



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1890 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

STAUS KHAKALI.....CLAIMANT

VERSUS

MONICA MAINA T/A ALMON PRODUCTS.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit through the firm of Nyabena Nyakundi & Co. Advocates claiming damages for unlawful termination and terminal dues. He avers that on or about 21st January 2008, the Respondent offered him employment as a Messenger at her business known as Almond Products with a starting salary of 8,000 per month exclusive of house allowance. This employment was done orally and was never reduced into writing contrary to the provisions of Section 9 of the Employment Act, 2007.
2. The Claimant further aver that he worked for the Respondent with due diligence and faithfulness until on or about 19th September 2011 when the Respondent unlawfully and unfairly terminated his services without giving any notice or payment in lieu thereof.
3. After the termination, the Claimant states that he took his complaint to the District Labour Officer at Nyayo House and sought payment of his terminal dues. The District Labour Officer wrote a letter to the Respondent but the letter never elicited any response as the Respondent refused to pay the Claimant his dues which again prompted the District Labour Officer to write a reminder to the Respondent inviting them for a meeting to discuss the matter.
4. The Claimant states that he instructed his Advocates to write a demand letter to the Respondent demanding payment of his terminal dues but the Respondent denied the demands set out in the letter.
5. The Claimant's Advocate wrote a reply to the Respondent and brought to her attention Section 37 of the Employment Act which deemed the Claimant as a permanent employee and that for the entire period the Claimant worked for the Respondent he was not granted annual leave as required by section 28 of the Employment Act or paid in lieu. The Claimant also worked two hours overtime daily but was never compensated and neither was he provided with house allowance as set out in Section 31 of the Employment Act.
6. The Respondent filed a witness statement where she avers that the Claimant is well known to her but that the relationship could not be as that of strict employment on her part as throughout the work relation

he was free to either go to the place of work or not depending on his commitments that day.

7. She further avers that the Claimant was an independent contractor who was free to accept her offer to work any day. The Respondent further avers that the wages she gave to the Claimant depended on the work at hand and there was never an agreed salary of the Kshs. 8,000 he had alleged.

8. The Respondent states that at some point around September 2011 she found certain items from her place of work missing and on enquiring about them the Claimant decided not to go to work again raising suspicion that he was culpable over the said loss. She further states that she never received any letters from the Labour Department inviting her for any conciliatory meeting.

Submissions

9. The Claimant filed his submissions where he submitted that under Section 43 and 45 of the Employment Act, 2007, the employer has a burden to prove that the reason for the termination of an employee's employment is valid and that in this case, the Respondent failed to prove that she had a valid reason to terminate his employment and therefore the termination was unfair and unlawful.

10. The Claimant states that, he never went for leave for 3 years and 8 months and neither was he compensated for the overtime he worked for the Respondent. He also states that he was never given any house allowance which he is entitled to and seeks service gratuity as well.

11. The Respondent filed her submissions where she submitted that there was no one time the Claimant worked at her place of work continuously for three months or more meaning that he was not an employee and there was no evidence to the figure of Kshs. 8000 that the Claimant termed as salary as there was no evidence of salary slips. The Respondent avers that the Claimant failed on a balance of probabilities to prove the Claim before the Court.

12. I have examined the evidence and submissions of the parties. The issues for determination by this Court are as follows:-

- 1. Whether the Claimant and Respondent had an employment relationship.**
- 2. If so whether the Respondent had valid reasons to terminate the services of the Claimant.**
- 3. Whether due process was followed before termination of the Claimant.**
- 4. What remedies to give in the circumstances?**

13. On the 1st issue, the Claimant told Court that he was orally employed by the Respondent and he served her diligently and faithfully.

14. The Respondent denied employment the Claimant and stated that he only worked for her whenever he felt like. This contention is countered by the Claimant's Appendix 1 which is a letter written by the Respondent dated 19.7.2011 indicating his staff member and the Claimant is named as one of his regular member.

15. The casuals are named separately – this is an indication that indeed the Claimant was an employee of the Respondent and never worked as a casual.

16. The contention by the Respondent that she never employed the Claimant is therefore not true. The Claimant having been employed by the Respondent was entitled to be issued with an appointment letter as envisaged under Section 9(1) of Employment Act 2007 which states as follows:-

- 1. "A contract of service:-**

a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

17. The Respondent failed to issue the Claimant with a written contract as envisaged and so by virtue of Section 10(7) of Employment Act, the burden of proving or disapproving any terms of the contract between Claimant and Respondent lies upon the Respondent.

18. On issue No. 2 above, given that this Court has established the existence of an employment relationship, the issues of reasons for any termination should have been communicated to the Claimant. The Claimant told Court that he was dismissed verbally and even reported to the Labour officer. The Labour Officer summoned the Respondent to a meeting as per Appendix 2 and 3. The Respondent never attended to the summons issued.

19. The Respondent has contended that the Claimant absconded duty after he was informed that some items were missing at the Respondent's premises.

20. The Respondent was also served with a demand notice by Counsel for the Claimant. A reminder was also send to her. The response was that the Claimant was a casual worker and had absconded duty. This contention cannot be true because already I have determined that the Claimant was not a casual worker. Also, if it was a case of abscondment then the letter from the Labour Officer should have been responded to, to indicate they couldn't trace the Claimant.

21. It is therefore my finding that indeed the Respondent dismissed the Claimant without any valid reasons because abscondment in the circumstances did not arise.

22. Section 43 of Employment Act states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

23. This Court finds that Respondent did not have reasons to termination as envisaged under the law.

24. On issue No. 3, the issue of due process is also envisaged under Section 41 of Employment. Section 41 of Employment Act states as follows:-

“(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

25. Indeed the Claimant was not accorded any due process as envisaged. I therefore find that the termination of the Claimant was unfair and unjustified.

26. In terms of remedies, I find that the Claimant has established wrong doing against him and I award him as follows:-

1. 1 month salary in lieu of notice = 8,000/=.

2. House allowance at the rate of 15% of salary for 8,000 = $15/8000 \times 36 \text{ months} = 0.15 \times 8000 \times 36 = 43,200/=$.

3. Leave for 1 year = 8,000/=.

4. Service pay for 3 years = $\frac{1}{2} \times 8000 \times 3 = 12,000/=$.

5. 6 months salary as compensation for unlawful termination = $8000 \times 6 = 48,000/=$.

TOTAL = 154,400/=

6. The Respondent should issue the Claimant with a Certificate of Service.

7. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 30th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo holding brief for Nyabena for Claimant – Present

Kirimi holding brief for Gachoka Mwangi for Respondent – Present