



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1693 OF 2014

CHARLES ROSASI OGWORI.....CLAIMANT

VERSUS

AL-YUSRA RESTAURANT LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th October, 2020)

JUDGMENT

The claimant is Charles Rosasi Ogwori. The evidence is that he temporarily converted to Islam and was adopted the new name Yusuf. He shortly thereafter converted back to Christianity. He filed a memorandum of claim on 29.09.2014 through Namada & Company Advocates. His case is as follows:

- 1) From 01.01.2010 the respondent employed the claimant as a waiter and was promoted to a Cashier in charge of Milk Department. His last salary was Kshs. 20, 000.00 per month. He worked 5.00am to 9.00pm even on public holidays.
- 2) On 03.04.2014 he reported on duty and at about 12.30pm he was summoned by the respondent's Manager one Hassan Bakai who asked him to hand in all the respondent's property. The claimant complied and the said manager ordered him to go back home as his services were no longer required. His efforts to be reinstated were not successful.
- 3) There was no misconduct or poor performance leading to the dismissal and no reason was given. No notice of termination was served. No disciplinary hearing took place.

The claimant claims and prays for:

- a) Salary for 3 days worked in April 3/30 x 20000 making Kshs. 2, 000.00.
- b) One-month salary in lieu of termination notice Kshs. 20, 000.00.
- c) Leave due but not taken for entire period served Kshs. 80,000.00.
- d) Service gratuity for period NSSF was not remitted 20,000.00.
- e) Pay for untaken public holidays 11/30 x 20000 x 4 years Kshs. 29, 333.00.
- f) Overtime pay for 8 hours worked daily for entire period served Kshs. 1, 439, 942.00.
- g) Compensation for 12 months for unfair termination Kshs. 240, 000.00.
- h) Total Kshs.1, 831, 275.00.
- i) A declaration the termination amounted to constructive summary dismissal and was unfair and inhumane.
- j) Costs of the suit plus interest.

The respondent entered appearance on 03.10.2014 through Rahma Jillo Advocates. The respondent filed the response to the claim on 14.10.2014. The respondent denied employing the claimant as alleged and as such he had no valid cause of action against the respondent.

The respondent prayed that the memorandum of claim be dismissed with costs.

On 29.07.2019 the claimant filed the amended memorandum of claim to introduce Al-Yusra Restaurant Limited as the respondent in the place of Al-Yusra Hotel Limited. The amended memorandum of response was filed on 17.09.2019.

The respondent denied that one Hassan Bakai (who the claimant alleged to have dismissed him) had never been the respondent's employee or manager. The respondent's further case was as follows:

a) The claimant met one Bishar Hussein and in the process the claimant converted to Islam. Bishar Hussein therefore had a responsibility to nurture the new convert, the claimant. The claimant was jobless and he approached one Hassan Bakai who owned a milk bar or shop and he accepted to retain the claimant as a seller. The said Hassan Bakai requested the respondent to remit NHIF and NSSF for the claimant and arrangement was with full knowledge of the claimant. Thus the claimant filed exhibits showing he worked for Camel Milk Supplier and Absolute Camel Milk and not the respondent.

b) The claimant allegedly stole Kshs. 60,000.00 from Hassan Bakai's milk enterprise and upon being reported to the police he deserted duty. Remitting the NSSF and the NHIF did not amount to employment relationship.

The claimant testified to support his case. The respondent called 3 witnesses.

The Court has considered the evidence. The claimant has confirmed by his evidence that he worked at the Milk Bar known as Absolute Camel Milk. He has also testified that he converted to Islam then back to Christianity. He also testified that he was paid by one Hassan Bakai. There is no reason to doubt the respondent's account that the claimant was employed when he converted to Islam and the employment was an effort to grow and support his new faith in Islam. The claimant has not by evidence shown that the Milk Bar was a branch or department of the respondent and has failed to show that Hassan Bakai who paid him and allegedly told him to go home was a manager or director for the respondent. The NSSF statement filed shows that the claimant was a voluntary contributor and the Court finds that there had been a local arrangement for the respondent to remit the NSSF and NHIF dues within that design of growing and supporting the claimant in his new faith. In any event the claimant failed to show by evidence how he came to be employed by the respondent as was alleged. During re-examination on the point he stated thus, **"Respondent employed me when Hussein, am sorry, Ismael, I say Mohammed Ali gave me job. He is Director for respondent. He gave me job of assisting at the Hotel.I was dressing tables..."** By that evidence the Court returns that the claimant failed to establish facts linking the respondent to the formation of the alleged contract of service and further failed to show the respondent paid his salaries to meet the definition of employer, employee and employment as provided for in the Employment Act, 2007 and requiring the evidence of payment of wages or salary in an employment relationship.

Hassan Bakai was RW3 and his witness statement was filed on 17.09.2019 and he admitted employing the claimant to sell milk at his Milk Bars. He parted with the claimant upon allegations that the claimant had failed to account for Kshs. 60,000.00. There was no reason to doubt the evidence by RW3 that he was the employer and the claimant offered no explanation why he failed to pursue the said Hassan Bakai – in circumstances whereby the claimant testified that on 03.04.2014 it was RW3 who asked him to handover and go home. The claimant's evidence was that RW3 had told him he would call him but he never did so. The evidence is clear that the claimant was dealing with RW3 as the employer but he failed to file suit against him and no material evidence is before court linking the said RW3 as a director or manager for the respondent. The Court therefore returns that as urged and submitted for the respondent, there existed no contract of service between the parties. The claimant's suit will therefore collapse as the respondent was an unnecessary party to the suit. In conclusion the claimant's suit is hereby dismissed with costs.

Signed, dated and delivered by the court at Nairobi by video link this Friday, 9th October, 2020.

BYRAM ONGAYA

JUDGE