



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 951 OF 2016
BETWEEN
BENARD OCHIENG' ODIMA.....CLAIMANT
VERSUS
MERCANTILE TERMINAL OPERATION LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

C.A. Odhiang & Company Advocates for the Claimant

Munee Katu & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 14th December 2016. He states he was employed as a Lashing Man, by the Respondent Company, then known as Mombasa Cargo Tally Organization [MTCO], in the year 1988. He was paid about Kshs. 150 per day at the beginning. He was promoted to the position of Foreman in 1990, earning Kshs. 500 daily, on an 8 hour daily shift. He was issued Port Passes indicating he was an Employee of the Respondent. The Respondent changed its name, acquiring its current name, in 2015. Existing Employees, including the Claimant, continued to serve in the re-named Company. The Claimant states he was not paid terminal benefits upon the change of name of his Employer.

2. He was injured on the leg and informed by Kenya Ports Authority that he could not continue working on a ship for safety reasons. The Respondent was advised to assign the Claimant office duties or other suitable duties. The Respondent did not do so, which resulted in the Claimant being rendered jobless. He was paid a paltry sum of Kshs. 700 by the Respondent. He proposed to the Respondent that he is retired on medical grounds. He prays for the following orders against the Respondent:-

- a) Declaration that the Respondent is legally bound to settle the Claimant's redundancy dues.
- b) An order that the Claimant ought to be paid his terminal dues/benefits by the Respondent.
- c) An order that the Claimant ought to have been confirmed permanent Employee with attendant benefits.
- d) An order that the Claimant is paid all overtime plus interest thereon.
- e) Terminal benefits amounting to Kshs. 2,016,000.
- f) Damages and aggravated damages.
- g) Costs and interest.

3. The Respondent filed its Statement of Response on 26th January 2016. Its position is that it is an independent entity from MTCO. It has no knowledge of the Claimant's involvement with MTCO. The Respondent is not in a position to know about terminal benefits payable to the Claimant by MTCO. The Respondent does not acknowledge approach from KPA about assigning alternative duty to the Claimant, as the Respondent did not have any relationship with the Claimant. The Respondent is not aware about loss of Claimant's job and does not acknowledge owing the Claimant any redundancy benefits. On 28th August 2016, a Representative of the Respondent found the Claimant at KPA gate soliciting for money from well-wishers to enable the Claimant get treatment. The Claimant informed Respondent's Representative that the Claimant got injured while working for a Company called Comaco Logistics Limited. Respondent's Representative offered to send the Claimant a little help through M-pesa money transfer platform. The Respondent reiterates it did not have any relationship with the Claimant. The Claim should be dismissed with costs to the Respondent.

4. The Claimant gave evidence, and rested his case, on 20th February 2018. The Respondent gave evidence through its single Witness, Human Resource Manager Renson Ngoma Mtungu, on 20th March 2018. Parties confirmed filing of their Closing Submissions, on 22nd March 2018.

5. The Claimant told the Court he was employed by MTCO in 1988. The Respondent was known as MTCO at the time. His work involved opening and closing of containers at the Port of Mombasa. He confirmed he was initially paid Kshs. 150, later increased to Kshs. 500 per day on his promotion to the position of Foreman. He adopted as exhibits his national identification card; copy of outpatient card; safaricom m-pesa statement dated 18th October 2016; port control pass; port identification card; letter dated 17th March 2003 from MTCO to Madison Insurance listing Employees covered under Madison Insurance; letter dated 21st February 2005 applying for port passes; and demand letter before action, from Claimant's Advocates to the Respondent, dated 30th September 2016.

6. He told the Court that the Respondent is based within the Port of Mombasa. He was stopped from accessing the Port because he could not wear safety shoes, owing to injury on his leg. His pass was confiscated by KPA. He informed his boss Hassan Taib that he could go on working elsewhere other than on a ship. Taib told the Claimant there was no other opening. The Respondent sent to the Claimant through m-pesa, Kshs. 700 only, after this.

7. Hassan Taib took over the Company after his Father died. He changed Respondent's name from MTCO to the current name. The Claimant worked for 28 years with Hassan's Father, the late Swaleh Taib. Hassan told the Claimant he would give the Claimant Kshs. 50,000 to begin a business. The Claimant identified Persons listed in the letters issued by the Respondent to Madison Insurance and KPA, as his Co-Employees. He denied that he was given Kshs. 700 by the Respondent, after he was found begging at the doorstep of KPA. He never worked for a Company called Comaco.

8. He conceded on cross-examination that he did not have documents in Court, showing the 2 Companies were related. It is not true that Hassan offered the Claimant Kshs. 700 after he found the Claimant begging. Hassan offered Kshs. 50,000 to the Claimant to start a business through word of mouth. He clarified on redirection that this offer was made through an Advocate called Owino.

9. Renson Ngoma Mtungu relied on his Witness Statement filed on 13th May 2017. He states that the Respondent did not change its name. It was registered in its current form, on 25th October 2013. He exhibited Certificate of Incorporation reflecting this date of registration. He states that the Claimant is a stranger, with no relationship to the Respondent whatsoever. The Respondent never took over from MTCO. He was given Kshs. 700 by Respondent's Representative when he was found begging for medical assistance at the KPA gate. He was injured while working for another entity called Comaco.

10. Mtungu told the Court on cross-examination that he has worked for the Respondent for 3 years. He is Human Resource Manager. Hassan Taib is the Director. Mtungu was not aware of change of name. He was not there when the Company was known as MTC. He confirmed Persons listed under Madison Insurance letter, were Employees of the Respondent. They were attached to other Companies as well. He was told this by the Director. The current Company was freshly registered, Mtungu told the Court on redirection. It was not a change of name, but a fresh registration.

11. The issues as commonly identified by the Parties are: whether the Claimant was an Employee of the Respondent; and whether he merits terminal benefits and other prayers, as claimed.

The Court Finds:-

12. There are documents exhibited by the Claimant, suggesting he was employed by Mombasa Cargo Tally Organization. There is a letter from this Company to Madison Insurance, dated 17th March 2003, listing the Claimant as one of the Company's Employees. There is a letter applying for Port Passes, from the Company to KPA, Dated 21st February 2005. There is a Port Pass identifying the Claimant as a Foreman working for an Organization named MCTO. He exhibited also, a Movement Control Pass with similar details.

13. It is not in doubt, that the Claimant was employed as a Lashing Man, by Mombasa Cargo Tally Organization. He was promoted to the position of Foreman.

14. In doubt is whether Mombasa Cargo Tally Organization, mutated into Mercantile Cargo Terminal Operation Limited. The Claimant states the latter, is a successor to the former. The Respondent states there is no nexus, the latter having been freshly registered. The Respondent consequently disavows any relationship with the Claimant. He is a stranger to the Respondent. He only made contact with Respondent's Director, Hassan Taib, at the doorstep of the KPA, where the Claimant was found soliciting for alms. Hassan Taib was an almsgiver, the Claimant a beggar, sprawled, in poor state of health, at the doorstep of the Port. If there was a relationship, it was that of stranger giving alms to another stranger.

15. This characterization of the relationship by the Respondent is quite disturbing. The Court chooses not to believe this narrative. The

former MCTO appears to the Court to be the present Mercantile Cargo Terminal Operation Limited [re-born MCTO]. The evidence of the Claimant is more persuasive. One MCTO, the Organization, gave way, on the death of the Patriarch Swaleh Taib, to MCTO, the Mercantile. True there was a fresh registration, but the record suggests, the business remained the same. Registration was made on 25th October 2013. Directors Hassan Taib and Fatima Taib took over after the death of Swaleh Taib. The business remained the same, engaging as shown in the letterheads of both Companies on record, in the business of containerization. There was continuity. The postal box number remained 81454, Mombasa. The Claimant remained an Employee of this business, until he was injured.

16. The Claimant was an Employee of the Respondent, as defined under Section 2 of the Employment Act 2007.

17. He was injured and could not, go on working within the KPA. Safety regulations applicable to Persons working within the KPA, barred the Claimant from continuing with his role. He was injured on the leg. He could not wear safety boots, which are worn by Persons working within the KPA, as a safety measure. The Respondent informed the Claimant it did not have alternative work, outside the mercantile ocean vessels, where the Claimant ordinarily worked. There was no available Office work.

18. In the absence of suitable work, the Respondent should therefore have retired the Claimant on medical ground as suggested by the Claimant. The Court does not think that termination of employment caused by an Employee's inability to continue working due to illness or injury, should fall within the law of redundancy. Redundancy involves termination of employment at the initiative of the Employer, where the services of an Employee are superfluous. This means the services are unnecessary, surplus or un-needed. Redundancy also refers to the practices commonly known as abolition of office, job or occupation. The Lashing/ Foreman role did not become superfluous and was not abolished. The definition buttresses the idea that positions, not Employees, become redundant. An Employee was injured, and unable to continue working in a specific environment. That is not redundancy. That should have been termination on medical grounds.

19. The Court does not find any averment by any Party, that the Claimant was a Casual Employee for 28 years. It does not make sense for the Court to declare therefore, that the Claimant ought to have been confirmed as a Permanent Employee with attendant benefits.

20. Declaratory prayers on the obligation of the Respondent to pay terminal dues are repetitious, and with no value addition to the Judgment. There is no evidence of overtime to support declaration on payment of overtime. There is no evidence to support the prayer for aggravated damages.

21. There is evidence however that the Claimant was employed by Respondent's business across generations of Respondent's business ownership. It was for the Respondent to show why it opted to terminate Claimant's contract of 28 years. No reasons were shown as required under Section 43 and 45 of the Employment Act 2007. Instead, the Respondent adopted a strategy of total disavowal of the Claimant. The Court is satisfied the Claimant is entitled to **compensation for unfair termination, which is granted at the equivalent of 26 days' wages x 6 months = Kshs. 78,000.**

22. Severance pay claimed at Kshs. 2,016,000 is not available to the Claimant for the reason explained by the Court above: termination was not on the ground of redundancy. Even if it was awardable, the Claimant seems to get his arithmetic all wrong. He earned Kshs. 500 daily. 15 days' pay for each of the 28 years served, does not result in an amount of over Kshs. 2 million claimed. He however, was entitled at the end of his 28 years of service, to recognition and reward in form of service pay, under Section 35 [5] of the Employment Act 2007, rather than severance pay under Section 40 of the Employment Act 2007. The Respondent did not bring before the Court evidence of the Claimant's subscription to any Social Security Plan, either statutory, or one put in place by the Employer. The Claimant left employment a beggar, with 700 shillings to his name, after 28 years of service. The law does not intend that Employees leave employment after long years of toil, without some form of social security. The Court shall therefore allow the Claimant social security in form of service pay, under Section 35 [5] of the Employment Act 2007. **The Respondent shall pay to the Claimant 15 days' salary at Kshs. 7,500, for each of the 28 complete years of service, totaling Kshs. 210,000.**

23. **Costs to the Claimant.**

24. **Interest granted at the rate of 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

[a] Termination was unfair.

[b] The Respondent shall pay to the Claimant compensation for unfair termination the equivalent of 6 months' pay at Kshs. 78,000 and service pay at Kshs. 210,000- total Kshs. 288,000.

[c] Costs to the Claimant.

[d] Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 6th day of July 2018.

James Rika

Judge