



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 59 OF 2016

BENJAMIN KESSI PAULCLAIMANT

VERSUS

BRANDED FINE FOODS LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for unpaid terminal dues accruing from the lapsed fixed term contract between the parties herein. The respondent admits that she owes the claimant terminal dues but has filed a counterclaim for ksh.162,585.64 being the net value of stock lost while under the custody of the claimant. No defence was filed against the said counterclaim.

2. The suit was heard on 18/1/2017 when the claimant testified as CW1 and the respondent director Mr. Iqbal Vall testified as RW1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

3. CW1 testified that he was employed by the respondent on 18/12/2013 as the Administrative Manager earning ksh40000 all-inclusive per month. He was not entitled to overtime and he worked from Monday to Saturday from 7.30 am to 1pm and then from 2pm till 5pm or 6pm. The contract was for one year ending 18/12/2014.

4. In April 2014 the County Labour Officer did inspection on the respondent's employment records and recommended that employees be paid overtime among other things. He was however not paid any overtime despite the fact that he worked for long hours through lunch time and evening upto 8pm. He was also never compensated by off days or given any leave.

5. On 6/3/2015, he was informed by a phone call that his services had been terminated and he was ordered to hand over the key and leave the company. On the following day, the Operations Manager called by phone and told him to report back to work on Monday 9/3/2015 which he did.

6. After working for 2 weeks, the respondent's directors told him that he stole or caused the loss of stock worth ksh.38160. CW1 protested the accusation and requested the director to report the matter to the police but he declined. Instead the director's spouse retrieved an invoice for the said stock of ksh.38160 endorsed an admission to pay by the claimant in her own handwriting and coerced him to sign which he did in fear of losing his job.

7. In the following week, the director's spouse gave him yet another invoice to sign admission to pay ksh.191,600 for lost stock but he refused to sign. He denied the said loss or theft contending that the premises are guarded 24 hours and has CCTV surveillance which could have caught any one stealing such large consignment which would require a vehicle to ferry.

8. Despite his protest, and without his consent, the respondent deducted his salary by 4400 from March to June 2015 and from July to November 2015 she deducted ksh.10000 per month. In December 2015 all his salary was not paid plus the pay for the 5 days worked in January 2016 when he was requested to do a handing over. He was also not paid for the annual leave earned in the 2 years worked.

9. On cross examination, CW1 denied that he was in the management although he was in charge of the Godown number 2. He admitted that he was in charge of goods coming in and leaving the godown. He admitted that the invoices given to him to admit liability to pay were in respect of stock from his Godown. He maintained that he was forced to sign the admission to pay or his contract would not be renewed. He contended that after signing the admission is when he was given a renewal letter backdated to 1/1/2015.

10. CW1 admitted that after signing the admission to pay, ksh4400 started being deducted from his salary but later it was increased to ksh10000. He denied the counterclaim and maintained that he owed the respondent nothing. He however admitted that the deductions made from his salary did not fully pay for the alleged lost stock in the 2 invoices. He however clarified that the deductions fully paid and exceed the admitted invoice dated 28/2/2015. He concluded by confirming that he was not the only person with the key to the godown.

DEFENCE CASE

11. RW1 confirmed that CW1 was employed as the Administrative Manager of Godown number 2. He stated that CW1 was responsible for goods in the store but he acted negligently leading to loss of stock while under his custody. Upon failure to explain or account for the lost goods, CW1 signed admission to pay for the same by monthly instalments until payment in full. He denied that CW1 was coerced to sign the admission to pay. He stated further that CW1 never complained about the salary deductions until he left employment on 6/1/2016.

12. RW1 contended that the employment contract was renewed on 1/1/2015 before the stock got lost. He denied that CW1 was entitled to any overtime and contended that he was in the management and his pay was all inclusive. He admitted that salary for December 2015, 6 days worked in January 2016 and accrued leave had not been paid and cited the counterclaim as the reason.

13. RW1 calculated the total loss of stock from the 2 invoices to be ksh.235,865.64 and the salary deductions from March to November 2015 being ksh.73279. After factoring the said salary deductions, the respondent counterclaimed for ksh. 162,585.64 plus costs.

14. On cross examination, RW1 confirmed that stock losses started in 2015 and he thought that other people were taking advantage over him. He admitted that he never involved the police after CW1 admitted the offence and apologized. He contended that the stock was audited but he did not produce any audit report. He further stated that the stolen stock was not insured. He admitted that there was a second person with the key to the godown but stated that he could not open the store without the claimant's key.

15. He admitted that the salary for December 2015, January 2016, leave earned and certificate of service are ready for collection by the claimant from his office.

ANALYSIS AND DETERMINATION

16. There is no dispute that the claimant was employed by the respondent and he successfully completed his contract term from 19/12/2013 to 31/12/2015. There is also no dispute that he worked a further 6 days after the lapse of the contract after being requested to do a handing over. The issues for determination

are:

- (a) Whether the reliefs sought by the claimant should be granted.
- (b) Whether the counterclaim should be allowed.

Claimant's Reliefs

17. The claim for salary for December 2015 and January 2016 have been admitted and therefore I award to the claimant ksh.47833.30 as prayed. Likewise the claim for accrued annual leave for 2 years is admitted. I therefore award him $ksh.34850 \times 42/26 = 56,296.15$

18. The claim for refund of skh67600 is allowed only to the extent that it exceeded the admitted sum of ksh.38160. Although the claimant alleged that he never signed it voluntarily, the fact that he refused to sign the second invoice dated 26/3/2015 and still continued to work till the end of his contract militates against his case. Being in charge of the Godown as a manager, the claimant was capable of refusing to sign admission to false demand from the employer. He was also capable of demanding for an investigations and even request for audit to verify the alleged loss like he did when faced with the second invoice dated 26/3/2015. Consequently, I award him ksh.67600 less ksh.38160 equaling to ksh 29,440. The VAT charged in the invoice dated 28/2/2015 is disallowed because the stock was not sold but lost.

19. The claim for overtime is dismissed because the clamant was in a management position. His contract of employment offered him the position of Administrative Manager with no overtime pay and he accepted by signing the contract on 18/12/2013. The said contract was not affected or varied at all after the Labour Inspection Report dated 10/4/2014.

20. The claim for certificate of service is allowed because it is a right granted under Section 51 of the Employment Act.

Counterclaim

21. In view of the finding above that the claimant only admitted the invoice dated 28/2/2015 for ksh38160, and denied the invoice dated 26/3/2015 for ksh.191,600, the respondent had the burden of proving that she lost stocks cited in the said invoice while under the custody of the claimant and that its value was ksh.191600. Regretfully she did not do so on a balance of probability. RW1 never produced any Audit Report on the stocks in Godown number 2 and never produced any other documentary evidence to prove that the alleged lost stocks were received in the Godown, placed under the custody of the claimant and later left the Godown through the negligence or effort of the claimant. Without such evidence, I find and hold that the claimant was right to refuse liability to pay the skh191600 in the invoice dated 26/3/2015. I will also not compel him to pay to the respondent any sum which has not been admitted or proved on a balance of probability. I dismiss the counterclaim of ksh.162,585.64.

DISPOSITION

22. For all the reasons stated above, I dismiss the counterclaim and enter judgment for the clamant in the sum of ksh.133,569.45 plus costs and interest from the date of filing the suit. He will also have certificate of service.

Dated, signed and delivered this 30th June 2017

O.N. Makau

Judge