



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 638 OF 2016

STEPHEN NDOLE NDETO.....CLAIMANT

-VERSUS-

SILVER HAWK INTERNATIONAL LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim on 19th April 2016 alleging that he was employed by the Respondent from 2009 to 2016 but it failed to pay him his commissions, salary arrears, leave allowances and benefits. He therefore prayed for the following reliefs:

- a) Payments salary arrears amounting to Kshs. 423,260.00
- b) Salary increment arrears amounting to Kshs. 1,075,563.00
- c) Payment for commissions to Rwanda and Uganda amounting to Kshs. 240,000.00
- d) Payment for commissions for tendered bonds accounting for Kenya Wine Agencies amount to Kshs. 200,000.00
- e) Payment for commissions on entered entries amounting to Kshs. 1,248,000.00
- f) Payment for commissions client Uchumi Supermarket (U) Ltd Kshs. 20,000.00
- g) Payment of benefits since 2009 to 2016 amounting to Kshs. 109,662.00
- h) Payment of leave allowances since 2010 to 2015 amounting to Kshs. 201,239.00
- i) Payment for unremitted NHIF/NSSF amounting to Kshs. 27,000.00
- j) Costs of this suit and interest at court rates

2. The Respondent filed its Statement of Defence and Counter-Claim on 13th May 2016 admitting that she employed the claimant. It however denied that the Claimant was not entitled to the commissions sought and averred that it paid him all his salary and other statutory payments when they fell due.

3. In its Counter-Claim, it avers that the Claimant was nabbed trying to clear a consignment of used continental tyres and thereby exposed the Respondent to liability of Kshs. 1,322,023. It therefore prayed for:

- a) The sum of Kshs. 1,554,003
- b) Costs of the Counter-claim
- c) Interest on 1 & 2 above

Claimant's case

4. The Claimant, Cw1, testified that he was employed by the Respondent on 1st June, 2009 after being poached from another firm. He testified that he was issued with a contract dated even date which provided for a monthly salary of Kshs. 20,000, annual increment, travel allowance, commissions of Kshs. 300 for every entered custom export entry and Kshs. 20,000 allowance for every truck he escorted to outside countries like Rwanda and Uganda.

5. He testified that he did all his best by introducing new business to the Respondent which included 4126 exports between 2009 and 2016 and 700 entries for normal exports other than wine exports for Kenya Wine Agencies Limited (KWAL). He further testified that he escorted 12 trucks of 21 tonnes to Rwanda to deliver wine between during his period of service. He however, contended that the Respondent never paid him the said commission of kshs.300 per entry and the out of country travel export of Kshs. 20,000 as per the contract of service.

6. He further testified that he demanded the foregoing by serving the Respondent with a statement of the outstanding commissions and allowances, dated 26th June 2015 but in vain. He then served another statement dated 18th March, 2016 but again it was also not settled.

7. He testified that his NHIF and NSSF contributions were deducted from his salary but they were not regularly remitted to both Agencies. It was his testimony that they had not agreed on the rate of salary increment per year but the contract provided for annual increment.

8. In cross-examination, he testified that his duty as a declaration clerk at the Respondent was to declare entries to Kenya Revenue Authority (KRA) and also escort trucks to Rwanda and Uganda. He maintained that he was entitled to an allowance of Kshs. 20,000 for escorting a truck to the said two countries and Kshs. 300 for every entry he secured. He contended that he brought new clients to the respondent such as KWAL, Siamanda Duty Free Limited and Distell Limited. He testified that he introduced Uchumi Uganda to the Respondent in December 2013 and the Respondent promised to pay him Kshs. 20,000 but later failed to do so.

9. He contended that due to discrimination and frustration by the employer in the foregoing matters, he resigned from the job. He denied that he resigned to avoid criminal processes. He further denied that he was dismissed from employment by the respondent for wrong doing. He also denied any wrong doing or being served with show cause letter or being summoned to any disciplinary hearing. Finally, contended that he was never called to appear before KRA in connection with the alleged diversion of goods from the port. He however admitted that he wrote a statement at KRA to on behalf of the respondent.

10. He admitted that the 15% salary increment was not specifically agreed in the contract of employment but it was his own estimation. He testified that he was entitled to leave every year but he never took any and as such he assessed at Kshs. 210,000.

Respondent's Case

11. Cristopher Musau, Rw1, confirmed that the Claimant was employed as a Declaration Clerk in is company from June 2009 when he requested him for a job. He testified that the company paid for the claimant's training after KRA compelled them to trains staff. He testified that he never issued appointment letters to his employees including the Claimant except one employee, Philip Mutua, who requested for the same to get a loan from the Bank. He is stationed in Busia. He contended that he signed every page of Mutua's letter which the claimant forged because some of the pages of the letter produced herein do not bear his signature and they are photocopies.

12. He further testified that he registered the Claimant for NSSF and NHIF and remitted his contributions. He relied on his M-pesa account Statement and musterroll to prove that he paid the claimant all his salary and other monies. He denied owing the Claimant any commission from KWAL and Siamanda Duty Free Limited and contended that the Claimant was not an agent of the said companies.

13. He further testified that he dismissed the Claimant for diversion of custom goods. He testified that the claimant's actions were criminal and he ran away when KRA summoned him. He testified that he was surcharged 1.2 million for the said conduct by the claimant and prayed for his counter-claim to be allowed.

14. In cross-examination he denied being awarded the contract by KWAL because of the Claimant. He maintained that he never agreed on any commissions in addition to the claimant's salary of Kshs. 20,000. He further contended that he issued the Claimant with a notice to show cause but he refused to sign it. He admitted that there was no actual loss of Kshs. 1.3 million incurred by the Company, but he contended that the company was in the red books for the attempted diversion of exports.

Claimant's submissions

15. The Claimant submitted that the engagement of an employee whether verbal or written is binding under the Employment Act including the payment of the commissions. He further submitted that he did not admit liability in respect of the diversion of transit goods as he was not involved and that his actions were as a result of instructions from the Director. He averred that the dismissal letter dated 30th August ,2014 is an afterthought and is based on falsehoods.

16. He submitted that there was no proof of payment of his allowance/commission in the LPOs produced by the Respondent. He testified that the Respondent did not produce any evidence that shows that she transacted with Kenya Wine Agencies Limited, Siamanda Duty Free Shop and Distell Wine Masters Limited before he joined the company. He urged that the documents he produced clearly show that he interacted with the said companies in the course of his previous employment. He therefore prayed the Court to allow his claim.

Respondent's submissions

17. The Respondent submitted that the resignation letter was never served on her by the claimant and that the evidence adduced by the Claimant does not satisfy the elements of constructive dismissal. She relied on the case of **Beiti Kipchumba v National Bank of Kenya Limited [2018]eKLR** where this Court cited **Maria Kagai Ligaga v Coca Cola East & Central Africa Limited** where the Court of Appeal

defined constructive dismissal to mean a situation where an employer's behaviour is intolerable and makes it difficult for the employee to continue working.

18. She further submitted that the claimant has failed to prove that there was breach of contract and that he resigned as a result of such breach. On the contrary, she submitted that she is the one who dismissed the Claimant from employment and the reason for the dismissal was valid and that section 41 and 45 of the Employment Act were complied with. She submitted that where an employee exposes the employer to liability, employees actions constitute a valid and fair reason under section 43,44 and 45 of the Employment Act. She submitted that the Claimant did not deny that he was responsible for clearing the consignment which was seized for attempted diversion of custom goods.

19. She further submitted that despite issuing the Claimant with a Notice to Show Cause he failed to respond to the same thereby flouting the the opportunity to be heard but flouted it by failing to respond to the show cause notice. She relied on the decision in **Peter Oluoch Deya v Riley Services Limited Cause 1915 of 2015**.

20. She submitted that there were no particulars of the months the Claimant seeks outstanding dues. She submitted that the Claimant received Kshs. 20,000 as is monthly salary and that it is suspect how the claimed sum was computed given that the period for which he claims that he was not paid was from the year 2013 to 2016. She further submitted that the Claimant failed to adduce any evidence justifying his salary increment arrears.

21. She also submitted that there was no agreement for the payment of commissions to the Claimant and that the tasks he performed were done in the ordinary course of his employment, thus the claims for all commissions should fail. She averred that she had proved by way of letters from Kenya Wine Agencies Limited and Siamanda Duty Free Limited that they never dealt with the Claimant in his individual capacity but with the Respondent. She therefore submitted that the payment of commissions for tendered bonds for Kenya Wine Agencies Limited at Kshs. 200,000 should fail.

22. In addition, she submitted that the particulars of benefits since 2009 to 2016 were neither pleaded nor proved. She further submitted that the Claimant did not prove that he is entitled to leave allowances.

23. Finally, she submitted that the payments for the unremitted NHIF and NSSF deductions of Kshs. 27,000 were not particularised and that she had produced evidence proving that she settled the Claimant's NHIF and NSSF. It finally submitted that the Claimant's claim is frivolous and should be dismissed with costs.

Issues for determination

24. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the Claimant was employed by the Respondent as a Declarations Clerk in June 2009 earning a salary of Kshs. 20,000. There is further no dispute that constructive dismissal and summary dismissal were not pleaded in the primary pleadings by the two parties but were only raised in evidence and the written submission. I therefore find that the only issue for determination are whether the Claimant is entitled to the reliefs sought in his suit and whether the counterclaim should be allowed.

Reliefs

25. To answer the question whether the claimant is entitled to the reliefs sought, it is necessary to determine whether his contract of service was governed by the appointment letter dated 1.6.2009. The Claimant produced the said letter as proof of his contract of employment. The Respondent avers that he never issued the Claimant with any letter of appointment and that the letter of appointment was a forgery.

26. The respondent never made any effort to prove that the said letter was a forgery and not from him. In fact Rw1 admitted that part of the letter was genuine when he stated as follows during his examination in chief:

“I only issued a letter to Philip Mutua when he wanted to get a loan from the Bank. He is stationed in Busia. I signed every page of Mutua's letter. The claimant has produced a forged appointment letter. It is Mutua's letter which he forged because some of the pages of the letter do not bear my signature and they are photocopies.”

27. The foregoing is admission that the signed page on the appointment letter belongs to Rw1. I further find that the allegation that the letter was forged from Mutua's letter to be false because the Company stamp on Mutua's letter is different from the one on the claimant's letter. Considering the evidence by the two witnesses I find on a balance of probability that the claimant was issued with the said appointment letter by the Rw1 and the terms contained therein formed the terms of their contract of employment between the two including the salary of kshs.20000 per month plus commission and allowances.

Salary arrears from the year 2013 to 2016

28. The Claimant seeks salary arrears for the period between the 2013 and 2016. However, the Respondent produced his M-pesa Statement as evidence that he paid the claimant all his salary for the entire period of his employment. The statement bears the watermark “Not transferable –Not to be Used in Court or by the Police”. The said statement is therefore not admissible as evidence in this case and it is rejected. The court appreciate that the claimant was not represented by counsel and that might be the reason why no objection was raised during the hearing.

29. The salary payslip produced by the Claimant indicates that he received salary for the month of September 2014 with the basic salary of Kshs. 20,000. Further, the December payroll annexed to his claim indicated that his basic salary was Kshs. 20,000 and that his net pay was to be Kshs. 18,180.25. The respondent disputed the authenticity of the said documents. I, therefore, dismiss the claim for salary arrears because

the claimant did not prove that he worked for the respondent up to 2016.

Salary increment of Kshs. 1,075,563

30. The Claimant avers that pursuant to the letter of appointment, he was entitled to an annual salary increment. It was his testimony that the rate of salary increment per year was not agreed upon. Consequently, the claim must also fail. Even if the Court was to consider salary increment there is no specific rate agreed upon which this Court can grant the claim.

Allowance for escorting cargo to Rwanda and Uganda and commission for entries secured.

31. The Clause on other remuneration in the appointment letter stated:

“You will be paid a gross monthly wage of sh. 20,000. And wage increment annually with applicable rates. Per Diem on travels outside Kenya and Commissions/allowances o jobs e.g Kenya wine agencies ltd from Kenya to Rwanda, Uganda per truck Kshs. 20,000. Kshs. 300 commission on every entered customs export entry from my client's i.e Kenya wine agencies Ltd/Siamanda duty free customs entries.”

32. The claimant produced copy of passport to prove that he escorted cargo to Rwanda and Uganda for 12 times and demanded Kshs.20000 per trip. Based on the said letter of appointment, I award him Kshs.240000 as prayed.

33. Likewise I award the claimant the claim for commission of Kshs.300 for each of the 4126 customs export entries secured by the respondent from clients including Kenya Wine Agencies Ltd and Siamanda Duty Free as per the appointment letter. Consequently, I award the claimant Kshs. 1,246,800 as his outstanding commission on the 4126 custom export entries.

34. In awarding the said commission I am alive to the fact that the respondent filed letters from the said two companies as proof that the claimant was not the one who secured business from them on her behalf. However, the said letters were written after the claimant testified and closed his case on 21.5.2019. They were filed without leave of the court and they were not produced by the authors. The letters are prejudicial to the claimant's case because he had no opportunity to testify on the same. Consequently, I return that the letters are inadmissible because they prejudice the claimant's right to fair hearing.

35. I further find that the claim for commission on the custom export entries is merited because even if the respondent was prequalified to provide services to the two companies before the appointment of the claimant, the claimant has proved that the respondent started getting the orders from the clients after his appointment.

Payment of Commissions for tendered bonds accounting to Kenya Wine Agencies Limited Kshs, 200,000 and commissions for Uchumi Supermarket Limited Kshs. 20,000

36. The claim for commission of Kshs.200000 for tendered bonds of accounting to Kenya Wines Agencies Limited and Kshs.20000 for introducing Uchumi Supermarket Limited Uganda are not supported by any written evidence and therefore not been proved on a balance of probability.

Payment of benefits since 2009 and 2016 amounting to Kshs. 109,662.00

37. This was an ambiguous claim as the Claimant did not prove which benefits were due to him.

Leave allowance from 2009 to 2016

38. The Claimant testified that he is entitled to leave allowance which he assessed at Kshs. 210,000. As earlier observed, the claimant did not prove that he was in service up to 2016. I will therefore award him leave for the period from 1.6.2009 to 30.8.2014 which period of service is not in dispute. The respondent did not prove by leave records that the claimant took his leave during the said period 5 years. Consequently, I find that he is entitled to cash in lieu of his leave of 21 days per year for five years. Hence kshs. 20000 x21/26 x 5 =Kshs. 80,769.25.

Payment of unremitted NHIF/NSSF amounting to Kshs. 27,000

39. The Claimant did not state the period in which his contributions were not remitted. The Respondent produced NHIF and NSSF statements indicating that the Claimant's contributions were remitted for different in 2013 and 2014. It was for the Claimant to prove the months and years he seeks payment of his contributions. This claim must fail.

Counter-claim

40. The Respondent seeks the sum of Kshs. 1,554,003 as the liability caused by the Claimant. Rw1 admitted during cross examination that there was no actual loss of Kshs. 1.3 million. Consequently, the counter-claim fails.

Conclusion and disposition

41. I have found that the letter of appointment dated 1.6.2009 was authored and issued to claimant by the respondent. I have further found that the terms in the said letter formed the contract between the parties herein and on its basis the claimant is entitled to the commission,

allowances and the accrued annual leave sought herein. Consequently, I enter judgment for the claimant for the sum of **Kshs. 1,567,569.25 plus costs and interest** from the date of filing the suit. The decreed sum is however subject to statutory deductions.

Dated, signed and delivered in open court at Nairobi this 17th day of January, 2020.

ONESMUS N, MAKAU

JUDGE