



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

CAUSE NUMBER 323 OF 2015

BETWEEN

ISSA SHEKUE SHALL.....CLAIMANT

VERSUS

BUSCAR LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mwanyale & Kahindi Advocates for the Claimant

Katuga & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 18th May 2015. He avers he was employed by the Respondent Transport Company as a Booking Officer sometime in 2002. He was elevated to the position of Office Manager at Respondent's Kilifi Office. He was summarily dismissed by Respondent's Director, Salim Sheikhan Salim on 19th December 2014. The Respondent did not justify termination. There was no hearing. The Claimant never went on annual leave. He did not have rest days. He was not registered under N.S.S.F and N.H.I.F. He was paid Kshs. 9,000 for 20 months, instead of the rate of Kshs. 13,722 prescribed under the law. He prays the Court to declare termination was unfair and unlawful, and grant him other orders listed as follows:-

- a) Severance pay at 15 days' salary for each complete year of service at Kshs. 54,000.
- b) 12 months' salary in compensation for unfair termination at Kshs. 164,673.
- c) Annual leave of 21 days for each of the 12 years worked at Kshs. 75,600.
- d) 12 years off days at Kshs. 280,000.
- e) Underpayment of salary at Kshs. 88,455.
- f) December 2014 salary at Kshs. 13,722.
- g) 1 month salary in lieu of notice at Kshs. 13,722.

Total.... Kshs. 690,973

h) Costs.

i) Interest.

2. The Respondent filed its Statement of Response on 2nd June 2015. Every averment in the Statement of Claim is denied by the Respondent. Jurisdiction of the Court is denied, on the ground that the Claim is time-barred. The Respondent prays the Court to dismiss the Claim with costs. The Claimant filed a Reply to the Statement of Response on 16th July 2015. He posits that the Statement of Response raises no arguable issues. The Claim is not time barred.

3. Parties recorded consent procedural orders on 1st March 2018, to the effect that the Claim is considered and determined on the strength of the record. They confirmed filing of their Final Submissions on 18th September 2018.

4. **The Claimant** submits that he was indeed an Employee of the Respondent. The Claimant calls the attention of the Court to a letter addressed by the Respondent to him, dated 26th May 2005, instructing the Claimant what to do in event any of Respondent's vehicles broke down within the business territory of Kilifi. He relies too, on the salary vouchers annexed to his Statement of Claim. He submits that the Respondent operated variously as Buscar Limited, Busways Limited, and Buscar E.A. Limited. The Claim is not time-barred. Termination took place on 19th December 2014. The Claim was filed on 18th May 2015, within the time given under Section 90 of the Employment Act 2007. The Claimant submits termination did not meet the minimum standards of fairness under Section 41, 43 and 45 of the Employment Act 2007. The Claimant was paid Kshs. 9,000 monthly as of the date of termination. Legal Notice Number 197 of 2013 set the minimum wage for General Clerks at Kshs. 13,722. He never went on annual leave. He did not receive notice. He was not subscribed to the N.S.S.F, and merits service pay under Section 35[5] of the Employment Act 2007.

5. **The Respondent** submits that the Claimant has failed to show who employed him. Buscar E.A. Limited was registered in Kenya on 18th July 2014 as shown in the Certificate of Incorporation. The Company the Claimant used to work with closed due to bankruptcy. The Claim has no foundation.

The Court Finds:-

6. The Claim is not time-barred as alleged by the Respondent in the Statement of Response. The Claimant was dismissed on 19th December 2014, and filed this Claim on 18th May 2015, less than a year later. The Claim was brought well under the time limit created under Section 90 of the Employment Act 2007.

7. It is not material to the Claim, whether the Respondent/Employer was Buscar Limited, Buscar E.A. Limited or Busways Limited. The Claimant has shown he was employed by the Respondent Transport Business, first as a Booking Officer and later as the Manager at Kilifi Office. The business and legal structure adopted by the Employer, which is frequently aimed at avoiding legal and regulatory burdens, should never be the concern of the Employee. It is sufficient that the Employee is able to show he worked for the Employer's business, regardless of whichever form that business adopts. The Claimant was never involved in registration of his Employer's business, and is not expected to know details or registration. Employees do not go about asking Employers, upon employment, what their Employers' business registration details and operational structures are. Section 2 of the Employment Act 2007 is broad enough to include the different incarnations of the business that is Buscar. It would even have been permissible for the Claimant, to sue the businessman named Salim Sheikhan Salim, who called and told the Claimant not to report to work, on 19th December 2014. The Claimant was an Employee of the business for 12 years. He has exhibited the letter from Buscar Kenya Limited, Luxury Bus Services, dated 26th May 2005. He was an Employee of the Respondent.

8. He was called by Respondent's Director Salim Sheikhan Salim on or around 19th December 2014 and told not to report to work. There was no notice of termination, no hearing, and no formalities; just a phone call. Termination was unfair under Section 41, 43 and 45 of the Employment Act 2007.

9. Although the Claimant describes himself as an Office Manager, he prays for salary underpayment based on the rate payable to General Clerk. It is fair to assume he was General Clerk, rather than a Manager, with the responsibility of overseeing Buscar business at Kilifi and its environs. He has shown that under legal notice No. 197 of 2013, he ought to have been paid a monthly salary of Kshs. 13,722 as of the date of termination. ***His claim for underpayment of salary, over a period of 20 months, is reasonable and well founded in law and fact. It is allowed at Kshs. 88,455 as prayed.***

10. ***Based on this rate, notice pay is granted at 1 month salary of Kshs. 13,722.***

11. ***Termination was unfair. Compensation is allowed at equivalent of 12 months' salary at Kshs. 164,664.***

12. The Claimant pleads severance pay, but submits on service pay. The Claim does not involve redundancy, and severance pay under Section 40 of the Employment Act is not due for consideration. The prayer has been corrected through Submissions, with specific reference to Section 35 [5] of the Employment Act. The Respondent did not have any Social Security Plan at the workplace, and failed to deduct and remit any contributions in favour of the Claimant to the National Social Security Fund. ***The prayer for service pay is merited and allowed at Kshs. 13,722 divide by 26 working days = Kshs. 527 x 15 days = Kshs. 7,916 x 12 years = Kshs. 94,998.***

13. The prayers for annual leave pay and rest days over the entire period worked, do not seem to the Court credible. The Claimant was running the Kilifi Office. He describes himself as the Office Manager. He had the leeway to run the Office in a way that afforded him annual leave and rest days. He had the latitude as the Head of the Office in Kilifi. He ought to have arranged with the Head Office in Nairobi, on utilization of his annual leave and rest days. He does not show that he made any proposal to his Head Office on these benefits, and was turned down. He has not persuaded the Court that he was denied annual leave and rest days cumulatively. These prayers are declined.

14. ***Costs to the Claimant.***

15. ***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: underpayment of salary at Kshs. 88,455; notice at Kshs. 13,722; compensation at Kshs. 164,664; and service pay at Kshs. 94,998- total Kshs. 361,839.

c) Costs to the Claimant.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 22nd day of November 2018.

James Rika

Judge