



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 91 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

OMAR MOHAMMED SOHA.....1ST CLAIMANT

IBRAHIM ANZETSE.....2ND CLAIMANT

VERSUS

KITALE INDUSTRIES LIMITED.....1ST RESPONDENT

READY CONSULTANCY GROUP EFFICIENT CONTRACTORS,

TRANSPORTERS AND MANPOWER SUPPLIERS.....1ST RESPONDENT

JUDGMENT

Vide claim dated 7th April 2016 and filed on 8th April 2016, the claimants OMAR MOHAMED SOHA and IBRAHIM ANZETSE aver that they were employed by the respondents as driver and loader respectively. The 1st respondent Kitale Industries Limited is a limited liability company having its registered offices and engaged in the business of manufacturing flour in Kitale. The 2nd respondent is described as a limited liability company with registered offices in Mombasa carrying on business as contractors, transporters and manpower suppliers.

The claimants aver that they were falsely and maliciously charged with stealing by servant in Kakamega Chief Magistrates Criminal Case Number 322 of 2014 and thereafter unfairly terminated and their terminal benefits withheld by the respondents. The claimants pray for the following remedies –

- a) Terminal dues of Kshs.392,880/= for the 1st claimant
- b) Terminal dues of Kshs.249,504/= for the 1st claimant
- c) One (1) year gratuity plus accrued interest.
- d) Cost of this suit plus interest.
- e) Interest at (a) to (d) at court rates.
- f) Any other relief that the court deems fit.

Claimant's Case

At the hearing both claimants testified that in February 2014 while on a trip supplying flour and feeds, they were carjacked in Kakamega Forest and robbed of all the money for the goods they had sold. They were both injured in the attack and were rescued by a lorry that was passing by. They were later arrested and charged. They were acquitted under Section 87(a) of the Civil Procedure Code.

When they were attacked they were with a salesman by the name Mohamed. They were in a lorry registration No. KAS 245H. The 1st claimant testified that he started working as a driver in 2012 and worked until 2014. His salary was Kshs.18,000 per month. He was paid

Shs.400 daily as transport allowance.

The 2nd claimant testified that he started working in 2009 and his last salary was Shs.400 per day and he was paid weekly. He testified that originally he was paid by the 1st respondent and later he was paid by the 2nd respondent.

Both claimants denied that they signed any contract with the 2nd respondent.

1st Respondent's Case

The 1st respondent filed a response on 1st August 2016, denying that it ever employed the claimants. The 1st respondent averred that the claimants were employees of the 2nd respondent as driver and loader respectively. The 1st respondent further denied causing the arrest of the claimants.

At the hearing the 1st respondent called two witnesses; MWANAIDI WESONDA, RW1 who testified that she was Human Resource Personnel of Kitale Industries Limited. She testified that the 1st respondent received demand notices from the claimants. She testified that she knew the claimants as employees of the 2nd respondent who was contracted by the 1st respondent to supply employees through a labour supply contract dated 17th May 2013. She denied that the claimants had ever been employed by the 1st respondent.

Under cross examination she testified that the 1st respondent was the principal of the 2nd respondent, that the claimants were allocated duties by the Depot Manager at the 1st respondent's Kakamega Depot by the name Harun Mohamed who was an employee of the 1st respondent. She testified that the 2nd respondent issued letters of appointment to claimants, paid their NSSF and NHIF and their taxes, but she did not have any proof of the same in court. She further testified that Abdulahi Newa Dokole the Security Officer whom the claimants allege stopped them from working was an employee of the 1st respondent. She testified that it is Abdulahi Newa Dokole who handled the criminal case against the claimants. She testified that the salesman was responsible for collection and banking the money from sales and not the claimants. She testified that the claimants were entitled to their terminal dues but never reported back to work.

RW2 ISAAC OTIENO ACHIEKA testified that he is the regional Manager for the 2nd respondent, that he knew both claimants as employees of the 2nd respondent. That the 1st claimant was on a 3 month renewable contract while the 2nd claimant was a casual loader. He testified that the claimants stopped going to work after they were charged in court.

He testified that the claimants were paid weekly, that the 2nd claimant collected his last pay while the 1st claimant did not collect his pay for 8 days worked, that both claimants worked up to 9th January 2014 for 8 days. He testified that the 2nd respondent was an agent of the 1st respondent.

RW1 testified that he called the claimants to go and see him after they were charged in court but they did not. He could however not recall the numbers he called them on. He testified that he was not aware the claimants were told not to report to work at the Kakamega Depot by the security officer.

2nd Respondent's Case

The 2nd respondent did not file appearance or defence. It filed an application under certificate of urgency on 20th March 2017 for setting aside of proceedings and leave to file its defence out of time. By the time the application was filed hearing had been concluded and the file was pending for filing of submissions. The application was never prosecuted.

RW2 who testified on behalf of the 1st respondent was at the time of testifying an employee of the 2nd respondent.

Determination

I have considered the pleadings, evidence and submissions of the claimants and 1st respondent. The issues for determination are whether the claimants were employees of the 1st or 2nd respondent, whether they were unfairly terminated and if they are entitled to the remedies sought.

1. Whether claimants were employees of the 1st or 2nd respondent

The 1st claimant testified that they were both working at the 1st respondent's depot in Kakamega and were assigned duties by the 1st respondent's Depot Manager. The lorry the 1st claimant drove with the 2nd claimant as his loader belonged to the 1st respondent. Both claimants also testified that they were employed by the 1st respondent. The 2nd claimant testified that at the time of termination his salary was paid by the 2nd respondent.

The criminal charge against the claimants was stealing by servant. Section 2 of the Employment Act defines employer as

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

Section 54(1) of the Labour Institutions Act provides that –

54. Criminal liability of agent, employer

(1) Where the immediate employer of an employee is himself in the employment of another person and that employee is employed on the premises of that other person, that other person is for the purposes of this Part deemed to be the employer of that employee jointly with the immediate employer.

Both RW1 and RW2 testified that the 2nd respondent was an agent of the 1st respondent as supplier of labour. Both claimants were originally employed by the 1st respondent who handed them over to the 2nd respondent whose only role from the evidence on record was to pay wages and make statutory deductions. The 2nd respondent did not assign work to the claimants, did not supervise their work. They were assigned duties by the 1st respondent whose premises they worked in.

Going by the very liberal definition of employer under Section 2 of the Employment Act and Section 54(1) of the Labour Institutions Act, and further taking into account the “*control test*” in employment, as well as the fact that they were charged with “*theft by servant*” in respect of the loss of 1st respondent’s money they were robbed of, I find that the claimants were employees of both the 1st and 2nd respondents as Principal and Agent respectively.

2. Whether the claimants were unfairly terminated

The claimants testified that after they were robbed on 31st January 2014, they were told by the 1st respondent’s security officer never to step at the depot. This was not controverted or denied by both RW1 and RW2. The claimants were charged with stealing by servant but were acquitted after the case against them was withdrawn. No charges of misconduct were made against them by the respondents. They were never called for a disciplinary hearing. They were never given an opportunity to explain what happened. They were not issued with letters of termination. They were just denied access to the workplace. The respondents having failed to comply with Sections 41 and Section 43 of the Employment Act, the termination of the employment of the claimants was unfair in terms of Section 45(2) of the Employment Act.

I find and declare accordingly.

Remedies

Having been unfairly terminated the claimants are entitled to notice. The respondents’ averment that the claimants were casual employees or on term contracts were not proved by production of documents. The allegations of the claimants that they worked from 2012 for 1st claimant and 2009 for 2nd claimant was not rebutted by the respondents. The averment of RW2 that the claimants worked for 8 days in January 2014 is also not supported by any evidence and does not explain the fact that the claimants were charged with stealing on 31st January 2014 which is the date on which they were attacked.

The claimants however did not prove that they were entitled to house allowance or that their salaries were not consolidated. Both of them testified they were paid based on daily rates which under the Regulation of Wages is consolidated. Having been unfairly terminated, the claimants are entitled to compensation.

12 months’ compensation prayed for by the claimants is however not justifiable taking into account all the circumstances of their cases. I find that five months’ salary is reasonable compensation taking all relevant factors into account.

Claims for transport to court and advocate costs are not directly related to termination of employment and were in any event not proved.

Conclusion

In the end I award the claimants the following –

1st Claimant – OMAR MOHAMED SOHA

Pay in lieu of notice at Kshs.735 x 30 = Kshs.22,050/=

Compensation 30 x 5 x 735 = Kshs.110,250/=

He is also entitled to 6 days’ pay admitted by RW2 as his salary that he did not collect at Kshs.5,880.00

Total Kshs.138,180/=

2nd Claimant – IBRAHIM ANZETSE

Pay in lieu of notice at Kshs.448 x 30 = Kshs.13,440/=

Compensation 30 x 5 x 448 = Kshs.67,200/=

Total Kshs.80,640/=

The respondents are jointly and severally liable for payment of the judgment debt.

The respondents shall also pay costs.

Interest shall accrue from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 2ND DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 14TH DAY OF MAY 2019

MATHEWS NDERI NDUMA

JUDGE