, to explain the reason why on 29.08.2017 you refused to take up work assignment given to you and instead you disappeared from work upto date. In the same tune the management requires you to confirm whether you are still working with us or your action means you have already resigned from being an employee of tornson agencies which please note.

Yours faithfully

TORSON AGENCIES

EUNICE KIOKO

HR MANAGER

CC. CEO

LABOUR OFFICER

MUTISYA & ASSOCIATES

OFFICE FILE”

RW1 testified that he did not recall how the letter was send but the claimants must have been called to the office to receive it. RW 2 testified thus, **“... They were assigned to go and see tenants at the field to pay rents. They refused to go. We called them to a meeting. They walked away. No show-cause letter was given. I fully rely on my paragraph 4. I was the one instructing them. There was no meeting. I told them to go to the field to collect rent. Each refused and walked away. My boss was present. Letter of 31.08.2018 was given to them. They came to the office and picked it.”**

The Court has carefully considered the evidence. The Court has to decide between the 1st claimant and the respondent’s witnesses, who is truthful. The Court finds that the 1st claimant’s evidence was incoherent. While alleging a verbal termination on the phone on 29.08.2017, the 1st claimant contradicted that pleading when he testified that on that date the manager called them back to the office and alleged they were asleep. Such evidence inconsistent with the pleadings cannot be trusted. Again the 1st claimant introduced the evidence that the Manager conferred with the director prior to their being terminated – and the same is obviously contrary to the pleaded case. The Court also finds that the 1st claimant’s evidence of purported allegation of being asleep was not conceptualised at all within their job environment and role as field officers for collecting rents from tenants. The 1st claimant failed to explain why in the letter voluntarily returning the respondent’s bicycle and in the demand letter, the details of the alleged unfair termination had not been raised at all. The court finds that the 1st claimant’s evidence was not only contrary to the pleaded case but also, when taken together was incoherent like from fairyland.

The Court finds that there is no reason to disturb and doubt the respondent’s coherent evidence which was consistent with the respondent’s pleaded case. It is that the claimants failed to take up duty as assigned by RW2 on 29.08.2017; the letter of 31.08.2017 issued; the claimants came to pick it and instead of subjecting themselves to the disciplinary process as was proposed in the letter, they decided to walk away as per RW2’s evidence. They are undeserving of the Court’s finding that due procedure was not followed by the respondent because the respondent clearly invoked due process of a notice under section 41 of the Employment Act, 2007 and prior to the hearing as envisaged in the section, the claimants resigned by walking away. The Court finds that the letter of 31.08.2017 amounted to a letter to show cause but the claimants decided to walk away thereby aborting the disciplinary process. The Court finds that the respondent never terminated the claimants’ employment but as submitted for the respondent, the claimants terminated their contracts of service by themselves when they walked away to avert the disciplinary process – a conduct amounting to resignation as urged and submitted for the respondent.

The claims for alleged unfair termination, compensation in that regard, and notice pay will all collapse as unjustified.

The **3rd issue** for determination is whether the 1st claimant is entitled to recover the alleged underpayments. It is pleaded and submitted that he worked in the position of marketing or sales department. In his witness statement he states he was employed as marketing or salesman. The 1st claimant testified that he was given a written contract but he never exhibited it. He further testified thus, **“I was a Field Officer. I was underpaid.”** The Court finds that the 1st claimant’s role was to go to the field to collect rents from tenants. The Court finds that it was misconceived for the 1st claimant to allege that he was a salesman or a marketer. In any event, the claimant did not specifically plead his job as matching to any of those in the wages orders relied upon and then computing the alleged underpayment. The Court finds that as submitted for the respondent, the claimant was paid the agreed consolidated pay and the alleged underpayment was unjustified.

On leave, there is no reason to doubt that the respondent closed early over Christmas period when the claimants took annual leave and as per the consistent notices on closure of the offices over that period. The Court finds that on a balance of probability the respondent has established that parties had clear arrangements for annual leave and the claimants’ prayers in that regard will collapse.

While the claimants worked in August 2017, the respondent has established that they walked away in resignation without due notice and the Court finds that the respondent was entitled not to pay as it was a justified set off in the circumstances of the case.

The statutory deductions made and allegedly not remitted while pleaded, were not strictly proved for the entire period as is required of liquidated claims. In any event, the dispute about the deductions would be resolved in accordance with the provisions of the enabling statutes. The claims and prayers on refund of NHIF will fail.

The claimants are entitled to certificate of service per section 51 of the Act. In that regard each party will bear own costs of the suit.

In conclusion the suit is hereby determined with orders:

- 1) The respondent to deliver the claimants' respective certificates of service in 30 days.
- 2) Each party to bear own costs of the suit.

Signed, dated and delivered by video-link and in court at **Mombasa** this **Friday 5th November, 2021**.

BYRAM ONGAYA

JUDGE