



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 175 OF 2015

BETWEEN

STEPHENSON MASILA KYALO.....CLAIMANT

VERSUS

MASS INVESTMENTS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe IRB Mbuya & Company Advocates

for the Claimant Sherman Nyongesa & Mutubia

Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 27th March 2015. He states he was employed by the Respondent between 1st March 2006 and 31st May 2014 as a Mechanic. He was employed on casual terms, but worked for 8 years and 3 months, converting to regular terms. He was paid a basic salary of Kshs. 20,000 per month as of the date of termination. He was retired unfairly on medical ground, on 31st May 2014. The Claimant suffered burns in the course of duty, resulting in retirement on medical ground. He was not registered under any Social Security Plan. He prays the Court to give him Judgment against the Respondent in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 23,000.
- b) Arrears of house allowance for 99 months worked at Kshs. 297,000.
- c) Service pay at 15 days' salary for each year completed in service at Kshs. 106,154.
- d) Compensation for unfair termination the equivalent of 12 months' salary at Kshs. 276,000.
- e) Certificate of Service to issue.
- f) Costs.
- g) Interest.

2. The Respondent filed its Statement of Reply on 2nd June 2015. Its position is that the Claimant was an Independent Contractor, who repaired Respondent's Trucks. He was paid his dues upon completion of a given task. He is not entitled to terminal dues. The Respondent denies it terminated Claimant's contract of employment. The Respondent prays that the Claim is dismissed with costs to the Respondent.

3. The Claimant testified, and rested his Case, on 17th March 2016. The Respondent called its former Transport Manager Salim Kingi Mwakitete, and its Driver Charo Chambo, who both testified on 20th March 2017 when the hearing closed. Parties confirmed the filing of their Closing Submissions at the last mention on 25th July 2018.

4. The Claimant told the Court he is presently a water vendor, and a resident of Changamwe in Mombasa. He restated his employment history with the Respondent, and the terms and conditions of employment as outlined in his Pleadings. He was not given a written contract. The Respondent was involved in transportation business. The Claimant was paid a salary of Kshs. 20,000 monthly. He was not given a pay slip.

5. He suffered burns while on duty. He sued the Respondent for work injury. The Workshop Manager terminated Claimant's contract. No reason was given in justification. There was no notice. The Claimant was not heard. He was not given the opportunity to defend any allegation. He was denied terminal dues. He was not paid house allowance at any time. The Respondent did not register him to any Social Security Plan.

6. Cross-examined, the Claimant testified he was not given a letter of employment. He was employed in March 2006. He was recruited by Respondent's Director Fahd. He worked at Makupa, at a Petrol Station within Respondent's Offices. He was employed by Makupa Petrol Station, which belonged to the Respondent. Fahd told the Claimant that the Claimant was an Employee of the Respondent. The Petrol Station is no longer in business. The Claimant did not know what happened to the business. He did not have a pay slip, or N.S.S.F Statements. He did not have an employment card. Termination was based on Claimant's injury. The Transport Manager told the Claimant by word of mouth, to leave.

7. He was a Mechanic, Test Grade 3. The Petrol Station did not have a yard in 2006. The Respondent had 4 Vehicles. The Claimant suffered injury on 26th September 2012. He was at the yard in Mvita. He worked at Mvita throughout at the time of the injury. He worked at Bombolulu after injury. Mvita is an open municipal yard. Self-employed Mechanics work there. The Claimant had been brought a vehicle belonging to the Respondent at Mvita for repair, when he suffered injury. The vehicle was being welded. The Claimant did not do the welding, but subcontracted a Welder, one Paul Pesa. The Respondent was to pay Pesa. The Claimant was to be paid his salary by the Respondent at the end of each month. He did not have anything to show he was paid at the end of the month. He was always at Mvita, whether Respondent's vehicles were at Mvita or not. The Respondent did not have a garage or yard at the time the Claimant worked for the Respondent.

8. The Claimant reported his accident at Makupa Police Station, in February 2014. He did this, so as to have evidence in his work injury claim. He did not mention the Respondent to the Police. Doctor recommended the Claimant not to work in open. He was taken to Bombolulu Workshop, where he just idled. He still earned Kshs. 20,000 monthly. He was not promised house allowance. Redirected, he testified that he continued to instruct mechanics at Bombolulu. He worked for the Respondent at Makupa Petrol Station.

9. Mwakitete testified he was the Transport Manager between 2010 and 2016. The Respondent transported fuel and cargo to Kampala, Uganda. Mwakitete met the Claimant at Mvita. The latter was never an Employee of the Respondent. He repaired Respondent's Trucks at Mvita grounds. The Respondent did not have a garage. The Claimant would be paid at the end of each week. The Respondent took its Truck for repairs at Mvita. It had a crack. The Claimant tried to repair the crack by welding. The tank exploded, and the Claimant suffered burns. The incident was reported to Makupa Police Station by the Claimant. The Occurrence Book extract exhibited by the Respondent, shows that the Claimant reported the vehicle was taken to him at Mvita grounds. Salim Mwakitete explained that he issued the Claimant a letter of recommendation dated 29th August 2014, upon a request made by the Claimant. The Claimant told Mwakitete that the Claimant had secured an employment opportunity elsewhere. The letter of recommendation was a local arrangement between two friends. The Claimant was not employed by the Respondent.

10. Cross-examined, Mwakitete testified that the Claimant was not employed by the Respondent. The Respondent did not have a garage. Mvita was an open ground. Mwakitete did not know who repaired Respondent's vehicles between 2006 and 2010. He did not drive the Truck to the Claimant at Mvita. He did not witness the accident which resulted in Claimant being injured. The Claimant was paid by the Respondent for repairing Respondent's vehicles. He was paid per task. The Respondent did not retain records of payment. Accountant made payments with the authority of the Director. Recommendation letter was a local arrangement between the Claimant and Mwakitete.

11. Charo Chambo testified that he was employed by the Respondent in the year 2012. He drives an Oil Tanker. He knew the Claimant as a Mechanic based at Mvita grounds. Mvita is an open garage, open to all mechanics. Chambo drove Respondent's Tanker to Mvita grounds. The Claimant attended to the Tanker. He was in a hurry to repair the Tanker. He was welding when the Tanker exploded, and the Claimant burnt. He was not an Employee of the Respondent. He was paid in accordance with work done. Another Mechanic completed the task as the Claimant was rushed to hospital. Cross-examined, Chambo testified he was employed by Fahd. He did not know who assigned the Claimant duties. The Claimant repaired Respondent's vehicles. He did not know if the Claimant had a contract which was terminated by the Respondent. Chambo was only able to testify on the accident, which he witnessed.

The Court Finds:-

12. There was a lot of doubt in the mind of the Court, as to whether the Claimant was an Employee of the Respondent. The Claimant was not on any written contract. On cross-examination he testified that he, for the better part of the period between 2006 and 2014, worked from an open garage at Mvita. He told the Court this is an open yard, where self-employed Mechanics [Juakali], operate from. He conceded Respondent's Oil Tanker, had been taken to Mvita for repair, when it exploded, injuring the Claimant. He was always at Mvita yard, whether Respondent's vehicles were there or not. This oral evidence by the Claimant given under cross-examination, created plenty of doubt in the mind of the Court, as to whether he was an Employee of the Respondent, or a Juakali Mechanic, occasionally given Respondent's Trucks to repair. Was he an Employee or Independent Contractor? This is the issue that needs to be resolved.

13. The doubt evaporated as soon as Respondent's Witness Number 1, Salim Kingi Mwakitete, gave evidence surrounding the letter of recommendation dated 29th September 2014, which he issued to the Claimant. The letter reads as follows:-

“ RE: STEPHENSON MASILA KYALO

This is to certify that the above mentioned person worked for our company as from 1st March 2006, to 31st May 2014 as a Supervisor in our mechanical department.

During his tenure, he proved to be hardworking, trustworthy, honesty [sic] and kind person. Always willing to serve and meet our organizational goals.

We wish him all the best in his future endeavours.

Yours, Faithfully,

Salim K. Mwakitete

Authorised Signatory.”

14. In his testimony in Court, Mwakitete explained that this letter was a local arrangement between him and the Claimant. It was an arrangement between two friends, aimed at assisting the Claimant in securing another job.
15. In his Witness Statement filed on 2nd June 2015, Mwakitete states that the letter dated 29th August 2014 is a forgery.
16. The letter cannot be a local arrangement between the Claimant and Mwakitete, and at the same time be a forgery.
17. It is a crucial employment record, which establishes conclusively, that there was an employment relationship between the Claimant and the Respondent. It evaporates all doubt in the mind of the Court, on the nature of the relationship that existed between the Parties.
18. It is fair to conclude that if the Claimant worked at an open garage at Mvita, it was with the knowledge and approval of his Employer. Probably this was so, because the Respondent did not have a yard of its own, where its Trucks could be repaired from. The Respondent always knew where to find its Employee. If the Claimant engaged other mechanics, in discharging his obligation to the Respondent, that probably was known too, to the Respondent. Employment relationships are dynamic. It cannot be concluded, that the Claimant was an independent contractor, paid upon completion of given tasks. The Respondent was unable to produce records of payments made to an independent contractor. Mwakitete first alleged the recommendation letter was a forgery, before changing his position, holding the letter to have been a local arrangement between him and the Claimant. The letter is on the letterhead of the Respondent. Mwakitete clearly states he is an Authorised Signatory on the letter. No other Officer or Director of the Respondent Company has contradicted Mwakitete on his authority to issue the recommendation letter. The specific dates of employment and termination are disclosed in the letter. They match the dates given in the Statement of Claim. It is disclosed that the Claimant served as a Supervisor, in Respondent's mechanical department. It is hard to believe that a Juakali Mechanic could have been a Supervisor. There is no reason for the Court to disbelieve the evidence given by the Claimant, that he was an Employee of the Respondent, over the period stated in the recommendation letter.
19. The Claimant was injured while he welded Respondent's Oil Tanker. He initiated a Claim for work injury in the Civil Courts. The Respondent terminated his contract, after about 8 years of employment.
20. The Respondent did not justify its decision to terminate Claimant's contract, holding it did not employ the Claimant at any one time. There was no valid reason or reasons shown to justify termination under Section 43 and 45 of the Employment Act. Procedure was not in conformity with Section 41 and 45 of the Employment Act. Termination was unfair.
21. The Respondent did not supply the Claimant with a pay statement. No records of payments made to the Claimant, whether as an Independent Contractor as alleged by the Respondent, or an Employee of the Respondent, were exhibited by the Respondent. The Court has no reason to reject the Claimant's evidence that he was paid a salary of Kshs. 20,000 per month.
22. The rate appears to the Court to be within the range payable to Mechanics in Nairobi, Mombasa and Kisumu under the Minimum Wage Order applicable, at the time of Claimant's termination of contract. The rate includes the housing element. The Claimant has not established that he is owed arrears of house allowance going back to the date of employment in 2006, amounting to Kshs. 297,000. This prayer is rejected.
23. ***He is allowed the prayer for notice pay at Kshs. 20,000.***
24. The Respondent did not subscribe the Claimant to any Social Security Plan. He was not enlisted under the National Social Security Fund. He deserves service pay under Section 35 [5] as read together with Section 35 [6] of the Employment Act 2007. ***The prayer is allowed at 15 days' salary for 8 complete years of service at Kshs. 92,307.***
25. Termination as concluded above was unfair, and the Claimant merits compensation. ***He is granted 2½ months' gross monthly salary in compensation for unfair termination at Kshs. 50,000.***
26. ***Certificate of Service to issue.***
27. No order on the costs.
28. ***Interest granted at 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: 1 month salary in lieu of notice at Kshs. 20,000; service pay at Kshs. 92,307; and compensation for unfair termination at Kshs. 50,000 – total Kshs. 162,307.*
- c) *Certificate of Service to issue.*
- d) *No order on the costs.*
- e) *Interest granted at 14% per annum from the date of Judgment till payment is made in full.*

Dated and delivered at Mombasa this 26th day of October, 2018

James Rika

Judge