

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 90 OF 2018

KENYA UNION OF COMMERCIAL, FOOD AND

ALLIED WORKERS.....CLAIMANT

VERSUS

MARTIN NJERU MWEA.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant Mr. John Ndwiga Gasee for alleged wrongful dismissal and refusal to pay terminal benefits. The Claimant averred that the Grievant was employed by the Respondent on 1st August 2005 as a driver for heavy commercial vehicles earning a starting salary of Kshs. 4,000/- which was later increased to Kshs. 10,000/-. The Claimant averred the Grievant's appointment was verbal without any appointment letter and his main duty was to collect cereals from the supplier from Tanzania to the Respondent's store in Kithimu in Embu. The Claimant averred that the Grievant was verbally terminated on 12th June 2016 for the reason that someone else had been employed to take over his duties and that his services were no longer needed. The Claimant averred that the Grievant had served the Respondent for 11 years and during that period he had never received any warning whether verbal or written which is a manifestation that he was a good worker committed to his duties. The Claimant averred that the Grievant reported the sudden termination on 11th July 2016 to the Union who immediately wrote a letter to the Respondent. The Claimant averred that the Respondent replied on 15th July 2016 and denied any knowledge of the Grievant. The Claimant averred that it wrote another letter on 20th July 2016 and proposed a joint meeting for the parties to settle the matter but the Respondent replied and declined the proposal. The Claimant averred that the dispute was then referred to the Cabinet Secretary Ministry of Labour who appointed a Conciliator. The Claimant averred that the Conciliator invited the parties for a Conciliation meeting on 21st June 2017 but on 16th June the Respondent addressed the Conciliator and informed him that he would not attend the meeting. The Claimant averred that he attended the meeting with the Grievant but the Respondent stood his ground. The Claimant averred that the Conciliator tried to resolve the dispute but the Respondent was adamant and never forwarded his proposals to the Conciliator as requested. The Claimant averred that the Conciliator thus issued a referral certificate to the parties. The Claimant averred that the Grievant was working overtime, was not given any off day, annual leave and public holidays and thus seeks compensation. The Claimant averred that the Grievant had committed no offence of gross misconduct to warrant him the termination. Claimant averred that the Respondent acted outside the law by terminating the Grievant's services simply because he wanted to hire another driver. The Claimant prayed that the Respondent be ordered to reinstate the Grievant to his original position, pay the Grievant all the salaries he could have earned since the date of termination up to the date the judgment will be entered, all his accrued annual leave and not taken, all the over time he had worked, for public holidays worked and not paid and rest days. The Claimant averred that in the alternative, and where the reinstatement will not be the best remedy, the court should order the Respondent to pay the Grievant's terminal dues which included one month's notice – Kshs. 26,751.80, accrued annual leave for 11 years – Kshs. 179, 120.50, off days/rest days – Kshs. 409,418.20, overtime – Kshs. 2,302,344/-, public holidays – Kshs. 93,825/-, service gratuity – Kshs. 127,942.20, underpayment of wages – Kshs. 1,503,332.25, compensation for unlawful termination – Kshs. 321,021.60 all totaling to Kshs. 4,963,755.55 plus costs of the suit.

2. The Respondent filed a response to the memorandum of claim and denied having knowledge of the Claimant. He denied every allegation in the claim and contended that since the Grievant was not his employee as alleged, he did not have the capacity either to engage him as a driver and/or terminate him. The Respondent averred that he is wrongly enjoined in this claim and he is non-suited in the proceedings and shall move the court to have his name struck out *in limine*. The respondent prayed that the suit be struck out or dismissed with costs.

3. The Grievant adopted his statement and his list of documents and testified that he was the driver of a lorry registration number KAR 233M having been employed in the year 2005. He stated that he took the lorry to the garage in June 2016 for repair and he kept on checking on as it is the routine but on 24th June 2016 he when he went to the garage to check the progress of the repairs to the lorry, he was informed that it had been taken by another driver by the name Njagi who had been instructed by the Respondent. He said that upon calling the Respondent, he was told that a new driver had been employed and his services were no longer needed and the June salary was sent via M-pesa. The Grievant stated that he used to work overtime, on public holidays with no off days and house allowance. He testified that he was not given prior warning and he was not given the reason for dismissal. The Grievant testified that he used to drive the Respondent's lorry and that the lorry used to carry various goods including wood from the forest. He stated that he used to transport cereals from Tanzania, Mwingi, Kitale, Nyahururu and so many other places and sometimes the Respondent could send him money via Mpesa to pay for the goods.

4. The Respondent herein, Mr. Martin Njiru Mwea testified that he is in the firewood business and that he did not know the Claimant Union as he had no prior dealings with them prior to the case. He testified that he did not have knowledge of the Grievant as he never employed him. He stated that he used to make payments either through cash or Mpesa. He denied having sent the Grievant money to buy cereals as he used to undertake firewood business. He denied that he owned a lorry and that his name was Martin Njiru Mwea not Martin Njeru Mwea. He stated that originally the lorry was his but he sold it to Roy Githinji who was his son in the year 2004 or 2005. He stated that he never employed the Grievant as a driver and that he never called the Grievant and that he did not know Mr Njagi. That marked the end of oral testimony.

5. The Claimant submitted that the Respondent, Martin Njiru Mwea who appears as Martin Njeru Mwea is the Respondent save for the typographical error and that should not be the basis of the argument. The Claimant submitted that the Respondent knew that he is the one referred to and that is why he filed the response and never raised a preliminary objection about his name. The Claimant submitted that the Respondent's counsel vide a letter dated 15th July 2016 had stated that the Grievant had deserted duties and has no recourse against any person, and that the Grievant had been paid his June salary in full by the Respondent despite his abandonment of duties causing the Respondent untold suffering and inconveniences. The Claimant submitted that this statement clearly confirmed the employer-employee relationship between the Respondent and the Grievant. The Claimant submitted that the Respondent had been changing the goal posts to deny the Grievant his rights and entitlements. The Claimant submitted that the Respondent should not purport to not know the Claimant Union and yet he is the one who instructed his counsel to address the Claimant Union in regards to the dispute before court. The Claimant submitted that the Respondent should not lie to the court that he sold his motor vehicle in 2004 when the documents before court showed that the motor vehicle was first registered under his name on 25th November 2003 and he only transferred it to his son Roy Githinji Njiru. The Claimant submitted that the Grievant was a member of the Union and that the Respondent knew him and that is why he used to send money to him to pay for the goods. The Claimant submitted that the Grievant was underpaid for the period he served the Respondent since he was not being paid as per the Kenya Gazette. The Claimant submitted further that this claim is valid and that it had proved that indeed there was an employer-employee relationship between the Grievant and the Respondent and that his employment was unlawfully terminated. The Claimant prayed that judgment be entered against the Respondent as prayed in the statement of claim.

6. The Respondent submitted that the Claimant did not have *locus standi* to file this suit on behalf of the Grievant as there was no recognition agreement between the alleged employer and the Union or any evidence to show that the Grievant was a member of the Claimant. The Respondent submitted that the receipts that he reproduced in his memorandum of claim are for parties that are not in this suit. The Respondent relied on the case of **Communication Workers Union v Safaricom Ltd [2014] eKLR** where Mbaru J. upheld the Respondent's preliminary objection that the Claimant union lacked *locus standi* to bring the suit on behalf of the Grievant and struck out the claim. The Respondent submitted that from the foregoing reasons and the evidence before the court, it is clear that the Claimant Union has no *locus standi* to bring this suit on behalf of the Grievant and the suit should be struck out. The Respondent submitted that the Claimant's allegations that he owned the business does not hold water as the Claimant did not provide any evidence of the registration of the business. The Respondent submitted that his name is Martin Njiru Mwea and not Martin Njeru Mwea and that he had put the Claimant on notice that he would object on a point of law for misjoinder but the Claimant failed to file a response to the memorandum of response and/or make any attempt to amend the memorandum of claim. The Respondent submitted that now the Claimant claims that it is a typographical error but he had failed to move the court appropriately. The Respondent submitted that this case is a misjoinder and prays that the same be dismissed. The Respondent cited the Court of Appeal decision in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR** where the court held that submissions cannot take the place of evidence. The Respondent submitted that he did not know the Grievant and that he was not the owner of motor vehicle KAR 233M as he sold it a long time ago, he did not have a driver called Njagi and that the Grievant was not a member of the Union. He submitted that the Claimant violated Section 107(1) of the Evidence Act as it failed to prove any of the allegations in the claim and that there was failure to produce any evidence to confirm that the Grievant was ever employed by the Respondent and/or evidence to show that he used to receive Mpesa from the Respondent. The Respondent submitted that the Grievant was never his employee and therefore the allegation that he was unfairly terminated cannot lie. He submitted that in any case the Grievant never produced any evidence to support the alleged unfair termination and he is thus not entitled to any of the reliefs sought. The Respondent relied on the case of **Zipporah Kemunto Onsombi v Kisii Prestige Shuttle Limited [2019] eKLR** where the claimant failed to establish an employment relationship between herself and the respondent and the honourable court dismissed the claim. The Respondent submitted that the Claimant herein had failed to establish an employment relationship between him and the Grievant and that the Grievant is not entitled to any of the reliefs sought. The Respondent thus sought the dismissal of the claim with costs.

7. The Claimant was said to lack *locus standi* to institute the claim on behalf of the Grievant. It was the Grievant's testimony that he was underpaid by the Respondent. Other than the interposition at the time of pursuing terminal benefits, there is no evidence of prior engagement of the Union with the Respondent. As such, the Union seems to have assumed the role of advocate which is not supported by the Labour Institutions Act and the Labour Relations Act. It is improper for a Union to act as an advocate since the law provides the manner and mode of interaction between the union and other social partners. It is clear as held by Mbaru J. in the case of **Communication Workers Union v Safaricom Ltd (supra)** that there is no standing to articulate the case before me. In the final analysis the suit by the Claimant is only fit for dismissal. As the Respondent waited for the full hearing he will not have any costs as he should have raised the matter *in limine* instead of letting the court take a full hearing. Suit dismissed with each party bearing their costs.

It is so ordered.

Dated and delivered at Nyeri this 25th day of February 2020

Nzioki wa Makau

JUDGE