



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 371 OF 2016

BETWEEN

STEPHEN KULALU MAKOKHACLAIMANT

VERSUS

JUMA MWALIKO t/a MIKINDANI GYM & FITNESS CENTRE..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe.

Wandai Matheka & Company, Advocates for the Claimant

Munyithia, Mutugi, Umara & Muzna Advocates for the Respondent

JUDGMENT

1. The Claimant states through his Statement of Claim, filed on 25th May 2016, and later amended with the consent of the Parties on 26th February 2018, that he was employed by the Respondent as a Gym Instructor effective from 13th December 2013, on a monthly salary of Kshs. 13,000.

2. Intriguingly, he pleads that: *he was offered a written contract, but it was oral.*

3. His contract was terminated by the Respondent through a mobile phone message, on 28th December 2015. He prays the Court to find termination was unfair, and grant him Judgment against the Respondent for:-

[a] 1 month salary in lieu of notice at Kshs. 13,000

[b] Gratuity at Kshs. 27,000.

[c] Annual leave at Kshs. 31,500.

[d] Overtime at Kshs. 77, 999.

[e] House allowance at Kshs. 70,200.

[f] Public holidays, at Kshs. 30,000.

[g] Equivalent of 12 months' salary in compensation for unfair termination, at Kshs. 156, 000.

Total... Kshs. 405, 699.

[h] Certificate of Service to issue.

[i] Costs.

4. The Respondent filed its Statement of Response on 5th July 2016. He denies having employed the Claimant. He holds that the Claimant was an apprentice of his cousin, Harun Kokonyo. Harun was a Gym Instructor, employed by the Respondent. Harun agreed that a portion of his salary is deducted, and paid to his cousin, the Claimant herein, under the terms of apprenticeship. The Respondent did not, and does not therefore, have any obligation to the Claimant. He prays that the Claim is dismissed, with costs to the Respondent.

5. The Claimant gave evidence, and closed his case, on 13th March 2017. The Respondent gave evidence on 18th September 2019. His Spouse and Business Partner, Nabila Mohammed Amir, gave evidence for the Respondent on 15th July 2019, closing the hearing. The matter was last mentioned on 23rd September 2019, when the Parties confirmed filing of their Closing Submissions.

6. The Claimant confirmed he was employed by the Respondent on terms spelt out in his Pleadings and Witness Statement on record. He received message by way of short message service from the Respondent, on 28th December 2015, advising the Claimant there would be no more work for the Claimant, from January 2016. The Claimant asked for his December salary. The Respondent sent him Kshs. 7,700. The Claimant demanded to be paid pending annual leave, balance of his salary, gratuity and overtime. He was paid nothing. He was not issued a letter of appointment. He was initially assigned to a Gym owned by the Respondent, situate at Mwatate Township. It is not true that the Claimant was taken in as an apprentice by his cousin Harun. The cousins were paid salaries by the Respondent, separately.

7. Cross-examined, the Claimant told the Court he was employed by the Respondent. Harun Kokonya is Claimant's cousin. He still works for the Respondent. He is the one who called the Claimant to work at the Respondent's Gym in Mikindani. He was not called in as a Trainee. He does not have any Certificate showing he is a Gym Instructor. It is not true that Harun paid Claimant's salary. There is no document showing the Respondent paid Claimant's salary. The Gym was not open throughout the day. It opened in sessions amounting to 6 hours a day. Overtime claim is not manufactured. The Gym did not close every December. The Claimant did not have any document showing he worked on public holidays. His prayer for house allowance is not backed up by anything. He claims gratuity because termination was unfair. Redirected, the Claimant told the Court he was not issued a letter of employment. His salary was paid in cash.

8. The Respondent denied categorically, to have ever employed the Claimant. The Claimant came to Respondent's Gym, through his cousin Harun, who is employed by the Respondent as Gym Instructor. The Claimant was brought as an Apprentice, from the upcountry by Harun. He did not know the basics of a Gym. Harun said he would train the Claimant. Harun would pay the Claimant Kshs. 10,000 monthly. This was later improved to Kshs. 13,000. Customers were complaining about the Apprentice. They were disappearing from the Gym. The Respondent asked Harun to let his cousin leave. The Respondent paid Harun a monthly salary of over Kshs. 25,000. The Claimant was not employed by the Respondent, and the Respondent does therefore not have any employment obligation to the Claimant.

9. Cross-examined, the Respondent told the Court an Employee left the Gym in 2014. Harun did not have an Assistant. The Respondent knew the Claimant was not up to scratch, because Respondent's Customers rejected Claimant's services. Harun's salary was Kshs. 35,000 monthly, at the time he paid Kshs. 13,000 monthly, to his cousin. There are no pay slips for either cousin on record. Redirected, the Respondent told the Court he never paid the Claimant salary personally.

10. Nabila associated herself fully with the evidence of her Partner. The Claimant was not an Employee of the Respondent. He was brought to the Gym by Harun as a Trainee. He was paid by Harun. Customers complained that the Claimant did not handle their training properly. Many left the Gym disaffected. Cross-examined, Nabila told the Court that Harun agreed to pay the Claimant from his own pocket. The Claimant came in 2014. He was not qualified as a Gym Instructor. Redirected, Nabila restated her position that the Claimant was a Trainee brought in by his cousin Harun. The Respondent and his Partner allowed Harun to bring in the Claimant because there was excessive work at the Gym.

The Court Finds:-

11. The questions arising out of this dispute are: whether the Claimant was an Employee of the Respondent; whether, if he was an Employee, his contract was terminated by the Respondent unfairly; and whether he is entitled to the remedies sought.

12. The Respondent's position is that it did not employ the Claimant. He was an Apprentice brought to work at the Respondent's Gym, by Respondent's Gym Instructor Harun. Harun was a cousin to the Claimant. It was agreed amongst the Parties, that the Claimant serves as an Apprentice, earning his salary from the salary paid to Harun by the Respondent. Initially the Claimant was paid Kshs. 10,000 monthly, when Harun earned Kshs. 25,000. This changed later with Harun earning Kshs. 35,000 monthly, and paying Kshs. 13,000 monthly to his cousin the Claimant herein.

13. Paragraph 6 of the Statement of Response underlines Respondent's position: that the Claimant was an Apprentice.

14. The Industrial Training Act, Cap 237 the Laws of Kenya gives definition of the terms 'Apprentice' and 'Indentured Learner.' The main difference is that the former is bound by a written contract with an Employer, to serve for a determined period of *not less than 4 years*, while an Indentured Learner, is bound by a written contract with an Employer, to serve for a determined period of *less than 4 years*.

15. The Apprentice is allowed to acquire knowledge, including theory and practice, of a trade in which the Employer is reciprocally bound to instruct that person. In contrast, an Indentured Learner is only entitled to acquire bare knowledge.

16. Underlying these forms of training, and imparting of skills in a trade, is that there must be a written contract. There is no room for oral contracts for Apprentices and Indentured Learners under the law. The law recognizes such 'Employees' are vulnerable and subject to

exploitation by Employers. There must be a written contract, with a determined period of service.

17. If the Claimant was an Apprentice as alleged by the Respondent, it was for the Respondent to avail to the Court, a written contract between the Claimant and Harun, designating him as an Apprentice.

18. The most plausible explanation is that the Claimant was called in by his cousin Harun, with the clear authority and understanding of the Respondent, to come and assist with work which Respondent's Partner described in her evidence, as excessive.

19. The Claimant was not at Mikindani Gym as an Apprentice brought by Harun. If he was, where is the written contract designating him as such? The Respondent did not even call Harun as a Witness. He is still an Employee of the Respondent. Why was he not availed to the Court, to establish his relationship with the Claimant, and by extension, the lack of an employment relationship between the Claimant and the Respondent?

20. The Respondent seems to have recruited the Claimant cleverly, to discharge the role that had been left vacant by an Employee who left in December 2013, leaving Harun unaided. The Respondent controlled the Claimant. He observed the Claimant as an Employer would observe an Employee, and concluded the Claimant was not a suitable Gym Instructor. To avoid assuming employment obligation, the Respondent went through Harun, to engage the Claimant. It was even said by the Claimant in his evidence, without much contestation from the Respondent, that the Claimant had a stint at Respondent's Gym in Mwatate. The Respondent had full control of the Gym and the Employees of the Gym.

21. The Court is satisfied that the Claimant was an Employee of the Respondent, within the definition of the term 'Employee,' contained in Section 2 of the Employment Act.

22. Was termination fair? The Respondent ostensibly dismissed the Claimant on the allegation that the Claimant was not ably instructing Customers at the Gym. Customers were complaining and their numbers, dwindling like the endangered white rhino. The Respondent did not place any charges of poor performance before the Claimant. There was no hearing in any form. The Respondent was safe in the knowledge that the Claimant was after all, an Apprentice, employed by his cousin, and beyond the protections and guarantees available to regular Employees, under the Employment Act. Termination was unfair under Sections, 41, 43 and 45 of the Employment Act.

23. ***He is allowed the prayer for 1 month salary in lieu of notice at Kshs. 13,000.***

24. He worked for 2 years. He did not tell the Court why, having served for about 2 years, he should be paid equivalent of 12 months' salary in compensation for unfair termination. ***He is allowed 2 months' salary in compensation for unfair termination at Kshs. 26,000.***

25. ***His prayer for annual leave pay is allowed based on the statutory minimum of 21 days for 2 years, at Kshs. 21,000.***

26. The Respondent did not register the Claimant with any private or state social security plan, contemplated by Section 35 [6] of the Employment Act 2007. ***He merits service pay for his 2 years completed in service at the rate of 15 days' salary for each year, at Kshs. 15,000.***

27. The other prayers for house allowance, overtime and public holidays are unsupported and declined.

28. ***Certificate of Service to issue.***

29. ***Costs to the Claimant.***

30. No order on interest as none has been pleaded.

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant: notice at Kshs. 13,000; compensation at Kshs. 26,000; leave at Kshs. 21,000; and service at Kshs. 15,000 – total Kshs. 75,000.

b) Certificate of Service to issue.

c) Costs to the Claimant.

Dated and delivered at Mombasa this 6th day of December 2019.

James Rika

Judge