



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 489 OF 2015

BETWEEN

FELIX ODHIAMBO MWAI CLAIMANT

VERSUS

P.N.MASHRU LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company Advocates for the Claimant

Cootow & Associates Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 16th July 2015. He states he was employed by the Respondent Company as a Turn Boy between 1st September 2003 and 10th August 2012. Initially he was employed on casual basis. He was transferred to Respondent's yard at Jomvu in April 2005 in the position of Foreman, where he worked uninterruptedly, till 10th August 2012. He earned a monthly basic salary of Kshs. 8,000. His contract was terminated on the ground of redundancy. He faults the process, stating it was unfair and unlawful, and contrary to Section 40 of the Employment Act 2007. He did not receive notice and was not registered with any Social Security Plan. He did not take annual leave. He prays for Judgment against the Respondent for:-

- a) Notice pay of 1 month at Kshs. 9,200.
- b) House allowance for the period of employment at Kshs. 105,600.
- c) Annual leave for the entire period at Kshs. 54,467.
- d) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 110,400.
- e) Punitive damages.

f) Certificate of Service to issue.

g) Costs.

2. The Respondent filed its Statement of Response on 30th July 2015, admitting the Claimant was its Employee, but denying his contract was terminated by the Respondent. The Claimant decided to leave employment voluntarily. He was paid service of 7 years at Kshs. 23,800 under Section 35 of the Employment Act and accrued annual leave at Kshs. 25,480- total Kshs. 49,280. He has no further claim against the Respondent. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

3. Felix Odhiambo Mwai gave evidence, and closed his case, on 4th November 2016. The Respondent adopted its Pleadings and Documents on record and closed its case the same date. The dispute was last mentioned on 30th November 2016, when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

4. The Claimant restated the contents of his Pleadings and Witness Statement of record, in his evidence in Court. He was not paid Kshs. 49,280 shown in Respondent's Bundle of Documents. He did not sign acknowledging receipt. Cross-examined, he stated he was paid very little terminal dues, about Kshs. 20,000. He was called by the Respondent 1 or 2 months after termination, to receive this sum. He did not recall when the amount was paid. Payment Voucher indicates it was in July 2012. He did not instruct his Advocates to deduct this from the total claimed in Court. He testified on redirection that the Vouchers are dated July 2012 while he left employment in August 2012.

5. The Claimant submits the Respondent is the custodian of employment records under Section 74 of the Employment Act 2007. No evidence was adduced to contradict the Claimant. Section 43 of the Act requires an Employer to prove reason for termination. The Respondent did not prove that the Claimant voluntarily resigned. Termination was not justified under Section 43 and 45 of the Act. The Claimant denied signing Payment Vouchers. The documents are dated a month before termination. No witness was called to authenticate the documents. Annual leave computed by the Respondent in any event is grossly understated. There is no claim made for service pay.

6. The Respondent submits that the burden of proof, under Section 107 [1] of the Evidence Act lies with he who alleges. The Claimant did not adduce evidence to prove his contract was unlawfully terminated. He did not discharge his burden of proof under Section 47 [5] of the Employment Act 2007. He admitted on cross-examination that he received terminal dues. He acknowledged he was paid over a month after he left employment. The documents are dated 2nd July 2012 and 10th July 2012, meaning the Claimant left employment before July 2012. As the Claim was filed on 16th July 2015, it is time barred under Section 90 of the Employment Act. House allowance would only be claimed from 2008 when the Employment Act 2007 came into being. It is in any case time barred. So is the claim for accrued annual leave. The Claimant failed to show he was unfairly dismissed, and is not entitled to compensation.

The Court Finds:-

7. In the Statement of Response filed on 30th July 2015, the Respondent does not give dates to key occurrences in Claimant's employment history with the Respondent. Paragraph 3 states the Claimant worked for the Respondent, and later decided to voluntarily leave employment. Upon the Claimant voluntarily leaving, he was paid his terminal dues.

8. The dates when an Employee enters and exits employment, are particulars of employment which must be retained by the Employer, in written form. If there is a dispute on the particulars, it falls on the Employer to prove its position, or disprove the position stated by the Employee.

9. The Respondent cannot rely on its disputed Payment Vouchers, to show the Court the date when the Claimant left employment, and to found an argument on limitation of time. Such an argument would only

have validity if the Respondent supplied the Court with clear documents on the date the Claimant left employment. The Respondent states the Claimant left employment voluntarily. No date is given when he left employment. In his evidence, the Claimant stated termination was in August 2012. This was his position as well, in the Statement of Claim and Witness Statement. He was consistent. His Claim was filed on 16th July 2015, within the 3 year period permitted under Section 90 of the Employment Act 2007.

10. The burden of proof, in termination of employment cases, is shared between the Employee and the Employer. Section 107, 109 and 112, must be read in the context of Section 43, 45 and 47 [5] of the Employment Act 2007. Until recent amendment to the Industrial Court Act, it is to be recalled that proceedings of this Court were not subject to the Evidence Act Cap 80, the Laws of Kenya.

11. Section 43 requires the Employer to show valid reason in all cases of termination of employment, whether termination is made voluntarily by the Employee; whether it is by mutual agreement; whether it is instigated by the Employer; or whether termination is involuntary. The Employer must be in a position to show valid reason why the employment relationship has ended. Section 45[7] requires the Employee to show he has been unfairly dismissed, or had his contract unfairly terminated, while the Employer has the duty to show justification for its decision. The maxim that he who alleges must prove is archaic and doctrinal postulation in the context of employment law, which needs to be interpreted, within the peculiarities of the employment relationship.

12. The Claimant testified on cross-examination that he was paid some little terminal dues. He was evasive on the actual amounts paid. He did not account for what was paid in his Pleadings. He was dishonest. He states he was paid nothing by way of annual leave. When it became clear during trial that he had received some amount of money in annual leave pay, he changed the claim in his Submissions, saying what was paid was in any case, understated. The prayer for annual leave pay for the entire period worked has no merit, and is declined.

13. The Respondent did not show it discharged its housing obligation to the Claimant, under Section 31 of the Employment Act 2007. It was the responsibility of the Respondent to get the Claimant reasonable accommodation at, or near, the place of work; or pay to him a reasonable house rent allowance to enable the Claimant secure such accommodation. He was paid a basic salary of Kshs. 8,000 throughout.

14. Accumulated wage obligations are recoverable at any time they remain unpaid. It is the arrears which are claimed, as a single item. The cause of action for the whole arrears stays alive, and is renewed each day there is default. The time the cause of action arises is not to be seen, as the end of every month, when house allowance is to be paid, or should have been paid; the cause of action arises at the end of the default. The obligation is cumulative. Every day the Employer underpays the Employee, the cause of action is revived. The arrears would only be unrecoverable, if the Cause as a whole was filed beyond the 3 year limitation period. It is said the cause and the remedy are barred, upon the lapse of the given 3 year time limit. To argue that house allowance, leave pay or underpayment of wages can only be recovered stretching back to 3 years from the date of termination ignores the continuous nature of breach, and the cumulative obligation. The assertion that the prayer for house allowance is time barred, or that the Claimant would only be entitled to house allowance under the Employment Act 2007, is without merit. Employees are entitled to all their accrued benefits during, and on leaving employment. Housing obligation of Employers to Employees has always been a feature of the law, new and old law. It was not created by the Employment Act 2007. Section 9 of the old Employment Act required Employers to avail their Employees reasonable housing accommodation, or sufficient cash allowance, to enable Employees have reasonable housing accommodation. Regulation 4 of the Regulation of Wages [General] Order under the Regulations of Wages and Conditions of Employment Act Cap 229 the Laws of Kenya, imposed similar housing obligation on the Employer. The Regulation is still in force, under Section 63 of the Labour Institutions Act 2007.

15. The Claimant is granted 15% of his basic pay of Kshs. 8,000 for the years worked as stipulated under Regulation of Wages [General] Order. It is noted that even in the Vouchers used by the Respondent in showing the Claimant was paid his dues, the years of service are indicated as 7. The Claimant gives his date of employment as 1st September 2003. He however claims house allowance for the period April

2004 to 10th August 2012. The assumption would be he was not entitled to house allowance or was paid for the period between 1st September 2003 and April 2004. **He is granted house allowance in arrears of 88 months as claimed at Kshs. 105,600.**

16. The Court is not able to find that the Claimant left employment voluntarily as alleged by the Respondent. It is always most unusual to find an Employee leave employment unprovoked and unannounced. There is always a trigger. It is for the Employer to show the Court what this trigger is. If the Employee has resigned voluntarily, there ought to be some form evidence of voluntary resignation. If the Employee simply deserts, there ought to be, not only evidence of desertion, but also some evidence of attempts made by the Employer to trace the Employee; invite the Employee to a disciplinary hearing over the offence of desertion; and bring the employment relationship to an end formally. It is not acceptable, or believable, to say the Employee just vanished.

17. In the absence of justification by the Respondent, the Court is persuaded the most probable cause of termination, was as alleged by the Claimant, redundancy. The Claimant was told business was down. He left involuntarily. The Respondent did not invoke the law of redundancy under Section 40 of the Employment Act. Termination was unfair under Section 40 as read together with Sections 43 and 45 of the Employment Act. The Respondent did not prove it was experiencing low business. It did not show diminished business, or operational necessity. Termination was instigated by the Respondent, and failed on justification and fairness of procedure. **The Respondent shall pay to the equivalent of 10 months' consolidated salary at Kshs. 92,000 in compensation for unfair termination.** The prayer for notice pay is merited. **The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 9,200.**

18. There is no case with regard to the prayer for punitive damages.

19. **Certificate of Service to issue under Section 51 of the Employment Act 2007.**

20. No order on the costs.

21. **Interest granted at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

a) Termination was at the instance of the Respondent, and was unfair.

b) The Respondent shall pay to the Claimant: arrears of house allowance at Kshs. 105,600; compensation for unfair termination the equivalent of 10 months' consolidated salary at Kshs. 92,000; and 1 month salary in lieu of notice at Kshs. 9,200, total- Kshs. 206,800.

c) Certificate of Service to issue.

d) No order on the costs.

e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge