



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 845 OF 2016

BETWEEN

STEPHEN ONYANGO OTIENO.....CLAIMANT

VERSUS

FIIBARAKO TRANSPORTERS CO. LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company Advocates for the Claimant

Garane & Somane Advocates for the Respondent

JUDGMENT

1. In his Amended Statement of Claim deposited at the Court's Registry on 27th February 2017, the Claimant avers he was employed by the Respondent Transportation Company as Turn Boy in August 2015. He earned a monthly salary of Kshs. 10,100. His contract was terminated by the Respondent on 5th August 2016. The background to termination is that he was involved in an accident in the course of duty, on 14th July 2016. He was injured, and was under treatment for 3 weeks. Upon return to work on 5th August 2016, he was informed by Respondent's Treasurer he was no longer needed. He avers he was not given notice of termination; he was denied a fair hearing; and was not issued a letter to show cause, why, he should not be disciplined. He was denied leave pay, severance pay and his salary was underpaid. He prays for Judgment against the Respondent in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 13,605.
- b) 12 months' salary in compensation for unfair termination at Kshs. 163,270.
- c) Service pay at Kshs. 6,802.
- d) Unpaid leave at Kshs. 13,605.
- e) Underpayment of salary at Kshs. 3,605 for 12 months at Kshs. 43,270.

Total...Kshs. 240,555

f) Certificate of Service to issue.

g) Costs.

2. The Respondent filed its Statement of Response on 12th July 2017. Its position is that it never employed the Claimant and did not therefore terminate his contract. It does not have a record of Claimant's involvement in any accident, his injury or hospitalization. The Claimant avers he was fired by Mr. Songok, and ought to direct his Claim against the said gentleman. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant gave evidence, and closed his case, on 6th June 2018. He told the Court he signed various contracts of employment with the Respondent, but was not availed copies. His first salary was Kshs. 8,000, which was improved to Kshs. 10,100 by the time of termination. He was transporting maize when a sack of maize fell on him, and injured him at Kitui Maize Millers. He was treated and was on sick leave for 3 weeks. On return, he was advised by Songok there was no more work for him. He tried to pursue work injury benefit through the Ministry of Labour. The Respondent was uncooperative. The Doctor confirmed the Claimant was injured and gave him sick off days. The Claimant was enrolled to the National Social Security Fund. He never went on annual leave. He was underpaid salary. Turn Boys were not named in the Drivers and Clerks' List exhibited by the Respondent. N.S.S.F contributions were not paid with regard to Turn Boys.

4. Cross-examined, the Claimant testified he assisted the Driver in collection of containers and changing of tyres. He signed contracts of employment, but did not receive copies. He was employed by the Foreman, Mohammed. Salary was paid in cash. There were no pay slips. The Claimant initially sued a Company named F.T. Co. Ltd. He was fumigating at Kitui Maize Millers when a sack of maize fell on him. The Doctor recommended he takes 52 days of sick leave. The Claimant's Witness Statement refers to 3 weeks. He did not have any document showing any relationship with the Respondent. Redirected, the Claimant told the Court he was recruited by Mohammed whose name appears on the list of Employees exhibited by the Respondent.

5. John Songok told the Court he serves the Respondent as its Accountant. The Respondent is a transportation business, transporting commodities from warehouses in Mombasa to the Port. It has a fleet of about 15 Trucks, and about 19 Employees. Songok was interviewed and hired by the Director Noor. It is the same with other Employees. He did not know the Claimant. The Claimant did not work for the Company. The Respondent does not employ Turn Boys. Loading of commodities is done by workers of the respective warehouses. The Respondent merely seals and drives its Truckloads to the Port. The commodities mainly transported by the Respondent are tea and wheat. Songok does not hire and fire Employees. Mohammed is Songok's Assistant. The Claimant's name does not appear on the N.S.S.F records, exhibits 1-4, of the Respondent's documents.

6. The Director, Noor, hires and fires Employees. He keeps records. The Respondent does not have Human Resources Manager. Songok was not aware of any accident involving Respondent's vehicles, which took place in June 2016.

The Court Finds:-

7. The Respondent denies vigorously, to have employed the Claimant as a Turn Boy. The evidence given by Songok was unequivocal that the Claimant was not an Employee of the Respondent. The Respondent did not employ Turn Boys. Its main business is transportation of tea and wheat from warehouses to the Port of Mombasa. Loading is done by Employees of the respective warehouses. The Respondent produced its pay roll for the period August 2015 to August 2016 when the Claimant alleges he was an Employee of the Respondent. The Claimant's name does not appear in these records. Also exhibited by the Respondent are Receipts from the N.S.S.F, complete with list of Employees on whose behalf contributions were forwarded to N.S.S.F. The Claimant's name is not in any of the lists.

8. Countered with this strong documentary and oral evidence, on the question whether the Claimant was an Employee of the Respondent, the Claimant did not avail any supportive evidence, other than his lone word. He states he worked with other Turn Boys. About 13 Turn Boys were employed by the Respondent. Why did he not call even just 1 of these 13 Turn Boys to corroborate his position? He does not have any records of payment of salary or wages. The rate payable to him was not consistently given in his Pleadings, Evidence and Submissions. He executed several contracts of employment, but did not have a single copy available to the Court. He was not sure, who employed him, at times suggesting it was 'Mr. Songoko,' who he referred to as Respondent's Treasurer, and on other occasions stating it was Mohammed the Foreman. Termination, according to the Claimant's evidence on cross-examination, was done by Songok. The Respondent's evidence is that Employees were hired and fired by the Director. The Claimant was not able to show that Songok or Mohammed were authorized to hire and fire Employees. The Claimant testified he used to sign attendance register. He did not avail this register, or demand for its production by the Respondent in Court. The Claimant ought to, in the absence of employment records, have availed the evidence of another Witness who worked with him, or who saw him work, or knew of his employment with the Respondent. Given the nature of the work he claimed to have performed, it is difficult for the Court, in the absence of corroborative evidence, and in light of the evidence given by the Respondent, to conclude that the Claimant was an Employee of the Respondent, within the meaning of the term 'Employee' given under Section 2 of the Employment Act 2007.

9. The lone word of the Claimant was inconsistent and full of gaps. His initial Claim, and Work Injury Form, were directed at a Company called F.T. Co. Limited. He avers he was injured in the course of duty. He states he dislocated his right hand joint and was treated at various hospitals. He did not produce any medical records showing that he was injured in a workplace accident, and was treated at the stated hospitals. If he dislocated his right hand joint, was he not x-rayed, treated, and given some form of medical records? No one was called from any warehouse, to confirm to the Court, that the Claimant was injured while in the process of fumigating. Why would a Turn Boy undertake fumigation services? He states the Doctor recommended he takes sick off days. The number of days given was inconsistently mentioned to be 21 days [3 weeks], or 52 days. The Directorate of Occupational Safety and Health Form, exhibited by the Claimant, does not contain any details of the Employer. Even assuming the Employer was uncooperative as stated by the Claimant, certain details to be filled by the Medical Practitioner, who attended to the Claimant, are missing. The date the Claimant was admitted to the hospital and the day he was discharged, are not disclosed. If he was an outpatient throughout, it is not indicated he attended hospital as such, from what date, to what date. The Driver who was accompanied by the Claimant at the time of the alleged accident is not named in the Claimant's Evidence, Pleadings and Documents. He was not called as a Witness, and no reason is recorded why he was not called by the Claimant, to authenticate the occurrence of the workplace accident. In short, the lone word of the Claimant was not supported by other oral evidence; it is inconsistent; and the documents exhibited by the Claimant are of little or no help to the Court.

8. The Claimant has failed to establish that he was an Employee of the Respondent. It is not necessary for the Court to go into other issues raised by the Claimant.

IT IS ORDERED: -

a) The Claim is dismissed its entirety.

b) No order on the costs.

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

James Rika

Judge