



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.78 OF 2017

PETER WAITHAKA MURIITHICLAIMANT

VERSUS

TIMSALES COMPANY LIMITED.....RESPONDENT

JUDGEMENT

The claim is premised on the facts that the claimant was employed by the respondent in March, 2013 to June, 2014.

The claim is that in June, 2014 the claimant's employment with the respondent was unfairly terminated without payment of his terminal dues. he reported to work and was informed that there was reduced work load and hence he should not report back to work the following day.

The claimant is seeking the payment of the following dues;

- a) Underpayments from October, 2010 to February, 2014 at ksh.69, 313.44;
- b) Leave pay Ksh.8, 379;
- c) Overtime pay Ksh.14, 928.74;
- d) Notice pay Ksh.9, 780.95;
- e) Severance pay Ksh.192, 687.82;
- f) Compensation; and
- g) Costs.

The claimant testified in support of his claims that he worked for the respondent from March, 2013 to June, 2014 as a causal worker and paid monthly at ksh.1, 610 per week and Ksh.6, and 916 per month. His duties were to split timber and move ready timber and when there was no timber he was allocated general duties.

In June, 2014 there was a problem. Every year they would be stopped and made to reapply for their causal jobs. They would assemble at the gate and use the identity card to clock in and be paid. The respondent kept these records for payment at end week or end month.

Work hours were 8 in total from 7am to 3pm or 8am to 4pm. No benefit was paid. Nahashon Maina was the supervisor and would pick the causals at the gate, after 6 months there would be stoppage of work. No terminal dues paid.

The claimant also testified that the practice was that they would bribe the supervisor Mr Maina so as to be picked at the gate, he would keep the identity cards and these would be used at end week to effect payments for all the causal employees.

The claimant also testified that he was earning a daily wage of Ksh.266 paid weekly. He worked for a period and would be laid off after 6 months and taken back based on availability of work. In his case there was on-going work for a year when production went low.

The defence is that the claimant is a stranger to them and by letter dated 24th April, 2017 wrote to his advocates seeking for better particulars and the department in which he worked so as to ascertain his claims but none were made available. The claims made are without foundation and should be dismissed with costs.

The respondent filed work records for casuals to confirm the claimant was not in their employment as stated.

Philip Ouma Agutu the human resource assistant with the respondent testified that the nature of the respondent's business, over 700 casual employees are picked daily and there is a muster roll and clocking cards for use by the casual employees, for payments and NSSF deductions and payments.

Mr Agutu also testified that when the respondent was served with summons they requested the claimant to give his details to trace him through the records but there were none. The system in use could have traced him if at all he worked for the respondent. There was no employment relationship between the parties.

At the close of the hearing both parties filed written submissions.

The core mandate for the court is on disputes relating to employment and labour relations and for connected purposes. Where an employment claim is denied and particularly that there is or there was no employment relationship, then the claimant as the employee was put to strict proof of his employment with the respondent. without proof of such matter, then the court lacks the requisite jurisdiction to hear and determine the dispute between the parties.

In this case, the claimant's claim is based on the facts that he was an employee of the respondent from March, 2013 to June, 2014 when his employment was unfairly terminated. In his evidence and claims, the claimant asserted that his employment was from October, 2010 to February, 2014. That his employment ended due to reduced work. There are apparent disparities.

The defence is that the claimant was never in its employment, upon service of summons the respondent reached out to the claimant to get his particulars so as to trace him through the muster rolls but could not get his details because he was never an employee.

The respondent filed detailed work records. This is as required under section 10(6) and (7) of the Employment Act, 2007.

These work records were not challenged by the claimant.

The claimant's details do not appear on the filed records.

Taking the claimant's claims into perspective and the filed work records, he testified that his supervisor was one Mr Maina who would be bribed so as to pick his identity card at the gate and which would be used to effect payments at the end of the week. He had no other work benefits of NSSF like other employees.

On his evidence, it was apparent to the court that where the claimant was in the service of the respondent, if at all, he was under a parallel system established by one Mr Maina who would be bribed so as to pick him and would ensure he was paid. This developed an informal parallel employment under the control of Mr Maina and lasted as long as the claimant was not picked again.

From the evidence and records of the respondent and Mr Agutu, it is clear to the court that the respondent registers all its casual employee at the gate, there is payment of NSSF dues and other benefits. Over 700 casual employees are picked daily.

I take it, in the picking of the over 700 casual employees daily, some rogue supervisors have devised a parallel system to pick casual at own benefit unknown to the respondent. this system would have continued to thrive had the claimant been kept on the parallel system. This was not the case.

The claimant cannot benefit from an illegality committed with his assistance to claim work benefits from the respondent.

Even where the claimant may have been in the service of the respondent, the agency for his service was one Mr Maina. For his conduct, the respondent as the one allocating Mr Maina the responsibility of supervising casual employees should deal. For the claimant, the wrong party is sued. Coupled with the contradictory claims that work commenced in March, 2013 and ended in June, 2014 and the evidence contradicting the same his claims relates to the period of from October, 2010 to February, 2014, the claims against the respondent are without foundation.

Without proof of employment and that there was unfair termination of such employment, the court lacks jurisdiction herein and must down its tools.

The suit is hereby struck out. Each party shall bear own costs.

Dated and delivered electronically this 12th June, 2020.

M. MBARU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship the Chief Justice on 15th March, 2020 the Judgement herein shall be delivered to the parties via e-mails. this 12th June, 2020.

M. MBARU

JUDGE