



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 521 OF 2017

BETWEEN

ELIAS KARIMIKO KALU.....CLAIMANT

VERSUS

JOASH M. ORINA t/a PLANNING AND FURNITURE.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Njoroge & Katisya Advocates, for the Claimant

Musinga & Company Advocates, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 27th June 2017. He states, he was employed by the Respondent as a Machine Operator, on 4th January 2014. He earned a salary at the rate of Kshs. 600 daily. His contract was terminated on 26th August 2016, by one Fred Osiemo, a Son to, and Manager of the Respondent. Termination was not based on valid reason. It was alleged by the Respondent that the Claimant assisted one Alfon Omar, in pursuing a complaint at the Labour Office against the Respondent; he incited others to pursue grievances at the Labour Office; and acted as Legal Advisor to Co-Employees. These allegations were untrue. They did not amount to valid reasons to justify termination. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 15,600.
- b. Arrears of house allowance, 2014-2016, at Kshs. 74,800.
- c. Annual leave 2014-2016, at Kshs. 42,000.
- d. Service pay at Kshs. 18,000.
- e. 12 months' salary in compensation for unfair termination at Kshs. 187,200.

Total...Kshs. 337,600.

f. Certificate of Service to issue.

g. Declaration that the Respondent is entitled under the law to make contributions and remit the Claimant's N.S.S.F and N.H.I.F dues, for the period of employment to the respective authorities, within 30 days from the date of Judgment.

h. Costs.

i. Interest.

j. Any other order and/ or relief the Court deems just to grant.

2. The Respondent filed his Statement of Response on 23rd February 2018. The Claimant was not a regular Employee of the Respondent. He was engaged based on the business performance. He was a Casual Labourer. He does not merit compensation and terminal benefits claimed. He was guilty of insubordination. He disrespected his Supervisors; incited other Employees against Management; and failed to observe the spirit of teamwork. The bottom line is that the Claimant was in casual employment, and does not merit any of the prayers sought.

3. The Claimant testified, and closed his case, on 9th July 2019. The Respondent did so, on 22nd October 2019. His Son, Fredrick Osiemo Machiegwa, also gave evidence for the Respondent on 22nd October 2019, bringing the hearing to a close.

4. The Claimant restated details in his Statements of Claim and Witness, in his oral evidence. Respondent's Son, Osiemo, was Claimant's Supervisor. He terminated Claimant's contract. There was no letter of termination. The Claimant used to be paid his salary weekly. The Respondent told the Claimant to deal with Osiemo. The Respondent however, was the Employer, as shown in a Certificate of Service issued to a Colleague of the Claimant, Jonathan Kazungu, signed by the Respondent, dated 6th June 2014. The Claimant was called by the Respondent and his Son to their residence. They alleged that the Claimant had incited Employees to report grievances to the Labour Office.

5. Cross-examined, the Claimant told the Court he has sued the Respondent because the Respondent was his boss. He did not have documents showing the relationship between Joash, and Planning & Furniture. The latter is a company as shown in receipt on record. The letter from the Labour Office, after the Claimant lodged complaint, is addressed to Osiemo. Osiemo is not a Party herein. Jonathan Kazungu's Certificate of Service exhibited by the Claimant, is relevant to the proceedings. Redirected, the Claimant reaffirmed that he earned Kshs. 600 daily, which was paid weekly.

6. Joash told the Court he did not hire or fire the Claimant. He does not know the Claimant. He does not own the business referred to as Planning & Furniture. He set up the business for his Son Osiemo. He could not recall in which year. He has never been involved in running of the business. He has never seen the receipt at page 5 of Claimant's documents. His cell-phone number was added on the receipt by hand. The business collapsed. Osiemo abandoned it for reasons only known to him.

7. Cross-examined, Joash stated he bought wood-cutting machine for his Son. The business had County Government Licence. It was not before the Court. Joash did not know that Osiemo referred to himself as the General Manager. Osiemo would seek advice from his Father on running the business. Joash conceded he signed the Certificate of Service for Jonathan Kazungu. Kazungu worked as a Machine Operator for 7 years. The receipt exhibited by the Respondent shows the business is at Salim Munga Road. The stated street is correct. Cell-phone number belongs to Joash. It has PIN and VAT numbers printed on it. The name Joash Orina is printed on the receipt. Joash did not receive Claimant Advocate's demand letter. He did not recall that the Claimant went to Joash, to complain about Osiemo. He did not recall visiting the Labour Office. He was not Claimant's Employer. Redirected, Joash told the Court the Certificate of Service issued to Kazungu, did not relate to the Claimant. It did not refer to Planning & Furniture. Kazungu was not a Witness in the Claim. The cell-phone number on the receipt was written by hand.

8. Osiemo told the Court he was gifted wood-cutting machine by his Father. Osiemo owned the business. He did not employ the Claimant; he worked with the Claimant. Osiemo paid the Claimant as his Employer. He paid the Claimant Kshs. 600 per day. The Respondent had no relationship with the business. The Claimant alleges he complained on 24th August 2016. It is the same date he states, termination took place. The complaint was about hostile working environment. Osiemo did not terminate Claimant's contract. The Claimant said he could not continue working and reported the dispute at the Labour Office. He has not exhibited any letter of termination. If there was no business, the Claimant was not required to report.

9. Cross-examined, Osiemo told the Court the business was informal – *jua Kali*. His Father bought wood-cutting machine between 2014 and 2016. Osiemo described himself as the General Manager. He did not exhibit employee records in Court. He did not have payroll records. There were no complaints against the Claimant from Customers. There were no warnings against the Claimant. There are no records to show the Claimant worked inconsistently. Osiemo was familiar with the Certificate of Service issued to Jonathan Kazungu dated 6th June 2014. The Claimant was in employment as of this date. Osiemo closed the business. He did not have documents showing closure. Redirected he told the Court Kazungu did not work under him. The document issued to Kazungu was not a Certificate of Service.

The Court Finds:-

10. The Claimant worked for the Respondent business as a Machine Operator, between 14th January 2014 and 29th August 2016. He was paid a daily rate of Kshs. 600. It is not agreed who employed him. Joash is the Father to Osiemo. The Claimant states he was employed by Joash. Joash states he does not know the Claimant, and did not have any relationship with the Claimant. He states he set up the furniture business for his Son Osiemo, by buying him a wood-cutting machine. Osiemo himself, if recorded correctly by the Court, gave rather unsettling evidence, sampled here-below:

‘I worked with the Claimant. I did not employ him. I owned the business. I paid the Claimant as his Employer. I paid him Kshs. 600 daily. My Father had no relationship with the business.’

11. The Court has formed the view that the Respondent and his Son, were involved in the ownership and running of a family furniture business. The Son may have been the day-to-day in-charge, describing himself as the General Manager, but the Father was an integral component in the business with decisional control, always lurking in the background. This is made clear by the Certificate of Service or Letter of Recommendation, issued to Jonathan Kazungu, dated 6th June 2014. The wording of the letter, satisfies the requirements of a Certificate of Service, and also contains recommendation of the addressee, at the tail end. It is signed by the Respondent, Joash Orina. It is

pointless for the Respondent to argue that the document was not a Certificate of Service. The addressee, like the Claimant was a Machine Operator. He was a contemporary of the Claimant. The receipt exhibited by the Claimant bears details of the business and its main proprietor Joash. It is impossible for Joash to extricate himself from the employer-employee relationship, and employment liability arising out of this relationship.

12. The Respondent and Osiemo, both fit the description of the term 'Employer,' given under Section 2 of the Employment Act.

13. Was termination fair?

14. Neither Joash nor Osiemo, gave a clear and valid reason justifying termination. The Claimant referred to Osiemo as his Supervisor. He stated his contract was terminated by Osiemo. Osiemo denied that he terminated Claimant's contract. The Claimant said he would not continue working and reported dispute to the Labour Office. The Respondent pleaded that he terminated the Claimant's contract for failing to observe general rules of employment. Particulars of gross insubordination are laid out at paragraph 23 of the Statement of Response, and captured at paragraph 2 of this Judgment. These unproven particulars of gross misconduct, corroborate Claimant's assertion that the Respondent alleged he was inciting other Employees against the Respondent. It is pleaded also, that the Claimant was a Casual Employee, not entitled to the protections and guarantees available to regular Employees under the Employment Act. The Respondent states he gave a notice to show cause to the Claimant, why he should not be dismissed. There is no evidence to support the broad allegations made against the Claimant. He worked in continuity. No attendance records were exhibited by the Respondent, showing that the Claimant was in casual employment.

15. There is a wide mismatch between the Evidence and Pleadings of the Respondent.

16. Termination was instigated by the Respondent and his Son. It was not based on any valid reason. It was executed in complete disregard of the minimum standards of fairness, prescribed under Section 41 and 45 of the Employment Act 2007.

17. The Claimant worked for approximately 2 years 7 months. Osiemo told the Court there were no complaints against the Claimant from Customers. There were no warnings issued against him by the Respondent. His record was clean. His identity card states he was born on 1st January 1976. He was 40 years at the time of termination. He is a Machine Operator, trained at Upweoni Development Project, in Malindi. He had previously worked for other companies. He also disclosed he had previously worked for the Respondent between 2006 and 2010, when he left on medical grounds, before rejoining in 2014. He did not contribute to the circumstances leading to termination.

18. **He is granted compensation for unfair termination, equivalent to 8 months' salary at Kshs. 124,800.**

19. **He is granted 1 month salary in lieu of notice at Kshs. 15,600.**

20. The Claimant's pay was daily rated. Daily rates take into account the housing element. The Court does not think the prayer for house allowance in arrears is merited. It is declined.

21. The Respondent offered no record on annual leave. His only response was that the Claimant was in casual employment and therefore undeserving of annual leave. The Court does not agree that the Claimant was in casual employment. **He is entitled to annual leave, at a minimum of 21 days annually, for 2 years and 7 months [54.25 days], translating to leave pay of Kshs. 32,550.**

22. The Respondent did not subscribe the Claimant to the N.S.S.F or any other registered Pension or Provident Fund contemplated under Section 35 [6] of the Employment Act 2007. **The Claimant is allowed the prayer for service pay at 15 days' salary for 2 complete years of service, at Kshs. 18,000.**

23. The Court does not think there would be reason to warrant grant of a declaratory order that the Respondent was bound to deduct and remit N.S.S.F contribution, and for the Respondent to be ordered to make contributions within 30 days of the Judgment, in light of award of service pay above.

24. There are no N.H.I.F records on record, to support the prayer for declaratory order with regard to N.H.I.F. If there are any dues which ought to be paid to N.H.I.F, the Claimant can pursue that under the Statute that creates the obligation, which has its own enforcement regime.

25. **Certificate of Service to issue.**

26. **Costs to the Claimant.**

27. Interest is granted at the discretion of the Court, under Rule 29 of the E&LRC [Procedure] Rules 2016. It is not governed by the Civil Procedure Rules. It is not static from yesteryears, and Employees must be cushioned against the ever rising cost of living and ever depleting purchasing power. **Interest is allowed at 16% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: compensation at Kshs. 124,800; notice at Kshs. 15,600; leave at Kshs. 32,550; and service at Kshs. 18,000 – total Kshs. 190,950.

c. Certificate of Service to issue.

d. Costs.

e. Interest allowed at the rate of 16% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 21st day of February 2020.

James Rika

Judge