



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1121 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th December, 2018)

ABDALLA SUDI ABDALLA.....CLAIMANT

-VERSUS-

BORDERLESS TRACKING LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant, Abdalla Sudi Abdalla, filed a Memorandum of Claim dated 7th July 2014 seeking payment of his dues against the Respondent, Borderless Tracking Limited. He avers that after being interviewed, he was appointed the General Manager of the Respondent based in its offices in Mombasa County but stopped working after some time due to induced frustrations and circumstances instigated by the Respondent, which made it impossible for him to continue with his employment.

2. That during his employment, he was entitled to salary and allowances which were and have never been paid to him even after he was asked to leave and that the dues amounting to Kshs. 385,000/= which had been agreed on between him and the Respondent on 9th December, 2013 are as follows:-

- a) *November 2013 Salary of Kshs. 210,000/=*
- b) *December 2013 Salary of Kshs. 160,000/=*
- c) *Airtime refund of 3 months of Kshs.15,000/=*

3. He avers that he had made a conditional concession that as long as he was paid the Kshs. 385,000/= owed to him, he would not to demand the following:-

- i) *Car Allowance of Kshs. 50,000/=*
- ii) *Accommodation in Mombasa from 10th November to 8th December 2013 totalling to Kshs. 72,500/= (2,500 x 29 days)*
- iii) *Travel expenses while on company business of Kshs. 35,000/=*

4. Further, that since the Respondent failed to pay him as proposed, the amount owing to him as at now is Kshs. 542,500/= in total dues and that the Respondent's unlawful actions or omissions have occasioned him great loss and suffering. That he has further issued demand and notice of intension to sue to the Respondent but it has ignored, neglected or refused to respond hence this suit. He prays this Honourable Court for orders against the Respondent for:-

- a) *An order directing the Respondent to pay the Claimant Kshs. 542,500/= owed to the Claimant.*
- b) *Costs of this suit.*
- c) *Interest on (a) and (b) above at Court rates.*
- d) *Any other relief that the court may deem fit.*

5. In his Witness Statement dated 07/07/2014, he states that he reported to work on 5th September 2013 but was never given an employment contract like all employees of the Respondent. That as a result of numerous challenges, he stopped working for the Respondent on 9th December 2013 when his boss Peter Echessa asked him to leave after informing him that his employment was not working out without giving him any reasons as to why it was not working out.

Respondent's Case

6. The Respondent filed a Defence dated 22/08/2014 on 27/08/2014 confirming the Claimant was its General Manager earning a salary of Kshs. 160,000/= per month from 13/09/2013 until 06/12/2013 when the Claimant terminated his employment on his own accord. It denies that the Claimant stopped working due to circumstances it instigated but that he chose to leave after being criticised for constant non-performance. That the Claimant was paid his salary up until the last day worked and that it is him who did not give notice to the Respondent. It also denies that there was an agreement to pay his dues stating that he was not entitled to any of the allowances he claims because they were never provided or agreed upon as a term of employment.

7. The Respondent filed a Statement dated 22/08/2014 on 27/08/2014 wherein Peter Echessa the Managing Director of the Respondent states that while the Claimant was still on probation, he realised the Claimant was absenting himself from the work premises and not performing as expected which led to constant complaints. That he was not terminated from employment then despite their disquiet and after warning him to improve, the Claimant decided to leave.

Evidence

8. The Claimant testified that because the Respondent was a start-up, he relied a lot on the CEO on how to proceed but at some point, that communication broke down and he could not communicate with the CEO.

9. That when he was asked to leave because his relationship with the CEO was not tenable, he was told he would be paid his November and December 2013 salary and when he asked the Finance Manager in an email why he had not been paid, he was told that the Respondent did not have money and that they were waiting for a cheque to be cleared.

10. That he thereafter wrote an email attaching a letter of appreciation to the rest of his colleagues on 09/12/2013 thanking them for the working relationship (referring to **Dexb 1** in his list of documents). In cross-examination, he stated that he did not know whether or not he was on probation when he left as he had no appointment letter and that he also had no receipts to show he spent Kshs. 75,000/= on accommodation or Kshs. 5,000/= on airtime.

11. In re-examination, he referred to page 9 of his documents on an email sent on 22/11/2013 at 3.29pm and that he had sent an earlier email asking the CEO why he expected him to work when his junior was doing his work.

12. RW1 who works for the Respondent as the CEO testified that while the Claimant's starting salary was Kshs. 160,000/= they did not agree to pay for his accommodation and that there was no agreement of any other allowances. He stated that he did not make it impossible for the Claimant to work as he was in Nairobi and the Claimant was in Mombasa. In cross-examination, he stated that the Claimant was on probation for 3 months and that he was told by other staff that the Claimant work was poor and he complained to the Claimant on email.

Claimant's Submissions

13. The Claimant submits that it is not disputed that he was an employee of the Respondent and that he was not given an employment contract setting out specific relations, role and remuneration parameters between him and the Respondent but avers that his letter of appointment dated 23/09/2013 at page 13 of the Claimant's consolidated bundle states that he was appointed a General Manager. That the oral testimony by DW1 fails because nowhere has it been indicated in the said consolidated bundle that the Claimant was on probation.

14. That **Section 9 of the Employment Act 2007** states that an employment contract shall not be given later than 2 months after the beginning of the employment and **Section 10(2) (h) of the Act** provides that the written contract of service should state the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits.

15. Further, that he requested for his employment contract on an email dated 22/11/2013 but was told by the Respondent's MD to simply work and that the failure to issue him with a contract was therefore not by chance but by design. That without prejudice, the assumption and or inference adduced from the above is that he was a permanent employee of the Respondent who accrued certain rights and liberties within the law and that no evidence has been produced by the Respondent to rebut the same.

16. He submits that while DW1 testified that he left employment voluntarily, the Defense as filed corroborates his facts surrounding his termination, with paragraph 2 of the defense clearly showing that he left employment on 06/12/2013, three days before his email marked **Dexb 1** and that the Respondent is twisting the facts to create untruths regarding its terminating his employment. That no reason was accorded to him upon his termination of employment as required by **Section 41 of the Employment Act** and that he relies on **Jeremiah Ochieng' Ponde & 3 others v Borderless Tracking Systems Limited [2016] eKLR** where the Court stated:-

“Termination was flawed both for want of valid reason and fair procedure. That the Claimants are entitled to compensation for unfair termination under Section 49 of the Employment Act 2007 as read together with Section 12 of the Employment and Labour Relations Court Act.”

17. It is submitted by the Claimant that he was never paid his entire salary during the course of his employment and that the Respondent never produced any evidence to show it paid him dues on time and that all his dues were adequately paid for. That he relies in the case of

Leah Shighadi Sinoya v Avtech Systems Limited [2017] eKLR where the Court apart from quoting other authorities opined as follows:-

“In the case of Osman Eggae Egaal versus John Philip Tilley & Others, Petition No.90 of 2012 the court in addressing the issue of constructive dismissal relied on the case of David Potter versus New Brunswick Legal Aid Services Commission, Supreme Court of Canada, 2015 SCC 10, where Wagner J held that;

The test for constructive dismissal has two branches. The Court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal.... First, the employer’s unilateral change must be found to constitute a breach of the employment contract and, second, if it constitutes such a breach, it must be found to substantively alter an essential term of the contract... Constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of act that, taken together, show that the employer intended to no longer be bound by the contract. In all cases the primary burden is on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer....

On 14th October, 2015 the Claimant sent an email to the Respondent noting that she had not been paid for two months. That she was unable to report to work for lack of funds. That she would resume work upon these matters being resolved. Was this then a resignation letter? Can it be termed as constructive dismissal?

First the respondent was in breach of contract when they failed to pay the claimant her due salaries as agreed end month end. Such was to put the claimant into circumstances that can only be termed as unfair and not warranted. The defense that the respondent had financial problems and other employees were attending work save for the claimant is not sufficient reason to warrant the breach of contract. There was no communication to the claimant on such problems in finances and in any event, the law allows an employer faced with financial constraints and is unable to keep employee to follow due process.

.....Failure to attend work is addressed under section 44 of the Employment Act as a matter subject to summary dismissal as it is classified as an act of gross misconduct. Where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same.....”

18. Further, that the Claimant in the Leah Shighadi Sinoya case above relied on the case of Coca Cola East & Central Africa Limited vs Maria Kagai Liganga [2015] eKLR in which case the employee had been forced to tender her letter of resignation following what the court found to have been intolerable circumstances.

19. The Claimant herein then refers this Court to page 12 of his bundle of documents in an email dated 06/12/2013 at 8:54pm wherein he was seeking his salary and informing the Respondent that he was finding it difficult to survive and which together with other numerous emails, the Respondent never responded to. No warning letters or customer complaints were brought before court as required by **Sections 107 and 109 of the Evidence Act, Cap 80**. He avers that the Respondent should have summarily dismissed him for gross misconduct on absconding work as it claims but which option it did not take thus raising more questions.

20. He submits that he earned Kshs. 210,000/= which included a car allowance of Kshs. 50,000/= but conceded that the said allowance to take a salary of Kshs. 160,000/= for the month of December 2013 upon an oral agreement with the Respondent’s MD. That even though DW1 denied the same in Court stating that the car allowance was a commission, this Court should disregard this new line of evidence and find that the Claimant indeed earned Kshs. 210,000/=. That the Respondent has not produced any document to prove it settled his monthly pay for November and December 2013 and that all documents just like his contract are unavailable.

21. The Claimant submits that his performance was not a primary issue during his employment period and it being an issue now is an afterthought by the Respondent and that in the thread of emails before this Court, it is he who was seeking further clarifications on how to improve his work but never received any satisfactory response from the Respondent.

22. Further, that DW1 did not deny that he called him for a meeting and asked him to leave his employment and that he also never denied the verbal agreement to pay the Claimant as stated in 6(a) of his Claim. He finally submits that he has filed a merited suit before this Honourable Court and calls upon the court to grant the prayers as prayed in the claim.

Respondent’s Submissions

23. The Respondent submits that the issues for determination are:-

- a) *Whether the Claimant was terminated or did he wilfully resign.*
- b) *What was the salaries the Claimant was entitled to?*
- c) *Whether the Claimant was paid his salaries for November and December 2013.*
- d) *Whether the Claimant was entitled to the allowances as claimed.*

24. That the email correspondence produced at pages 8, 9 and 10 of the Claimant’s Consolidated List of Documents corroborates its assertions that the Claimant’s performance was unsatisfactory and that when the Claimant was made aware of the same, he chose to suddenly leave office.

25. That the Claimant was also unable to prove the commissions he alleged were inclusive in his said Kshs. 210,000/= salary and the Respondent admits that it did not avail any payslips or evidence that November and December 2013 salaries were paid. That the Claimant was not also entitled to car allowances, accommodation and travel expenses that he claims for and that he has not produced in court any evidence, receipts or accounts of the expenses he claims should be reimbursed.

26. The Respondent finally submits that the dues lawfully owed to the Claimant is salary for November of Kshs. 160,000/= less tax and 9 days worked in December amounting to Kshs. 48,000/= less tax. It states that all other claims should be dismissed.

27. I have considered evidence and submissions of the parties. The Claimant's case is that he was employed by the Respondent with effect from 5th September 2013 but was never issued with any appointment letter. Indeed no appointment letter was exhibited by the Respondent but they admit to the employment relationship.

28. His claim is for payment of his November and December 2013 salary which he avers he was never paid. He also agreed he worked for the Respondent upto 9th December 2013.

29. The Respondent are willing to pay the Claimant the November 2013 salary and December 2013 salary for 9 days worked at 160,000/= per month. This amounts to 208,000/=.

30. The Claimant has not produced any evidence about how much he was entitled to. There is no evidence that he was entitled to the allowance he has sought.

31. I will therefore find for the Claimant only to the extent of the Respondent's admission and award him Kshs.208,000/= less statutory deductions plus costs of this suit and interest at Court rates with effect from the date of filing this suit.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutai holding brief Odhiambo – Claimant

Respondent – Absent