



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.89 OF 2017

JOHN KARANJA MBOGO..... CLAIMANT

VERSUS

LEAH WANGUI MBURU

T/A GILGIL DISTRIBUTORS LIMITED..... RESPONDENT

JUDGEMENT

The claimant's case is based on the facts that in the year 2003 he was employed by the respondent as a driver/salesman at a monthly wage of Ksh.8, 541 and which wage was increased gradually to Ksh.18, 500 in the year 2014 when his employment was terminated.

The claim is that during the pendency of his employment the claimant was underpaid, he was not allowed annual leave for his last two years; he worked during public holidays including working on Saturday and Sundays all without pay or compensation. Employment was terminated in the year 2014 without notice, hearing or being given any reasons.

The claimant is seeking the following dues;

- a) Compensation for unlawful termination of employment Ksh.222,000;
- b) Notice pay Ksh.18,500;
- c) Public holidays Ksh.217,104;
- d) Annual leave Ksh.38,989;
- e) Gratuity Ksh.143,792;
- f) Unlawful monthly deductions of ksh.250 for 12 years Ksh.26,000;
- g) Ksh.82,000 under Workman's Compensation;
- h) Unremitted deductions to NSSF Ksh.2,800;
- i) Certificate of service; and
- j) Costs.

The claimant testified that in the year 2003 he was employed by the respondent as a salesman to sell beer and had no written contract and would be paid monthly. He was only issued with letter of rules and regulations and terms of work which he signed on 1st September, 2003. It contained a code of conduct.

The claimant was paid Ksh.8, 500 per month which was increased to Ksh.18, 000 but in December, 2013 this was reduced by Ksh.3, 000 to Ksh.15, 000 per month and to confirm he has filed the payment slips/statements.

The claimant also testified that in February, 2014 while at Nairobi he was called by the respondent who terminated his employment. He was directed to give his vehicle to another driver. No reasons were given. There was no complaint or reason leading to termination of

employment or payment of his terminal dues which arose from the fact that he worked overtime without pay from 7am to late in the day and without fixed hours. He was required to load his vehicle and return it to the yard. His allocated route was Bahati to Subukia, this changed to Molo and then Lanet. The respondent had a store in Gilgil where he picked the vehicle and loaded goods. He had to delivered beer to over 60 bars on his list and make returns to the respondent.

The claimant also testified that he was at work daily without a break and also during public holidays. He was not paid for overtime work and when not taking a rest.

The claimant was paid for 21 leave days but in the last 3 years of work he was not paid.

During the course of his employment the claimant was issue with a warning on 8th January, 2014 with regard to handling the volume of work. This letter was however not served on him. There is no evidence of service.

Employment was terminated on 18th February, 2014. By this time the claimant was working with *Isanda* and there was no complaint on work performance. The respondent had sent him to work at *Isanda* as he remained an employee.

The respondent said the claimant would be paid on commission basis on the sales made but by month end they reverted back to the old system upon realisation that paying on commission they would not make a profit. The commission due was higher than the salary.

The claimant also testified that he got injured while at work on 13th August, 2006 in a non-fatal accident. He was hospitalised and the County Labour officer had insurance and was supposed to pay Ksh.82, 000. The respondent failed to pay.

Statutory dues for NSSF and NHIF were paid for by the respondent and the claims made should be allowed.

Upon cross-examination, the claimant testified that he is not aware the respondent closed due to bankruptcy. They were distribution beer by EABL and he is not aware the contract was discontinued. He has however not seen their vehicles on the road since but when his employment was terminated the business was running.

The salary was paid monthly and issued with a pay slip and not commission. The claimant admitted he was paid different amounts;

June, 2011 he was paid Ksh.15, 964;

7th January, 2009 he was paid Ksh.18, 625;

6th December, 2008 he was paid Ksh.11, 923;

5th February, 2010 he was paid ksh.9, 646;

11th December, 2007 he was paid ksh.11, 823;

May, 2004 he was paid Ksh.8, 541;

5th February, 2005 he was paid Ksh.8, 541.

That the salary was increased over time but not a commission. The crates of beer sold would be noted and salary increased.

There was a criminal case where the claimant was charged but he was released and not found culpable.

His last day at work with the respondent was 28th February, 2014 when he was called while in Nairobi and told to hand over his vehicle to another driver at *Isanda*.

He was placed with *Isanda* from September, 2013 using the respondent's vehicle and who also paid salary and issued him with several letters.

Defence

The defence is that the claim is incompetent, bad in law and should be struck out.

There are general denials to the claims made and that the claimant has not produced any academic documents to support his claims and qualifications to work as a driver or a salesman as alleged. The claimant wilfully deserted employment after being warned through letters and having failed to attend disciplinary hearing when summoned.

The defence is also that where employment was terminated the same arose out of justified reasons. And the claims made should be dismissed with costs.

Vincent Kariuki Mburu a former director of the respondent testified that the respondent ceased operations several years ago. The claimant had been employed on commission basis based on sales and as not on the full time employment of the respondent and not required to work all day. He was given an assignment where required. He was taking a consignment for delivery. Based on sales using the respondent's vehicle he would be paid a commission.

The claimant was given several warning letters occasioned by absenteeism and inability to carry out his duties well and failing to reconcile accounts.

Mr Mburu also testified that the claimant failed to attend a disciplinary hearing when invited and eventually absconded duty.

The respondent was dealing with sale of EABL products. Just a dealer. The payment vouchers produced by the claimant related to the commissions he was paid. The respondent did not file the payment records which were stored in the office upon the audits.

The respondent stopped operations in the year 2013 after a disagreement with EABL on empties and high costs on breakages during delivery of products. The salesmen were responsible for these deliveries with drivers being reckless and causing huge losses.

Mr Mburu also testified that the respondent closed business and in June, 2013 EABL stopped supplying them and instead initiated dialogue with *Isanda* to take over the distribution area. From June, 2013 the claimant was placed with *Isanda* who hired the respondent's vehicles and who used the existing systems of salesmen. The respondent would receive funds in its account to pay the drivers and in this regard the claimant was paid Ksh.15, 000 in February, 2014 and ksh.30, 000 in January, 2014. These payments were channelled through the respondent who had control of the drivers using their vehicles.

While the claimant was in the service of the respondent he worked from 8am to 5pm when the yard closed for conciliations. On Saturday and Sunday the bar owners who required delivery would collect from the respondent's stores whereas on public holidays there would be no work and the stores would be closed. The policy was to pick the vehicle at the yard and return it and hand over the keys.

The claims made for overtime, rest days, work on public holidays do not arise.

The claimant was injured in the year 2011 and any claims therefrom are time barred.

The claim for a deduction of Ksh.250 is not due. The claimant introduced his trade union and authorised a monthly deduction to the benefit of his trade union.

Mr Mburu also testified that there were letters of complaints form *Isanda* with regard to the claimant's work performance. They wrote to the claimant and he failed to address. His employment was terminated as a result by *Isanda*.

Mr Mburu also testified that the respondent paid statutory dues with regard to the claimant and including his PAYE.

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

Determination

The court has gone through the pleadings, the evidence and the written submissions and the issues which emerge for determination can be summarised as follows;

Whether the claimant was the employee of the respondent;

Whether the remedies sought are due; and

Who should pay costs.

Before addressing the issues herein set out, the filed response by the respondent though amended in reply to the amended claim by the claimant is at variance with the Witness statement filed by Mr Mburu for the respondent. The averments in the response weighed against the witness statement introduced other extraneous matters not addressed in the response and thus denied the claimant a fair chance to reply.

In his evidence, Mr Mburu was relating to information on the current status of the respondent and not with regard to the claim filed with regard to alleged termination of employment in February, 2014. The fact of the respondent being bankrupt, not being in operation, operations having been changed to a third party *Isanda*, these were matters treated casually and not given the due weight.

On the claim, the defence filed and the parties having been allowed to amend their pleadings, the highlighted issues, and the court shall address based on the applicable law.

On the relationship between the parties, the claimant asserted that he was the employee of the respondent paid a salary monthly while the respondent's case was that he was assigned duties and paid a commission and that the different payments each month confirm to this kind of relationship.

An employee is defined under the Employment Act, 2007 (the Act) to be as follows;

“Employee” means a person employed for wages or a salary and includes an apprentice and indentured learner.

The employment relationship can also be defined through an oral or written contract of service under the provisions of section 8 and 10 of the Act. See **Stanley Mungai Muchai versus National Oil Corporation of Kenya [2012] eKLR**.

Where parties contest employment with the employee asserting that such a relationship did not exist and the person was on a service paid a commission and the other party claims there was employment and the benefits of the law are due, the court must discern the facts. Where there is no written contract of service or a contract for service, the distinguishing factors of whether one was an employee or not is outlined in various case authorities.

In **Vitalis Oliewo K’omudho versus AAR Health Services Ltd [2016] eKLR** the court held that;

Some of the defining characteristics of the claimant’s case is that he was a consultant; he had no salary but a commission payable on an override commission at 1.35%; he was subject to withholding tax at 10% and did not pay statutory deduction; the benefits at work were not applicable as the Claimant was to pay for his own medical cover, had no leave days; and the parties had a written contract that recognise the Claimant as a Consultant.

In **Frederick Byakika versus Mutiso Menezes International Unlimited, Cause No. 327 of 2014** the Court held that;

... even where a salary or wage is paid, where parties have reduced the terms and conditions regulating the relationship into writing, such is to be given importance with reference as such form the basis and intentions of such parties. ... The use of the terms such as salary, employment terms and conditions, summary dismissal - such though referred do not confer an employment relationship. In the employment contract there were deliverable, terms and conditions, but the Claimant was largely left on his own to undertake his duties and the element of control was his contract of service

In the **Stanley Mungai Muchai case**, cited above, the court held that;

... a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work. However the formal or personal subordination of a worker as a test for existence of a contract of service may not apply for highly specialized workers such as in the case of the doctors, lawyers, and other professionals.

Therefore there are distinguishing features of an employee as against a contracted person for a service. *an independent contractor/ contract for service person is one who is a registered taxpayer, will work his own hours, runs his own businesses, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his services and will be paid accordingly and will not be subject to usual ‘employment’ matters such as the deduction of PAYE, will not get annual leave, sick leave and not subject to the disciplinary procedures as an employee would be subject to. Where the contractor for a service is unable to deliver as agreed, the contract of terms for the service is terminated as this is just but a commercial undertaking and not employment. See **Kenya Hotel & Allied Workers union versus Alfajiri Villas [2014] eKLR**.*

In this case, the claimant testified that he remained under the control of the respondent for the entire period of service from the 2003 to 2014 when employment terminated. He enjoyed annual leave save for the last 3 years of service; his statutory dues were paid by the respondent and for his services he was paid a monthly pay.

The respondent confirmed statutory deductions were effected and paid. That the claimant was subject to the disciplinary requirements of the respondent. these features cannot extricate the respondent from an employment relationship with the claimant.

Where the claimant was on a contract for service, and which is not the case here, the respondent did not file any records. Mr Mburu testified that there were records which are kept in a store following eh audits. Moved by the claimant in these proceedings taking into account the claims made with regard to an employment relationship, where the respondent had material evidence in its possession to confirm that the claimant was not an employee but an independent contract paid a commission and not a wage or salary, then the burden was on the respondent to produce such records.

The court find the claimant was an employee of the respondent. there was no written contract of service which is allowed under section 8 of the Act and where the claimant continued in the service of the respondent from the year 2003 to the year 2014, the duty was on the respondent as the employer to issue a written contract pursuant to section 10 of the Act.

with regard to termination of employment, section 47(5) of the Act places the burden to proof unfair termination of employment upon the employee and the burden to justify the termination of employment on the employer pursuant to section 43 of the Act.

The employee must therefore adduce *prima facie* evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the employee presents *prima facie* evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on a balance of probabilities.

The claimant testified that he was asked to hand over the vehicle keys by the turn boy of *isanda* while in Nairobi. He then termed his employment to have been terminated. The respondent on the other hand tendered evidence that the claimant was placed with *insanda* when he deserted duty.

Part of the work records filed by the respondent is several warning letters to the claimant. Though the claimant denied the service of these letters, in his amended claim and response to the amended response he does not denounce these records. What is apparent to the court from these records is that the claimant had a record of misconduct and leading to several warnings being issued to him and resulting in the letter dated 20th February, 2014; warning letter dated 7th March, 2014 for being absent from duty and letter dated 19th March, 2014 for being absent from duty.

The claimant testified that his last day at work was 28th February, 2014 when he was asked to hand over the vehicle keys. He did not report back to the respondent where he felt aggrieved by such a requirement.

the respondent's case is plausible to the extent that the claimant was last serving a third party in Nairobi and not his normal route from Gilgil and its environs. The claimant testified that the Respondent had its store in Gilgil and the claimant's last route was Lanet to Molo. The reason he was last found in Nairobi was explained. The explanation is correct based on the facts before the court. the claimant absconded duty, he was issued with two notices with regard to his absence and he failed to abide.

Absence from duty is gross misconduct pursuant to section 44 of the Act and the sanction of summary dismissal is justified. The claimant cannot be found to claim notice pay and compensation on the circumstances.

On the claims made, the employer has the burden to file work records. See section 10 of the Act. see **Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018] eKLR;**

it is the duty of every employer upon a claim being lodged with the court to attend and file all the work records to enable to court address the same on its merits. Section 10(6) and (7) of the Employment Act, 2007 requires that;

...

An employer should keep all work records for a period of 5 years even where employment has eased as such records may become necessary and important particularly in proceedings such as these. Also, where legal proceedings are initiated by an employee, the law places the duty to produce the work records upon the employer.

19. Where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not found necessary; the submission of work records is a legal requirement.

The respondent failed to discharge its burden. From the evidence of Mr Mburu for the respondent, it was apparent to the court there were work records kept in a store but these were not produced.

The court is left with the claimant's claims without a challenge. These shall be assessed based on the applicable Wage Orders as the claimant was not under a written contract of service.

The claims for work during public holidays are set at 10 days each year for the periods of service save for the period of February, 2006 to January, 2007 for 9 days. Under the applicable Orders work on public holidays attracts double payment which is analysed and appropriately allocated based on the due wage for each year.

The claimant is awarded ksh.217,729 for work during public holidays.

There are no records that the claimant was allowed annual leave pursuant to section 28 of the Act. his claims relates to two years of leave days not taken or paid for in lieu thereof. The payment is awarded based on the last wage for two years at ksh.38,989.

The claim for gratuity is not due. the claimant had no written contract giving him such benefit. The respondent was paying statutory dues and even where a service pay was claimed, with such payment of PAYE, NSSF no service pay is due.

On the claim for a deduction of ksh.250 for 12 years, the defence was that the claimant authorised the respondent to deduct and remit monthly contributions to his trade union. Section 19(1) (g) of the Act allow an employer to deduct from the employee's wage or salary and remit as directed;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

the deduction of Ksh.250 from the claimant's wages continued for 12 years. where these deductions were not authorized and did not get remitted to his trade union or the body so authorised, there was no complaint.

On the claim for compensation for work injury under the Workman's Compensation, where injury to the claimant occurred in the year 2011 and the claim filed in the year 2017, such is time barred under the provisions of section 90 of the Act. even where the claim was valid, such ought to have been addressed under the provisions of the Work Injury Benefits Act, 2007 and the court lack original jurisdiction to hear such a claim. See **Law Society of Kenya v Attorney General & another [2019] eKLR;**

... Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour

Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions.

Work injury claims lie to the Director under the Work Injury Benefits Act, 2007. The court is only appellate.

On the claims for unremitted NSSF dues amounting to Ksh.2, 800 being a deduction of ksh.400 per month, where an employer has deducted statutory dues and failed to remit to the relevant body, the alternative is not to claim for such monies as there are lawfully due to the statutory body and not to the employee. There are sanctions on h employer including penalties for failure to remit statutory deductions. The claimant cannot be awarded the claimed statutory dues.

A Certificate of Service is due to every employee upon exit of employment pursuant to section 51 of the Act.

On the claims made being found partly successful, the court awards 50% of costs.

Accordingly, judgement is hereby entered for the claimant against the respond in the following terms;

- a) Pay for work during public holidays Kshs. 217,729;**
- b) Leave pay Kshs.38,989;**
- c) Certificate of service shall be issued pursuant to section 51 of the Act;**
- d) Costs awarded to the claimant at 50%.**

Delivered electronically and dated this 28th July, 2020 at 0900hours.

M. MBARU

JUDGE