



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 493 OF 2017

BETWEEN

1. FRANCIS SITIMA IHACHI

2. INVIOLETA KHASIALACLAIMANTS

VERSUS

SHARKS GREAT CLUB & BEER GARDENS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ameli Inyangu & Partners, Advocates for the Claimants

Diro & Company, Advocates for the Respondent

JUDGMENT

1. The Claimants, a Man and his Wife respectively, filed this Claim on 21st June 2017.
2. They aver, they were employed by the Respondent, through an oral agreement, sometime in 2003. They were employed as Caretaker and Housekeeper, earning monthly salary of Kshs. 20,000 and Kshs. 10,000 respectively.
3. In 2017, the 1st Claimant was elevated to the position of Financial Controller. The 2nd Claimant was added the role of Cook. The promotion was based on good performance.
4. In March 2017, the Respondent's Director instructed the 1st Claimant hands over all finances to Respondent's Manager. The 1st Claimant did so. The till had a sum of Kshs. 746,000 on handover. On 5th March 2017, the Director alleged that the 1st Claimant had misappropriated a sum of Kshs. 2,000,000 from the Respondent. Report was made by the Respondent to the C.I.D Likoni Office. Investigations carried out by the C.I.D found the 1st Claimant innocent.
5. The Respondent nonetheless, declined to pay Claimants salary for February, March and April 2017. The Respondent terminated Claimants' contracts in April 2017. There was no valid reason given. No notice issued. The Claimants never went on annual leave.
6. They seek Judgment against the Respondent for:-
 - a. Salary for February to April 2017 [1st Claimant], December 2016 to April 2017 [2nd Claimant]
 - b. Leave.
 - c. 12 months' salary in compensation for unfair termination.

d. 15 days' salary for each complete year of service, as service pay.

e. Declaration that termination was unfair.

f. Certificate of Service.

g. Costs and Interest.

7. The 1st Claimant seeks a total sum of Kshs. 670,000, while the 2nd Claimant seeks a total of Kshs. 300,000.

8. The Respondent filed its Statement of Response on 11th October 2017. Its position is that the 1st Claimant was a personal Employee of a former Director of the Respondent, Ali Ahmad Khalid. He was accommodated at the Respondent's Likoni premises, where Khalid resided. The 1st Claimant brought along his Wife, the 2nd Claimant herein and the Claimants' 2 Children, to stay with the Claimants at Respondent's premises. There was a misunderstanding between Khalid and the 1st Claimant. The Respondent was not privy to the misunderstanding. The 1st Claimant fled the premises, leaving behind his Wife and Children. The Wife and the Children were, at the time of filing the Statement of Response, still being accommodated by the Respondent, on humanitarian grounds. She was periodically engaged on casual basis, whenever there was some work to do at Respondent's business. The Respondent prays the Court to dismiss the Claim with costs.

9. The 1st Claimant gave evidence on 19th February 2019. The 2nd Claimant gave her evidence on 2nd July 2019 as did John Mbeo Benson for the Respondent, bringing the hearing to a close.

10. The 1st Claimant restated that he was employed in 2003. He was initially employed as a Carpenter then a Storekeeper. He mutated into a Foreman, when the Respondent undertook construction work at its premises. The Club opened in 2016. The 1st Claimant was alleged to have misappropriated Kshs. 2,000,000 from the Respondent. He was investigated by the Police, and absolved. The Respondent went on to terminate 1st Claimant's contract on 31st March 2017. His last salary was Kshs. 20,000 monthly.

11. On cross-examination, the 1st Claimant told the Court he was employed in 2003. He did not have any document to show this. The Respondent was registered as a Company in 2003 as indicated in the Certificate of Incorporation. Business operations commenced in 2016. Liquor license issued in 2016. Anwar Khalid and Mohammed Khalid were the Directors. They employed the 1st Claimant. The Claimant received his salary through Western Money Union. He did not have a document to show this. He was not a personal Employee of Anwar Khalid. Anwar paid the 1st Claimant directly because the business was not operational. Mohammed lived in the US. The 1st Claimant studied up to form 1. He was given the role of Finance Controller, upon assessment by the Management. Cash went directly to Respondent's till. There was a Manager at the business.

12. Ali Khalid is a brother to Anwar and Mohammed. He was the first to be involved with the business. The 1st Claimant lived with Ali at Sharks from 2013. Ali was ailing. The 1st Claimant attended to Ali. The 1st Claimant lived at the premises with his family from 2013. Ali left in 2013. He is not one of the Directors of the Respondent. 1st Claimant's Wife was also employed by the Respondent. The 1st Claimant left the workplace before his Wife. Redirected, the 1st Claimant told the Court he dealt with Anwar Khalid. Ali did not employ the Claimant. Ali was at Sharks place before the 1st Claimant.

13. The 2nd Claimant testified, contrary to the contents of paragraph 5 of the Statement of Claim, that she was employed in January 2014. The Respondent is owned by Mohammed Hamad Khalid. She was a Cleaner and also, cooked for Mohammed's dogs. Her salary was Kshs. 10,000 monthly.

14. She worked for 4 years. She lived with her Husband and Child at the premises. In April 2017, Mohammed came from the US. He quarreled the 1st Claimant. He brought in C.I.D Officers alleging the 1st Claimant had stolen from the business. Investigations that followed absolved the 1st Claimant. Mohammed threatened to kill the 1st Claimant. The 1st Claimant left the premises. Mohammed told the 2nd Claimant in April 2017, to look for accommodation outside the workplace. He promised to pay rent for the 2nd Claimant. He advised the 2nd Claimant to keep away from her Husband, the 1st Claimant herein. The 2nd Claimant declined this advice. Her contract was terminated. There was no notice. She was not paid salary for 5 months, beginning December 2016, to April 2017. Mohammed was away on most occasions. She never went on annual leave. The 2nd Claimant told the Court that the Witness Statement of Moses Benson was incorrect. She was an Employee of the Respondent. The business did not just start in 2017. She could not have lived at Mohammed's premises, if she was not an Employee.

15. On cross-examination, she conceded that business license shows the Respondent became operational in 2017. The business sells alcohol. Mohammed paid 2nd Claimant's salary. He lived in the US. The 1st Claimant managed the business in the absence of Mohammed. The 1st Claimant could not pay the 2nd Claimant, in the absence of Mohammed. Claimants' Children lived with the Claimants, within the workplace. Mohammed employed the 1st Claimant. 2nd Claimant did not know Ali Khalid. Threats by Mohammed to kill the 1st Claimant, were reported to the Police. This is not captured in the Witness Statement of the 2nd Claimant. She did not state also, that Mohammed advised she abandons her Husband. She did not have any documents to show she worked for Sharks.

The Court Finds:-

16. The Claimants are Man and Wife.

17. Although they plead that they were employed by the Respondent in 2003, evidence on record shows the 1st Claimant was employed, if at all, by the Respondent in 2003, while his Wife, the 2nd Claimant herein was employed, if at all, by the Respondent in 2014.

18. There are documents to show that the Respondent was incorporated in the year 2003. The business however, became operational in 2016. PIN Certificate was obtained in 2016. VAT and Corporate Tax became payable from 2016. Alcoholic Drink License issued in 2017. According to the evidence of the 1st Claimant, he was initially a Carpenter and later, a Foreman. The Respondent was under construction. He specifically testified, in his main evidence, that the Respondent opened its business in 2016. This evidence tallies with the documents supplied by the Respondent to the Court, indicating it became operational in 2016/ 2017.

19. The Court does not think therefore, that either of the Claimants is entitled to claim having worked for the Respondent from the year 2003.

20. There is indeed no firm evidence to conclude that the Claimants were in formal employment with the Respondent business. They seem to have been engaged informally at different times, by the Directors of the Respondent.

21. The 1st Claimant worked for Ali initially. He told the Court he took care of Ali when Ali was ailing. Ali left and the business was left in the hands of Anwar and Mohammed. The various roles carried out by the 1st Claimant, such as storekeeping, carpentry and foreman shows he was deployed in a fluid, informal relationship, by the Respondent's Directors. He was even branded Financial Controller, while his education and training did not qualify him to discharge the role of Financial Controller. Mohammed eventually took over the business and because he was out of the Country most of the time, the Claimant was entrusted the business.

22. His family, Wife and Children went to live at the workplace. The Wife, like the Husband was entrusted a wide range of domestic chores. She told the Court she would clean Mohammed's house and feed Mohammed's dogs.

23. The Court has formed the view that the family was taken in by Mohammed and his business to live at the workplace, and operate the business, while maintaining Mohammed's residence and dogs. It was an informal arrangement, so much so that even when the 1st Claimant left, he left without his Wife and Children. The Wife told the Court that Mohammed advised her, curiously, to leave her Husband, leave the workplace, and Mohammed would step in, and provide the 2nd Claimant with rent. This curious advice, supports the view that there was no formal employment relationship between the Claimants and the Respondent's Directors; rather, it was a familial, friendly and social relationship, where a family was invited to operate a business and keep a residence clean, while the principal owner of that business was constantly away in the US. Which Employer would suggest to his Employee that she abandons her Husband and Co-Employee, while the Employer undertakes to assume the responsibility of housing the separated Wife?

24. Eventually, these relationships collapsed when the principal owner of the business returned, and suspected the 1st Claimant had breached his trust and confidence. Parties disengaged. The Court would be stretching the Employment Act too far, by finding that there was an employment relationship amongst the Parties involved in this dispute. The Parties operated close to a family undertaking, under the banner of Sharks Great Club and Beer Garden. The Directors were brothers, not always present or together, at the business and their business was left mainly to the Claimants, a Man and his Wife. The business became operational only in 2016, while disagreement occurred in 2017. What would be the basis of granting annual leave to a family who have made the workplace their home? And if the 1st Claimant deducted his salary from the day's earnings as he testified on redirection, where is the validity to his prayer for arrears of salary? If the 1st Claimant managed the business in the absence of Mohammed, did he not have the authority to pay his Wife's salary? The Court should be slow in reading employment rights and obligations in such a family undertaking. The Claimants were a family who were given by another a family, a roof over their heads, and a chance to have some work and income.

IT IS ORDERED:-

a. The Claim is declined.

b. No order on the costs.

Dated and delivered at Mombasa this 28th day of January 2020.

James Rika

Judge