



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

CAUSE NUMBER 426 OF 2011

GIDEON KATILA KULA.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. By a statement of claim dated 21st March, 2011 the claimant averred that he was employed by the respondent on 1st July, 1993 as a casual employee by the respondent's predecessor Kenya Posts and Telecommunication Corporation as a bar man at its sports club in Nairobi. He worked continuously for the respondent rising up the ladder until he became the club manager.
2. The claimant averred that he was retained by the respondent after the KPTC was split into three organization and the respondent promised to pay his dues including full salary, allowances and benefits which he was entitled to by virtue of his employment but the respondent has to date failed to do so. The claimant therefore claimed Kshs 6,731,690 which he considered as the quantum of his terminal dues. According to the claimant, he was never issued with formal letter of employment and that during the period he was employed he never went on off even during public holidays. He further averred that he continued to work for the respondent and has never been terminated.
3. The respondent on the other hand pleaded that by virtue of Legal Notice number 157 of 1999 the Minister for Information, Transport and Communication transferred employees of the defunct KPTC to Communications Commission of Kenya, Postal Corporation of Kenya and the respondent respectively. The claimant was not among the employees that were transferred to the respondent.
4. The respondent further pleaded that by virtue of legal notice number 158 of 1999 the Minister transferred some of the assets vested on the defunct KPTC to the respondent and that the premises upon which Ngong Sports Club was erected was among the assets transferred to the respondent. The respondent further stated that the Sports Club was a members club managed by an elected committee chaired by a Chairman and that the club was sustained by funds contributed monthly by members of staff subscribing to it. Further that the officials also employed and maintained their own members of staff. The claimant was an employee of the club and has remained as such.
5. According to the respondent, in order to facilitate the activities of the club, the respondent gave the club a canteen which was based at ground floor Extelecoms House. However, when safaricom was founded the latter needed the canteen space for a mobile phone shop consequently the welfare/sports club was moved to Ngong Sports ground. According to the respondent therefore the claimant has never been an employee of the respondent. The respondent further pleaded that there being no employer – employee relationship, it was under no obligation to pay any salary to the claimant. Further, in its amended memorandum of response, the respondent pleaded that the claimant's claim for salary arrears was statute barred.
6. In response to the memorandum of response, the claimant stated that he continued to work for the respondent and rose to the level of club manager and the respondent referred to him as such. He exhibited as appendix "a" a letter in support. He further pleaded that he worked under the authority and control of the respondent and always sought approval of the respondent before undertaking any task. He attached as appendix (b), (c), (d), (e) and (f) as evidence of such control.
7. In his evidence in chief the claimant additionally stated that he was transferred from the sports club to Extelecoms House Canteen and worked there as a cashier. On 7th July, 1993 he was told he would stay without salary for three to six months but that he would be paid a monthly allowance of Kshs 1000/=. On 14th December, 1995 he was given a temporary letter of appointment but the letter was later not honoured. He further stated that all the records showed he was getting allowance but not salary. According to him, he became a manager in 1996 and the salary due ought to have been as per annexure 10.
8. This was based on the CBA schedule 3 & 9. When KPTC split he was told by Telkom Manager Mr Tanui that he would be retained by the respondent. He conceded that he was not in the list of the absorbed employees yet his ex-colleagues at the canteen were absorbed by the respondent. It was his evidence that he continued to work even after the split until they were retrenched. According to him, the club was for

the respondent and the employees were from the respondent.

9. In cross-examination he stated that the letter dated 14th December, 1995 was by KPTC. He further conceded that there were no letters from Telkom Kenya to him. It was further his evidence that he was getting Kshs 3,500/=per month awaiting confirmation. This payment was made from the office of the Manager Industrial Relations and Welfare Mr Tanui.

10. The claimant's second witness Jane Wairigi stated that she knew the claimant and that they worked together at the Extelecoms Canteen where she was Head Cook and the claimant was a cashier. In cross-examination she stated that everyone except the claimant received a payslip. According to her, payslip was given to confirmed employees only and the claimant was never confirmed. The claimant upon being recalled stated that on 27th January, 2012 while in court he received a call from Head of Security a Mr Charles Odhiambo who asked him where he was and also informed him they were closing the office. When he visited the premises he found them closed. He therefore considered himself dismissed from that date. He never got any notice prior to that date.

11. Claimant's witness number 3 Mr David Mayienga informed the court that he was employed by the respondent in 1993 as an accounts clerk. He left in 2009. According to his evidence, the club had a membership through staff contribution. The claimant was transferred from the Extelecoms House to the club. He stated that employees of the club were seconded by the respondent's management. According to him, the club was run through welfare department and that the claimant was paid through welfare departments. Mr Mayienga further stated that they had no control over staff at the sports club and that they were under control of the HR department of the respondent.

12. In cross examination he stated that the club was supposed to run independently but in reality it was under control of the welfare department. Claimant's 4th witness Mr Kennedy Odhiambo informed the court that he was an accountant and that computations he made were based on salary scales at the time the claimant was working and if he was in management. He further stated that he was not an employee of the respondent but was a practicing accountant.

13. The respondent on its part called three witnesses. The first witness Mr Tairu Gitunya stated he worked for Postal Corporation and formerly he was at KPTC. He was based at Ngong Sports Club owned by the respondent. According to him, he knew the claimant. He used to work at Extelecoms Canteen. According to him the Canteen had two categories of employees. Some were casual employed by KPTC and the Sports club while others were permanent.

14. A permanent employee had employment number and were issued with employment letters signed by the General Manager Human Resource. The appointment letter would be accompanied by a form PB 30 which indicated rank, salary and personnel number and department. According to him the claimant did not produce any such form. Those with personnel numbers were the ones who were transferred to newly created employers of KPTC.

15. In cross-examination he stated that in 1995 he was seconded to Ngong sports club as a General Manager. The respondent's second witness Mr Isaiah Kandie stated he joined KPTC in 1996 as a clerk. When KPTC was split he was transferred to Telkom. It was his evidence that all employees who had personnel numbers were distributed to the three entities. According to him the claimant was an employee of the sports club. The club was a voluntary membership club run by a committee elected by members. In cross-examination, he stated that KPTC was not involved in the running of the club but it used to subsidize bills for the club.

16. Respondent's witness number 3, Mr Charles Arogo stated that he was head of security at Telkom. According to him there were some irregular operations at the club and that someone was selling drinks without authority of the respondent. A person known as Kula (the claimant) was running the club and asked him to move out. According to him, he gave the claimant time but he did not move out forcing him to lock the premises. In cross-examination he stated that he went to the club in 2012 and was not aware about the matter in court.

17. The claimant in this matter is a victim of old legal regime where it was possible to keep an employee in casual status indefinitely. In fact, under this regime, an employee could work as a casual until retirement. This has however changed under the new Employment Act such that a casual employee who has served continuously for aggregate period of not less than one month is deemed to be a regular employee whose wages are payable monthly and the termination of such employees services shall follow the normal procedure contained in the Act.

18. The claimant herein is simply a victim of circumstances where his employment status became contested simply because his wages was paid by the welfare department of the respondent. He could not be absorbed in any of the three organizations created by the splitting of the former KPTC. The reason he could not be absorbed was because he was never issued with an appointment letter and personnel number. This was obviously not the claimant's fault since it was the responsibility of an employer to issue an appointment letter. The issue as to who was the claimant's employer was not sufficiently dealt with by the respondent. The evidence on record showed the heavy presence of the respondent in the affairs of the club including ownership of the land the club was situated, payment of the clubs utility bills and giving directions on usage of club facilities. No evidence was placed before the court to show the claimant was employed by a committee of the club and not the respondent.

19. The court therefore finds and holds that the claimant was an employee of the respondent. The claimant's eviction from the respondent's premises on 27th January, 2012 was therefore unlawful and unfair termination of his services.

20. The court therefore awards the claimant as follows:

Kshs

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|-----------------------------------------------------------------------------|--------|
| a. One month's salary in lieu of notice | 3,500 |
| b. Service pay at the rate of 15 days pay for each complete year of service | 31,500 |

c. Twelve months salary for unfair termination of service

42,000

77,000

d. Costs of the suit

21. Items (a), (b), and (c) shall be subject to taxes and statutory deductions.

22. It is so ordered.

Dated at Nairobi on this 13th day of April 2018

Abuodha J. N.

Judge

Delivered at Nairobi on this 13th day of April 2018

Onesmus Makau

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent