



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1258 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 23rd October, 2018)

WILLIAM OTIENO ODIANYA.....CLAIMANT

VS

BRAND IMPORTS (AFRICA) LIMITED.....1ST RESPONDENT

PHONELINK LIMITED.....2ND RESPONDENT

JUDGEMENT

- 1.The Claimant herein filed his Statement of Claim in this case on 5/7/2017 in person.
- 2.He contended that he was unlawfully and illegally declared redundant by the Respondents who have refused to pay his redundancy dues.
- 3.The Claimant's case is that he was employed by the Respondents on 1.11.2009 as C and F Declaration Clerk when the company was trading as Brand Imports Limited (International Brand Distributors) which name was changed to Brand Import Africa with the same director.
- 4.He contends that on 30th May 2017 he reported to work as usual. He was called by his Manager one Kirit Sutaria and told he had been instructed by the Director to inform him to stop working for the company.
- 5.On 31.5.2017, he reported to work thinking they would change their mind. They told him to wait for his payment in the bank. He waited for the payment. It was less than what he expected.
- 6.He avers that he used to earn 55,000/= payable by the 1st Respondent and 2nd Respondent was paying his 20,000/=. He avers that the 1st Respondent employed him but his payslip used to come from 2nd Respondent. He avers that he was only paid his leave allowance and May salary.
- 7.He seeks payment for his terminal dues as enumerated under paragraph 12 of the claim plus damages for unlawful redundancy.
- 8.The Respondent opposed this case. They filed their Response to the Statement of Claim and Counter Claim on 28/9/2017. The Respondents denied the claim. They contend that the Claimant absconded duty. The 1st Respondent admits employing the Claimant but also avers that the Claimant also worked for 2nd Respondent which was in breach of the express terms of the contract Clause 11. They asked this Court to dismiss this claim.
- 9.They Respondents called one witness who stated that the company had been going through difficult times and a possibility of early retirement was discussed but not reached. All of a sudden, the Claimant rushed to Court seeking unfair termination and seeking his dues. They aver that they tried to settle this matter but no settlement was reached.
- 10.They aver that they paid him his May 2017 salary and that his claim under paragraph D is not payable. The witness said he represents both 1st and 2nd Respondent but he is paid by the 1st Respondent. He stated that he did not know why 2nd Respondent paid him but he acknowledged that both 1st and 2nd Respondent use the same premises.
- 11.I have examined all evidence and submissions of both Parties. The issues for determination are as follows:-

1. Whether Claimant was employed by both Respondents.

2. Whether the Claimant absconded duty or was declared redundant.

3. What remedies to grant in the circumstances.

12. On the 1st issue, the letter of appointment of the Claimant is dated 1.11.2009 and is from the Brand Imports Limited (International Brand Distributors) indicating his salary was 39,130 and house allowance was 5,870 making a total of Kshs.45,000/=. His payslip however show the employer as Branch Imports (Africa) Limited – the 1st Respondent and also Phonelink Limited – the 2nd Respondent.

13. The 2nd Respondents have not denied employing him. The 2nd Respondent does not also deny he issued a payslip to Claimant showing a basic pay of 20,000/=.

14. The 2nd Respondent has not explained why he paid the Claimant a salary if he never employed him. The Claimant's contention that he was employed by both Respondent s is therefore true.

15. On the issue of whether Claimant absconded duty or was terminated, the Respondent contend that they had some financial difficulties in May 2017 and they considered laying the Claimant off but the matter was never settled.

16. That notwithstanding, from the Claimant's May 2017 salary there is a payment of leave arrears of Kshs.103,008/=. This is what Claimant stated he was paid plus his May salary and told to go away.

17. The Respondents do not explain why they chose to pay this arrears at this time, if not for the fact that they were laying off the Claimant.

18. Soon thereafter, the Claimant wrote an email to Respondents asking for payment of his dues but there was no response.

19. If indeed the Claimant had absconded duty, the Respondent had a chance to issue him with a show cause letter to explain his absence and they did not.

20. It is therefore my finding that the Respondent's contention that the Claimant absconded duty is not true and that the Respondent terminated the Claimant's services. There was no reasons given for the termination and neither was the Claimant taken through any due process. It is therefore my finding that the Claimant's dismissal was unfair and unjustified and I declare it so in terms of Section 45(2) of Employment Act 2007 which states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

21. In terms of remedies, I find for the Claimant and I award him as follows:-

1. 1 month salary in lieu of notice = 75,000/=

2. 8 months' salary as compensation for unfair termination = 75,000 x 8 = 600,000/=

Total 675,000/=

3. The Claimant be issued with a Certificate of Service.

4. The Respondent will 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 23rd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nelson Wafula for Respondent – Present

Claimant – Present