



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 979 OF 2015

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

MOKAMBA NAFTAL ONYANGO.....CLAIMANT

VERSUS

JABALI FURNITURE LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Statement of Claim on 8th June 2015 contending that he had been unfairly terminated by the Respondent. The Claimant prays for the following remedies:-

1. A declaration that the Respondent's action in dismissing the Claimant from Employment was unlawful and unfair.

2. The Sum of Kshs. 576,363.30 being his terminal dues.

3. Costs of the suit.

4. Interest on the amount awarded at Court rates.

2. The Respondent filed its response to the Statement of Claim and Counter-Claim denying the allegations in Statement of Claim. The Respondent in its Counter-Claim averred that the Claimant had recklessly damaged the Respondent's truck while in his custody resulting to the Respondent incurring repair costs of Kshs. 20,250.

Claimant's Case

3. The Claimant avers that he was employed by the Respondent as a Technician in July 2012 earning a salary of Kshs. 10,000. The Claimant avers that vide a contract of employment dated 27th January 2013 he was confirmed as the Respondent's employee and issued with a contract of employment.

4. The Claimant contends that despite his confirmation as a permanent employee the Respondent refused to pay him House Allowance and forced him to carry out other duties including those of a Stores Manager. The Claimant further contends that the Respondent refused to compensate him for the extra services, the extra hours worked and failed to pay the Claimant the set minimum wage.

5. The Claimant avers that while at the Respondent's Director's residence, the Director informed him that the company wasn't doing well and that his services were no longer required.

6. The Claimant testified that the Director did not give him a termination letter but he was given a recommendation letter. In cross-examination, the Claimant testified that he had no evidence of the records showing he was a store clerk. He further testified that the amounts sent to him via M-pesa were for the payment of his last salary which was Kshs. 7,000 and further amounts of Kshs. 440 and Kshs. 11,000 to buy building material.

Respondent's Case

7. The Respondent avers that there was no job description at the Respondent as a Store Manager as the Respondent is a small furniture enterprise. Further, the Claimant had no formal education or professional qualification to render services as a Store Manager.

8. The Respondent avers that the Claimant's job description had no specific duties and as such he was expected to undertake the technical

duties assigned to him by the supervisors. The Respondent avers that the Claimant was paid all his allowances, sales effort allowance, annual bonus and his salary increased by 45.5% from Kshs. 11,000 to Kshs. 16,000.

9. In respect of the extra hours worked the Respondent avers that the Respondent is a small business with limited or no sales and could not manage to assign duties for 8 hours or overwork the Claimant.

10. The Respondent avers that the Claimant resigned on his own volition and was never terminated on account of redundancy. Despite the Claimant, seeking alternative employment he failed to heed to the management's pleas to return to work as evident from M-pesa payments sent to the Claimant.

11. RW1, Kevin Muriithi the Respondent's Director and CEO testified that he did not give the Claimant a specific job as the Claimant was given different jobs daily. He further testified that the salary payable included all payments and the Claimant was not working as Store Manager.

12. He testified that the Claimant was not terminated but instead the Claimant secured another job and abandoned his work at the Respondent. In respect of the counter-claim RW1 testified that he prays that the Court do order the Claimant to pay for the expenses incurred in repairing the company's motor vehicle.

Claimant's Submissions

13. The Claimant submitted that Clause 7 of the Respondent's employment contract offended the provisions of Section 31 of the Employment Act as the Clause prohibited the payment of allowances such as housing.

14. The Claimant further submitted that the Respondent's employment contract did not specify the Claimant's job description as required under Section 10 (2) (c) of the Employment Act and relied on the case of **Carolyne L. Musonye v Panari Hotel Ltd [2017] eKLR** where Justice Monica Mbaru held:-

“The requirement that an employer should give an employee a clear job description is not the duty of the employee. Section 10(2) (c) of the Employment Act requires an employer, while giving an employee an employment contract and giving the details of such employment or the particulars thereof to also set out the job description. Where such job description is not defined in the contract of service, the employer must state where the employee is to access such a document. Whether in the work policy, manual or any other work related rules and regulations;..”

15. The Claimant further submitted that the Respondent unilaterally varied the Claimant's employment contract by assigning him the duties of a Store Manager and Driver contrary to Section 10 (5) of the Employment Act. The Claimant relied on the Court of Appeal decision in **The Board of Governors, Cardinal Otunga High School, Mosochi & 2 Others v Elizabeth Kwamboka Khaemba**.

16. The Claimant submitted that he was neither notified of the reasons for termination nor invited for a disciplinary hearing. Hence, his termination was substantively and procedurally unfair. The Claimant cited the decision of Justice Radido in **David Gichana Omuya v Mombasa Maize Millers [2004] eKLR**.

17. With respect to the terminal dues the Claimant submitted that he was never paid house allowance, despite RW1 stating that the basic pay was a consolidated element and was entitled to May 2015 salary one month in lieu of notice and 12 months compensation together with costs of the suit.

18. The Claimant further submitted that he was entitled to salary as a Store Keeper and Driver and driver and that there was no bar to him earning three salaries since the Respondent is a private company and the Employment Act does not prohibit the payment of separate salaries.

19. I have examined all evidence of the parties and submissions herein. From the records, the Claimant was employed by the Respondent as a Technician. He was confirmed into this position on 27.1.2013. His last salary was 16,000/= as per the payslip submitted in Court. It is not clear in which respect the Claimant carried out this technician shop.

20. The Respondents have denied engaging the Claimant in any other duties such as Driver and Store Manager. Indeed there is no evidence that the Claimant served as Store Manager. The fact that he was driving the Respondent's vehicle which Respondent admit was even damaged may be a pointer that the Claimant also carried out duties of driving.

21. That notwithstanding, there is no indication as to how the employment relationship between the Claimant and the Respondent ended.

22. The Claimant has contended that he was dismissed on 15/5/2015 when the Respondent's Chief Executive Officer informed him that the company was not doing well and his services were no longer required. In essence the Claimant contends that he was dismissed due to redundancy.

23. The Respondents have contended that the Claimant absconded duty. The Respondents do not explain whether they served him with any (NTSC) Notice to show cause why his services should not be terminated due to absconding duty.

24. In the circumstances, I will take the view given by the Claimant as the correct position and find that the Claimant was indeed dismissed by the Respondent for whatever reasons. No due process was accorded to the Claimant.

25. Section 45 of Employment Act 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..".

26. In the case of the Claimant, I do find that no valid reasons have been established to warrant dismissal of the Claimant and due process was also not followed. I therefore find the dismissal of the Claimant unfair and unjustified and I declare it so.

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

1. 1 months' salary in lieu of notice = 16,000/=.

2. 6 months' salary as compensation for unfair dismissal = 6 x 16,000 = 96,000/=.

3. Severance pay for 2 years = 15/30 x 2 x 16,000 = 16,000/=.

4. Unpaid house allowance for 17 months = 15% x 10,000 = 28,050/=.

Total = 156,050/=

5. 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 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Mutai holding brief Gomba for Claimant – Present

Respondent – Absent