



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2535 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th February, 2019)

JAMES KIPCHIRCHIR SAMBU.....CLAIMANT

-VERSUS-

PATRIOTIC GUARDS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Namada & Company Advocates against the Respondent seeking reliefs, which he framed as the non-payment of terminal dues and outstanding salary.
2. The Claimant averred that he was employed by the Respondent on 15th May 2005 as a Training Officer earning Kshs. 80,000/- a month and that his salary was abruptly reduced in March 2008 without notice, he averred that this subsisted until May when the Respondent stopped regular payment of salary. The Claimant averred that due to these frustrations he finally resigned with notice on 30th November 2012.
3. He averred that the refusal to pay his salary and terminal dues was contrary to the law and sought payment of salary for April 2008, unpaid salaries for 2010, 2011 and 2012, Safaricom responsibility allowance February to December 2008, underpayment of salary for 36 months, Safaricom wage restructuring bonuses, unpaid sales commission, gratuity for 7 years of service, payment of leave days not taken from 2006 till 2011. The Claimant also sought costs of the suit plus interest thereon.
4. The Respondent filed a defence and counterclaim on 30th June 2014. The Respondent averred that the employment of the Claimant was from 15th May 2005 and that the Claimant was duly remunerated for work done by way of salary which salary was increased from time to time. The Respondent denied that the Claimant's salary was abruptly and unilaterally reduced by the Respondent without any reasons.
5. The Respondent averred that the Claimant was the Administrative Manager at the time of his departure and left after embezzling Kshs. 160,000/- from the Respondent. The Respondent averred that the embezzlement of funds was reported to Kileleshwa Police Station and denied that the Claimant was entitled to the prayers sought in his Memorandum of Claim.
6. The Respondent averred by way of counterclaim that the Claimant did not give adequate notice and sought Kshs. 80,000/- being one month's salary in lieu of notice and Kshs. 160,000/- being the sum embezzled by the Claimant. The Respondent thus sought the dismissal of the Claimant's claim and entry of judgment for the Respondent for Kshs. 240,000/- plus costs of the counterclaim.
7. The Claimant filed an answer and reply to the Memorandum of Claim and response to counterclaim. The Claimant averred that he never took or embezzled a sum of Kshs. 160,000/- which monies were utilized to pay employee salary arrears. The Claimant averred that he issued due notice before his resignation. He thus sought judgment as sought in the Memorandum of Claim and dismissal of the counterclaim with costs.

Evidence

8. The Claimant testified on 14th July 2015. He stated that he was employed by the Respondent from 2005 and that he rose through the ranks and was Assistant Branch Manager overseeing Nairobi branch and earned Kshs. 32,400/- a month.
9. He testified that he was responsible for leave, labour budgets, overall supervision of operations of the branch and that he held this position until he was redeployed to Mombasa to head the Mombasa region. He stated that he was given an additional Kshs. 40,000/- and his additional responsibilities were to ensure that collections were done, secure growth of the business and ensure the labour budgets were

properly done.

10. He testified that he was entitled to fuel allowance and airtime allowance. After holding the position in Mombasa for 7-8 months he was transferred to Nairobi as the Deputy Operations Manager with effect from December and that he earned Kshs. 60,000/- a month and that he held that position till 2011 when he was promoted to Administration Manager based in Nairobi.

11. He testified that he managed to sell and gain on commission basis for introducing business to the Claimant. He testified that he had been promoted to run the project for one of the major clients, Safaricom and was to get a commission of Kshs. 45,000 but this was never paid despite the letter of March 2008.

12. He testified that he was tasked with the task of reducing the budget and wages on the project and he worked with the Project Manager and reduced the salary budget by avoiding wastage and the two of them were to receive a bonus of Kshs. 1.35 million to be shared equally among them. This money was not paid despite communication on the same.

13. He stated that he faced many challenges during his employment and was held hostage by the employees of the company due to the Respondent's failure to pay wages and that it took the intervention of the flying squad to rescue him from the irate staff. In tears, he testified that in September 2012 he was thrown out of a building from 4th floor and that the only thing that saved him from death was a balcony on 3rd floor.

14. He testified that on informing the Director of this, the Director only laughed at him. He stated that the company thereafter begun disposing of assets to pay debts and that he sold a motor vehicle for 134,000/- in Meru and advised the director that he would apply the sum to payment of wages vide letter to the Respondent. He testified that he gave notice of his resignation and offered the deduction of the one month from leave days not taken.

15. He testified that he had been given payment in April but the cheque on presentation was dishonoured. He testified that the mismanagement of the Respondent by the Director who bought himself flashy cars and land is what led to the inability to pay salaries and debts.

Respondent's evidence

16. One Mr. Titus Kipkoech Kigen who was the Managing Director of the Respondent at the material time testified on behalf of the Respondent. He stated that the Claimant was terminated after he embezzled Kshs.160,000/= which was in his possession after selling the Respondent's Motor Vehicle. That the matter was reported to Kileleshwa Police Station and thereafter the Respondent terminated the Claimant under Section 44(4) of the Employment Act. That the Claimant did not resign as alleged.

Claimant's Submissions

17. It is submitted that no evidence was adduced to show that the unpaid salary for the month of April, 2008, was paid as alleged by RW1 and thus the same remains payable.

18. On unpaid salaries for the years 2010, 2011 and 2012 it is submitted that under the provisions of Section 10(7) of the Employment Act, 2007, the duty to produce document to rebut such a claim lies with the employer. The Claim that the Claimant left the Respondent with records is false and the Respondent should be ordered to pay these claims.

19. On Safaricom responsibility allowance, it is submitted that he was entitled to monthly allowance of Kshs. 45,000/= per month from February to December 2008 when the contract ran its course which was not paid. That the claim that the allowance was not authorised was not substantiated and therefore the claim remains due.

20. On underpayment, it is submitted that RW1 could not prove that the Claimant was paid his full salary as promised and the claim is therefore payable.

21. On the Claim for sales commission the Claimant submits that commissions were promised in the letter of 27th May, 2005 and 14th March 2008 which have not been paid to date totalling to Kshs. 215,160/= and thus the amount is payable.

22. The Claimant submits that Gratuity/Service pay is ordinarily payable where there are no provident fund payment. That the Claimant's NSSF statement shows nil remittance. That the Claimant is therefore entitled to gratuity.

23. On leave untaken for the period 2006 – 2011 it is submitted that due to the demands in his work schedule he could not be allowed to go on annual leave. No leave forms were adduced to prove the contrary.

24. On the assertion that the Respondent had closed its business, it is submitted that the Respondent has and trades interchangeably in many company names including Patriotic Group Limited, Alarmax Limited, C.I.T et al. That the claim of closure is an attempt by the Respondent to evade Court process. The Claimant urges the Court to allow the Claim.

Respondent's submissions

25. It is submitted on behalf of the Respondent that the Claimant is not entitled to the sum of Kshs. 3,758,210 or at all as terminal dues for the reason that the unpaid salary was paid when it fell due. That the payroll evidence in support of the payment was carried away by the

Claimant as he was the one in charge of the same.

26. On outstanding salaries for 2010, 2011 and 2012 it is submitted that the same is fictitious as the spreadsheet in support of this claim was prepared by the Claimant for the purpose of the suit and did not originate from the Respondent.

27. As to underpayment, the Respondent alleges that his basic salary was Kshs. 52,800, which after deductions became 42,568, which the Respondent duly paid. That it is inconceivable that the Claimant was underpaid his salary for 3 years while he was the Deputy Operations Manager and subsequently the Administration Manager and never once complained to the Respondent about underpayment.

28. On the claim for Safaricom responsibility allowance, it is submitted that the same is not payable as they allege the same was as a result of collusion between the Claimant and the Respondent's then legal officer.

29. With regard to unpaid commissions it is submitted that the Claimant did not make any invoice sales while working for the Respondent and that the Claimant never made any new sales to entitle him to receive the purported sales commissions as alleged. No evidence to the contrary was presented to Court.

30. They submit that Gratuity is not payable as the employment contract did not provided for gratuity and that the Claimant was a member of NSSF therefore he is not entitled to service pay.

31. On the Claim for leave not taken it is submitted that it was the Respondent's policy that leave was to be taken during the calendar year and no evidence was led to show that he was prevented by the Respondent from taking his leave days.

32. As to the Counterclaim, it is submitted that the Claimant resigned on his own volition after embezzling Kshs. 160,000, which is a criminal offence contrary to Section 281 of the Penal Code. Further that the Claimant did not serve the Respondent with the notice before his resignation and thus owes the Respondent Kshs. 80,000 in lieu thereof. They urge the Court to dismiss the claim and allow the counterclaim.

33. I have examined all the evidence and submissions of all the parties. The issues for determination are as follows:-

1. What were the terms of employment between the Claimant and Respondent?

2. Whether the Claimant is entitled to remedies sought.

3. Whether the counter claim is proved.

34. On the 1st issue, from the documents on record, the Claimant was 1st employed by Patriotic Guards Limited vide a letter dated 27.5.2005 as a Training Officer with effect from 15/5/2005. Subsequently, the Claimant was promoted to various ranks in 2006 and 2007 and then transferred to Mombasa on 4.4.2007 as Head of Coast Region.

35. The move to Mombasa came with an allocation of a company car and fuel budget of 20,000/= and an additional pay of 10,000/= and airtime of 3,000/= per month. A further promotion came on 12.12.2007 when he was made Deputy Operations Manager with effect from 1/12/2007 with a pay rise of 20,000/=.

36. From these documents then the salary of the Claimant would be deemed to be 30,000 + 20,000 = 50,000/= and allowances of 23,000/= being 20,000 fuel allowance and 3,000/= airtime allowance. The payslip shows a salary of 75,410. The Claimant also contends that he was subsequently promised another payment of 45,000/= per month for Safaricom project by the Respondent's Legal Officer through a letter dated 14.3.2008.

37. The only contention here is why the Respondent's Legal Officer took it upon herself to be the one to write this letter to the Claimant instead of the Human Resource Manager as this was a Human Resource Management function.

38. The Respondent have submitted that this letter was written by the Legal Officer in collusion with the Claimant which I find is the most plausible explanation given that the Human Resource Manager was the one who has always communicated with the Claimant on matters employment and payments. It is therefore not clear why in this case, the Legal Officer was doing a Human Resource function and which was not her duty.

39. From the last letter on record dated the 12.4.2011, the Claimant's salary was 60,000 plus a 20,000/= responsibility allowance. This would translate to 80,000/= per month less statutory deductions. I will take the Claimant's salary as at time of resignation to be 80,000/= gross as per August 2012 payslip.

40. The Claimant seeks various remedies amongst them unpaid salary for April 2008 as evidenced from a cheque of 42,932/= which bounced. The Respondent have not given any evidence that they made good this payment. It is therefore my finding that indeed the Claimant was owed his April 2008 salary amounting to Kshsw.42,932/=.

41. Another claim by the Claimant are for outstanding salaries for 2010, 2011 and 2012 totalling 1,046,566. On this, the Respondent have submitted that in May 2011, the Claimant wrote to the Respondent seeking settlement of his final dues which were said to be Kshs.236,284/= and salary for March and April 2011.

42. The letter in question was produced by the Respondent. In the letter, the Claimant indeed stated that he was owed arrears of

Kshs.236,284 for the previous year and final dues but was to remain being owed ½ salary for March 2011 and one month for April. This would translate to Kshs.356,284/=.

43. The Claimant did not object to writing this letter. The Respondent contend that they actually paid this money as per their Appendix 12 but there is no evidence of the payment through a statement of their bank account.

44. The Claimant produced another excel sheet to show he is owed 1,046,566 as outstanding salaries for 2010, 2011 and 2012. He departs from the amounts he indicated he was owed as at May 2011.

45. Assuming the amount includes the 356,284 owed, as at May 2011 the moving forward what is owed will be salary from June 2011 to 2012 October when he resigned.

46. The Claimant set out what is payable including payments dating back before May 2011. From 2011 May, he claims Kshs.739,000. If I add the amount of 356,284 this comes to over 1 million. I will therefore find he is entitled to payment of this amount claimed as unpaid salary of 1,046,566 as the Respondent have not produced evidence to show they paid the said amount.

47. On the claim for underpayment, the Claimant has not stated against what the underpayment was made. It is a claim not proved. The same applies to the issue of Safaricom bonus, which I have already stated, was authorised by an unauthorised staff. The claim for unpaid sales commission was abandoned.

48. The Claimant was a member of NSSF and so gratuity is not payable. I will however award him all unpaid NSSF remittances for 7 years = $400 \times 7 \times 12 = 33,600/=$.

49. As for leave not taken, the Claimant was expected to take leave during the leave year. There is no indication that he applied for leave and the same was rejected. The only leave I will award him will therefore be for the last year of service which is year 2012 = 80,000/=.

Total awarded therefore is Kshs.1,203,098/=

Less statutory deductions

50. On the counter claim, it is clear the Claimant did not give notice before exiting the Respondent's service. He also admitted taking some money belonging to the Respondent and paying himself. The total claimed is the notice pay and the money he took himself. This is payable and I find the counter claim proved to the extend of Kshs.240,000/=.

51. I therefore award the Claimant Kshs.1,203,098 less 240,000/= for the counter claim which is Kshs.963,098/= less statutory deductions plus costs and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 19th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ouko holding brief Obok for Respondent – Present

Claimant – Absent