



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 1076 OF 2013

MUSAU KIVUVA.....CLAIMANT

VERSUS

MASTERMIND TOBACCO LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant averred that he was employed by the respondent as a general labourer at a salary of Kshs 9,000/=. On or about 10th January, 2013 he was involved in an industrial accident and when he sought compensation the respondent refused hence instituted legal action for compensation.
2. In March 2013 the respondents Cashier refused to pay him his March salary due to the fact that he had instituted legal action against the respondent. The respondent on its part denied the claimant was its employee and therefore the issue of dismissal could not arise.
3. In his oral evidence in court the claimant stated he used to work for respondent as a mason and that he got injured in the course of his work and was hospitalized for three months. During the period he worked, he claimed he never went on leave. He further stated that he was not issued with a written contract of employment.
4. In cross-examination he stated that he was never told whether he was a casual worker or not. He further stated he was issued with a hiring letter but the letter did not give duration for the hiring. He further stated that he used to work within and outside the respondent's premises. He denied signing the letter of contract attached to the respondent's bundle of documents and claimed the signature was not his.
5. The respondent's witness, Mr Duncan Karimi stated that he was privy to respondent's records. He denied knowledge of any cashier called Maragu. In cross-examination he said the respondent did not do construction business. He further stated that the respondent had a sister company called NGM. It was a construction company. They shared directors with the respondent. According to him the claimant was working for NGM and that Kirima was an employee of NGM.
6. This case presents a situation where there is possibility of confusion as who was the actual employer to the claimant. This is common where companies set up more than one company to handle various components of their business. The claimant herein has claimed he was employed by the respondent but has not produced any document or any work identity card to show he worked for the respondent.
7. In the course of her duties the claimant exhibited insubordination and lack of co-ordination, which earned her a first warning letter. On 28th May, 2013 four months into her job and within the probation period, the claimant was assigned an event to facilitate but showed lack of organizational skills in spite of earlier briefing, literally messed up the event through indifferent attitude and later refused to give a written explanation on why the event flopped. This earned the claimant a stern written warning.
8. On 29th May, 2013 the claimant had a discussion with the respondent where her performance was evaluated and it was mutually agreed that she was unable to discharge her duties to the required standard where upon it was agreed that her services be terminated. According to the respondent, the claimant appealed to the respondent not to use her attitude as a basis for the termination of her services.
9. The claimant appealed to the respondent that if her attitude was used as a basis to terminate her services, it would diminish her further prospects with potential employers. In her oral evidence she stated that on 30th May, 2013 she returned to work from leave and received a termination letter on account of redundancy. According to her, she was terminated due to the restructuring of the department. She stated that she was not notified of the intended restructuring. She was still on probation when she was terminated. She denied receipt of the letter dated 19th April, 2013 and stated that the signature on the letter was not hers. The claimant further denied receiving the letter dated 28th May, 2013.
10. In cross-examination, she stated that she had not filed any application to challenge the authenticity of the documents filed by the

respondent. She denied she was a poor performer and further denied pleading to be terminated on account of redundancy. The claimant further stated that her account was hacked but did not object to the emails.

11. The respondent's witness Ms Hannah Wanjiru Karuru stated that the claimant was on probation for 6 months but did not successfully complete probation period. The claimant receive two warning letters during probation but there was no improvement on her performance. A decision was therefore reached not to confirm her into employment. She stated that the claimant was terminated by giving her 7 days pay in lieu of notice and was further paid her terminal dues.

12. According to her the claimant requested for termination on account of redundancy to make it easier for her to get a job elsewhere. Ms Karuru further stated that all staff were allocated email and were required to use personalized passwords. She denied the claimant's pass work was hacked and that she received all mail to her. In cross-examination she stated that the restructuring was used upon claimant's request and that there was an email to support that.

13. The claimant's services were terminated while still under probation. The letter of appointment dated 2nd Januqry, 2013 provided that during the probation period, the services of an employee may be terminated by either party giving the other one week's notice of equivalent salary in lieu of notice. The claimant has averred that her services were terminated on account of redundancy and that she was not convinced the reason for termination of the services.

14. The respondent on its part has stated that the claimant's services were terminated on account of poor performance and bad attitude and that she had two previous warning letters. These letters were exhibited by the respondent as annextures to the memorandum of response. The respondent further exhibited email exchange between the claimant and one Rose. In one of the email, the claimant requested that her services should not be terminated on account of her attitude as she would not be able to secure a job in future. She requested that the respondent uses any other reason.

15. The claimant has denied in her oral testimony in court knowledge of the warning letters and email. She further claimed that her email account was hacked. The memorandum of response was filed together with these annextures on 11th February, 2014. The claimant never filed any response refuting or explaining the averments in the memorandum of response and the annextures. Mere denial in court and allegation that her account was hacked does not seem convincing.

16. The court seems persuaded that the termination of the claimants service while still on probation was mutual and that the reasons stated on the termination letter were agreed on to protect the claimant's future prospects of finding a job.

17. The court therefore finds the claim to be without merit and dismisses the same with costs.

18. It is so ordered.

Dated at Nairobi on this 23rd day of February 2018

Abuodha J. N.

Judge

Delivered at Nairobi on this 23rd day of February 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

..... for the Respondent