



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 167 OF 2016

KAHINDI KAZUNGU BAYA.....1ST CLAIMANT

KALUME KENGA BAYA.....2ND CLAIMANT

VS

BONIFACE SILAS MUKANGA

T/A NEW GALANA BAR & RESTAURANT.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 29th February 2016 and filed in court on 1st March 2016, the Claimants have sued the Respondent for unlawful termination of employment. The Respondent's defence is contained in a Memorandum of Response dated 30th May 2016 and amended on 15th May 2016.

2. When the matter came up for hearing, the 1st Claimant testified on his own behalf and on behalf of his co-claimant. The Respondent testified on his own behalf. Both parties further filed written submissions.

The Claimants' Case

3. The 1st Claimant, Kahindi Kazungu Baya states that he was employed by the Respondent as a cashier/manager from 18th November 1992. The 2nd Claimant, Kalume Kenga Baya states that he was employed as a cook and security guard effective 31st December 2001.

4. The Claimants further state that they worked until 3rd July 2015 when their employment was terminated. They add that at the time of termination, they earned monthly salaries of Kshs. 8,000 and 6,000 respectively.

5. The Claimants aver that the termination of their employment was unlawful and unfair. They also accuse the Respondent of underpayment and failure to pay them notice, house allowance, service pay, public holidays and leave pay. They therefore claim the following:

1st Claimant: Kahindi Kazungu Baya

- a) One month's salary in lieu of notice.....Kshs. 8,000
- b) House allowance for 271 months.....325,200
- c) Leave pay for 5 years.....40,000
- d) Service pay for 22 years.....88,000
- e) Underpayment from 2012 to 2015.....278,344
- f) 220 public holidays @ double pay.....117,330
- g) 12 months' salary in compensation.....96,000

2nd Claimant: Kalume Kenga Baya

- a) One month's salary in lieu of notice.....Kshs. 6,000
- b) House allowance for 271 months.....157,500
- c) Leave pay for 5 years.....30,000
- d) Service pay for 14 years.....42,000
- e) Underpayment from 2012 to 2015.....199,726
- f) 140 public holidays @ double pay.....56,000
- g) 12 months' salary in compensation.....96,000

6. The Claimants also ask for certificates of service plus costs of the case.

The Respondent's Case

7. In his Memorandum of Response as amended on 15th November 2016, the Respondent states that in the year 2011, he took over a restaurant by the name *Galana Bar & Restaurant* whose owner had passed away. He thereafter sought to have the name changed to *New Galana Bar & Restaurant*.

8. Upon taking over the business, the Respondent set out to recruit employees and among the persons who showed up were the Claimants. However, when the Respondent informed the Claimants that they would be required to execute formal contracts, they objected and went away never to return.

9. The Respondent later heard of the Claimants when he received letters from KUDHEIHA Workers and the Labour Office alleging unfair termination and failure to pay terminal dues. The Respondent avers that he obliged to the summons by the Labour Officer, who later did a report arriving at a finding that the Claimants were never terminated.

10. It is the Respondent's case that the Claimants were never his employees and a claim for unfair termination cannot stand.

Findings and Determination

11. The following are the issues for determination in this case:

- a) Whether there was an employment relationship between the Claimants and the Respondent capable of enforcement by the Court;
- b) Whether the Claimants have made out a case for unfair termination;
- c) Whether the Claimants are entitled to the remedies sought.

Employment Relationship?

12. From the pleadings filed and the evidence adduced in court, the first issue that emerges for determination is whether there was an employment relationship between the Claimants and the Respondent. The 1st Claimant, Kahindi Kazungu Baya told the Court that he and his co-claimant were employed by Silas Mukanga and Joseph Kadzembe Simbiro who passed away sometime in the 1990s. Kahindi claimed that the Respondent took over the business in 2003.

13. On his part, the Respondent testified that in 2011, he was approached by relatives of Joseph Kadzembe Simbiro to take over the business. He further told the Court that he started running the business in 2014 after undertaking major renovations and restocking.

14. The parties differed on the correct name of the business. However, this being a business name, the real question has to do with the identity of the person running the business and whether there was an employment relationship between that person and the Claimants.

15. The parties were agreed that attempts to document an employment relationship failed because the Claimants refused to sign employment contracts offered by the Respondent. The 1st Claimant told the Court that he and his co-claimant did not sign the contracts because the terms of employment were not indicated. They were also apprehensive that they would lose their accrued benefits.

16. The parties were conflicted on the date and nature of their first of interaction. The Claimants stated that they were employees of the Respondent from the time he took over the business in 2003. The Respondent on other hand stated that he first met the Claimants in 2014 when he began to recruit employees for the business. The Claimants refused to sign employment contracts and were therefore never employed.

17. It was upon the Claimants to prove the existence of an employment relationship between themselves and the Respondent. They failed to show their transition from employment by the initial owners of the business to employment by the Respondent as the new owner and therefore did not establish an employment relationship capable of enforcement by the Court.

18. The result is that the Claimants' entire claim which is dependent on the existence of an employment relationship fails and is dismissed.

19. Each party will bear their own costs.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mr. Nyange for the Claimants

Miss Opolo for the Respondent