



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.275 OF 2016

PETER MWANGI MWENDIA.....CLAIMANT

VERSUS

IAN CASEMAN.....RESPONDENT

JUDGEMENT

The claimant is a male adult and has described the respondent as a businessman operating under a business.

The claim is that the claimant was employed by the respondent as a night watchman on 2nd December, 2012 at a wage of Ksh.6, 000.00 per month and included a house allowance in the year 2015.

On 30th November, 2015 employment was terminated without due cause or payment of terminal dues.

The claim is also that the claimant would be at work from 6pm to 6am each day, no annual leave or payment in lieu of taking the same thereof.

The claim is further that on 30th November, 2015 the claimant was issued with letter terminating his employment by summary dismissal on allegations that he was found sleeping at work but there was no warning and the allegations were not true. The claimant was also alleged to be disappearing from the compound while on duty, was incompetent, not trustworthy and which claims were all not true.

The claimant reported the matter to the labour office and upon invitation to resolve the matter the respondent declined and is claiming the following dues;

- a) Notice pay Ksh.10,115.15;
- b) Gratuity for 3 years Ksh.21,011.40;
- c) Underpayments Ksh.184,441.35;
- d) Overtime Ksh.581,466.15;
- e) Annual leave Ksh.12,139.00
- f) Public holidays Ksh.43,310.55;
- g) Compensation; and
- h) Costs.

The claimant testified that on 30th December, 2015 the respondent called him and informed him that there was no more work for him. He was then issued with letter of summary dismissal with allegations which were not true and he was not given a chance to defend himself. The allegations that he had been found asleep while on duty is not true and was not proved. There was a time some wild animal got into the compound and ate quails and he did not sell or steal any birds as alleged. Had he stolen or sold any property of the respondent, there was no report with the police. At the time he was earning ksh.8, 000.00 per month.

Upon cross-examination, the claimant testified that he was employed by Ian Caseman Orphanage Kenya and the respondent was a trustee and the responsible person. He was protecting the respondent's private residence and in the letter of dismissal, the respondent signed it. He did not work at the orphanage but was placed at the private residence of the respondent as the orphanage trustee.

Defence

The defence is that the claimant was never employed by the respondent as alleged and was an employee of Ian Caseman Orphanage Kenya, a separate legal entity from the respondent. The allegations made against the respondent are without basis and should be dismissed with costs.

The respondent testified the claimant has made false allegations against him as he was never his employee. The claimant was a neighbour when he was arrested and while in prison his friend asked the claimant to watch over his property. At the time the respondent was running an orphanage which closed in the year 2014. The letter of summary dismissal issued to the claimant was signed upon advice by Mr Watson Mochama who was a trustee of the orphanage. As he remained in jail, he could not employ the claimant.

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

Employment has been denied by the respondent.

The claimant produced letter of summary dismissal dated 30th November, 2015 allegedly issued to him by the respondent. The respondent admitted signing this letter upon being drafted and written by Watson Mochama *for and behalf of Board of Trustees I.C.O.K.*

The letter states as follows;

.....following the resolution from a BOARD OF TRUSTEES MEETING held on 30th November and the view of this matter the decision has been taken to terminate your employment with IAN CASEMAN OPHANAGE KENYA. (EMPLOYMENT ACT SECTION 44(3)).

The reasons for the decision are that

This is the letter the respondent signed for and on behalf of the Ian Caseman Orphanage Kenya. Employment terminated following a decision of a third party.

In defence, employment was denied. This ought to have moved the claimant to address his Memorandum of Claim. He never did.

There is no employment letter, contract or agreement. Employment terminated under the hand and letter of the respondent as the Trustee of a third party who is not a respondent herein. The decision leading to termination of employment is that of the third party with the respondent being the trustee.

The addition and inclusion of such party was necessary and relevant.

The claimant has in the descriptive part of his claim defined the respondent as a businessman operating under a business. Where employment was in that regard, and the defence was clear to the extent that there was no employment between the parties and there was disclosure the employer was a third party, thus moved, the claimant should have attended as necessary.

The fact of an employment and labour relations is a crucial matter for the court to address. This is not a technicality which can be cured under the provisions of article 159 of the Constitution, 2010. Without any employment relationship between the parties, employment having terminated by a third party and this having been well brought to the attention of the claimant by the respondent in defence, the court lacks the requisite power to address the claims made.

The claimant has in his submissions relied on the case of **African Orthodox Church of Kenya versus Charles Omuroka & another [2014] eKLR** where the High Court held that trustees can be sued in their own name or in the name of the officials. However, the court reading of this decision is that, where the intention of the claimant herein was to sue the respondent as a trustee of the third party, such matter ought to have been addressed in his Memorandum of Claim. This cannot be left to imagination. The claimant did not address this fact until he was put on cross-examination.

Even where the claimant may seek to reply on such case as cited above, employment was therefore relationship was not with the respondent in his private capacity. Where employment was with the third party, such party is not included herein as a respondent.

Without establishing employment or labour relations between the parties herein, the claims made are found without basis. They cannot stand against a respondent acting as trustee of a third party and which party is not respondent or interested party herein.

Accordingly, the claims made are found without basis and are hereby dismissed. Costs to the respondent.

Delivered at Nakuru in open court this 30th day of April, 2019.

M. MBARU

JUDGE

In the presence of: