



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 282 OF 2016

MOSES KARAGU WAMBUGU.....CLAIMANT

VERSUS

HIT TRANSPORTERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for alleged unlawful termination and for compensation for injuries allegedly sustained in the course of employment. The Claimant averred that he was employed by the Respondent and that he earned Kshs. 11,000/- a month. He averred that he worked for the Respondent until 24th December 2015 when his services were terminated without notice. The Claimant averred that the Respondent never remitted the statutory deduction of Kshs. 200/- for NHIF and NSSF for the months of July, August and September 2013. The Claimant averred that he was not paid for all the 8 public holidays he worked and that he was entitled to compensation twice the daily salary for each public holiday. He averred that he was also not compensated for the annual leave that the Respondent did not allow him to take in 2015. The Claimant averred that he was not compensated for injuries sustained in the course of employment on 1st February 2014 which particulars he gave as a cut wound and bruises on the lower limb. The Claimant averred that he was not paid salary for the year 2015 and prayed for unpaid salary for the 12 months of Kshs. 132,000/-, payment in lieu of notice – Kshs. 11,000/-, dues for unpaid public holidays – Kshs. 5,864/-, payment in lieu of annual leave for the year 2015 – Kshs. 11,000/-, an order for payment of NSSF contribution and penalties for the months of July, August, September 2013, an order for payment of general damages by the Respondent for failure to remit NHIF contributions on behalf of the Claimant, general damages for pain and suffering and general damages for breach of the employment contract.

2. The defence by the Respondent averred that the Claimant was its employee from January 2013 to October 2014 after which he left employment on his own will and rejoined the Respondent's company on 1st March 2015 to December 2015. The Respondent averred that during the period of employment, the Claimant broke his service and left on his own accord and that his service with the Respondent was not continuous but broken. The Respondent averred that the Claimant's salary was paid to him at the end of every month like the other employees and his claims are lies and an abuse of the court processes. It was averred that the Claimant was not a member of NSSF in the month of July, August and September 2013 as he had just joined Hit Transporters and was being observed to see if he was fit to be a permanent worker in the Respondent's establishment. The Respondent averred that after 3 months the Claimant qualified to be a permanent employee and the Respondent registered the Claimant with NSSF and started remitting his Kshs. 200/- contribution plus the employer's contribution making a total of Kshs. 400/- every month. The Claimant did not apply to be deducted his NHIF contribution for those 3 months as NHIF is his responsibility and he consumed the money himself, however the Respondent registered him to NHIF after the observation. The Respondent averred that it does not open for business on public holidays but in case they do all workers are paid twice at the end of the working day. The Respondent averred that it therefore does not owe the Claimant any money for holidays worked. The Respondent averred that all workers received compensation for their annual leave every December and that the Claimant was fully compensated and paid in cash amounting to one month's salary like the other workers. The Respondent averred that the workman had not presented the DOSH1 forms for action and that it was willing to receive the forms if presented. The Respondent averred that the Claimant's one month's notice of Kshs. 11,000/- was deposited with the Labour Officer Kirinyaga and that the Claimant is aware of it. The Respondent denied that the Claimant suffered in any way during his employment and prayed that he should not be awarded any general damages. The Respondent averred that there was no breach of employment as the employee left on his own will.

3. The Claimant filed a reply to defence and averred that he was working for the Respondent prior to January 2013 and had made bank deposits on behalf of the Respondent as shown in the Co-Operative Bank deposit slips dated 17th February 2012 and 11th March 2013. He sought the production of the Respondent's Co-Operative Bank statements from January 2012 to November 2013. The Claimant averred that the Respondent was not paying employees in the presence of each other hence the Respondent's witness cannot purport to have witnessed the payment alleged to have been made to the Claimant and invited the Respondent to produced signed payment vouchers for the period in dispute.

4. The Claimant testified that he started working with the Respondent in 2012 and that he used to deposit money on the Respondent's behalf as shown by the Safaricom statement and the Co-Operative Bank statement. He said that in 2013 there are NSSF and NHIF dues that were not remitted in July, August and September 2013. He testified that he never stopped working and that he was in employment even for the 3 months it was alleged he had absconded. He stated that the Respondent ought to have paid the dues. He testified that he was suddenly stopped from working in December 2015 and was not paid salary for the year 2015. He asserted that the Respondent after hiring employees

registers the staff with NSSF and NHIF. He stated that his NSSF deductions were not made in respect to 2013. He testified that he was injured at the workplace after which he was taken through a lot of harassment and that the Respondent received the DOSH1 form and the injury was reported. In cross-examination he confirmed that he never signed in receipt because he never received the cash as he was chased away without payment.

5. The Respondent's witness was Kalpesh Patel a director of the Respondent. He testified that the Claimant worked for 5 years and that the Claimant left the Respondent's employment on his own volition. He confirmed that he used to pay the Claimant his salary. He testified that the Claimant started working in 2013 as a casual labourer and that the NHIF and NSSF dues were remitted. He stated that the Claimant reported a dispute with the Labour Office in Kerugoya that he had not been paid and the Respondent admitted to have paid a sum calculated as the Claimant's dues of Kshs. 25,723/- at the Labour Office. He testified that the Respondent does not open for business on Sundays and public holidays and in case of an emergency and staff are required to work, the salary due would be agreed on and after working the employees would be paid. He admitted that the Claimant was injured by a nail at work, was taken to the hospital and his bills paid. He stated that the Claimant was issued with a DOSH1 form but he was not aware if the Claimant had filled it and processed it as the Claimant never returned it to him. He stated that the Claimant was paid for leave but he refused to sign the form for leave. He insisted that all dues were paid for the year and even an extra salary of Kshs. 13,500/- was paid. In cross-examination he confirmed that the Claimant previously worked for him and returned in 2013 and stated that the Claimant's assertion that he was not paid for a whole year was a lie. He denied having signed the DOSH form and stated all dues were paid for the days worked. He testified that the Claimant was paid salary of 11,000/- and an allowance of Kshs. 2,500/- making a total of Kshs. 13,500/- a month. That marked the end of oral testimony.

6. The Claimant submitted that the Respondent had alleged that the Claimant was its employee from January 2013 and then later from March 2015 to December 2015, but that it however failed to prove that fact since no document was filed to disprove the Claimant's claim that he had worked for the Respondent from 26th May 2010. The Claimant placed reliance on the case of **George Onyango Akuti v Security Services Kenya Ltd [2013] eKLR** and submitted that his termination was unlawful since the Respondent failed to issue him with a notice before termination or make payment in lieu of notice. Basing his argument on Section 43(1) of the Employment Act, the Claimant submitted that the Respondent had failed to discharge the burden of proving the reason for termination. The Claimant submitted that the Respondent's averment that he left employment on voluntary basis ought to have been supported with evidence but the Respondent had failed to so do. He submitted that he was wrongfully, unlawfully and unfairly terminated after sustaining injuries at work and was not issued with any notice of termination. He cited the provisions of Sections 28 and 68 of the Employment Act and submitted that he was entitled to 21 days annual leave which he did not take in the year 2015. He submitted that the Respondent did not deny his claim of not taking leave but instead alleged that the Claimant received all compensation every December. He submitted that the Respondent however failed to produce any evidence in support of these averments. The Claimant submitted that he is therefore entitled to payment in lieu of annual leave in accordance with Section 68 of the Employment Act. The Claimant relied on the case of **Ignas Karingo Mghona & 4 others v Star of Hope International Foundation [2016] eKLR** where the court held that:-

“the payments of severance pay, notice pay and outstanding annual leave must be made before the termination”

The Claimant submitted that the Respondent had admitted to not keeping proper employment records and failed to prove that the Claimant did not work on any public holidays. He placed reliance on the case of **Morris Kavale Kasyoki v Narcol Aluminium Rolling Mills Ltd [2014] eKLR** where the claimant was awarded the refund of NSSF which were never remitted to the authority, the Claimant submitted that the Respondent deducted part of his salary for the month of July, August, and September 2013 but failed to remit it to the authorities. The Claimant further averred that the allegations by the Respondent that the Claimant was not a permanent employee and that he was just observing him in those months lacks basis and contradicts the Respondent's assertions that the Claimant was employed as from January 2013. The Claimant submitted that at the time of his termination, he was still nursing his injuries and appeals to this court to award him general damages for breach of employment, pain and suffering to be calculated at Kshs. 11,000/- for 12 months as per Section 49(1) of the Employment Act which amounts to Kshs. 132,000/- and the claim be allowed as prayed.

7. The Respondent submitted that the Claimant only alleged that he was unfairly terminated but did not show how this was done. The Respondent submitted that he who alleges must prove and cited Section 107 of the Evidence Act arguing that the Claimant did not demonstrate from his pleadings how unfair termination was undertaken and therefore did not satisfy the burden of proof as stipulated in the law. The Respondent submitted that the Claimant's claim for unlawful and unfair termination fails. The Respondent submitted that the Claimant left his employment on his own volition, a fact that was not rebutted by the Claimant in cross-examination or in his response to the claim. The Respondent submitted the Claimant was also awarded two months' salary by the Labour Officer which was deposited to the Labour Offices by the Respondent as evidenced by the evidence it had adduced. The Respondent submitted that the Claimant's contention that he was not paid salary for the year 2015 is a blatant lie and that it baffles why the Claimant while at the Labour Offices claimed that he was only being paid half salary and the other half was retained by employer for savings. The Respondent submitted that the Claimant was only taking advantage of its poor book keeping and was not a person who can be trusted. The Respondent submitted that the Claimant had indicated that his employment was terminated on 24th December 2015 yet he claimed to have worked on Christmas Day and Boxing Day of the year 2015. Due to the foregoing the Respondent submitted that the Claimant was a liar who cannot be trusted since even his pleadings are contradictory. The Respondent admitted that the Claimant was injured at the place of work but submitted that his claim on general damages should fail as the Respondent took him to the hospital and took care of the bills a fact that was not rebutted by the Claimant. The Respondent submitted that the Claimant had failed to prove his case on a balance of probabilities as it is required by law and that his claim should be dismissed with costs.

8. The Claimant sought reprieve for alleged termination from employment. He had reported the dispute to the Labour Office in Kerugoya where the parties had a conciliation which led to the award of sums to the Claimant. It is in evidence that the Respondent deposited the sum ordered at the Labour Office and the Claimant was to collect his terminal dues. It therefore was not open to the Claimant to file the suit herein as the issues he could have had resolved before the Court were dealt with at the Labour Office and no referral certificate was issued. The suit was therefore a misconception and he is only entitled to collect his dues at the Labour Office. The suit is dismissed but there is no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 15th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar