



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 903 OF 2015

WILLIAM TABUCLAIMANT

VERSUS

A & A HAULIERS LTDRESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondent on 24/1/2015. The respondent denies ever employing the claimant or terminating his services as alleged. On the contrary, the respondent avers that she only provided the claimant with space and facilities to learn mechanical engineering but he and another employee Mr. Rashid Suleiman stole two dozens of lanterns and disappeared after the matter was reported to the police.

2. The suit was heard on 21/11/2016 when the claimant testified as CW1 but the defence never attended court. However, on 19/1/2017 the trial was reopened by consents and respondent allowed to adopt the witness statement written by her HR Relations Officer Mr. Benson Ongoro as her defence evidence. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

3. The claimant stated that he was employed by the respondent as a Turnboy on 24/7/2004 earning ksh.2000 per month. Thereafter the salary was increased to 2500 per month in 2007, 3500 in 2010 and finally ksh. 4000 in 2012. That in his view the salary was underpaid because it was below the gazette Wage Order. He produced as an exhibit the Legal Notice No. 71 of May 2012 to substantiate his contention of low pay.

4. The claimant testified that he persistently agitated for a higher pay and when the employer would not stomach it any more, he was dismissed without any valid reason, hearing or prior notice. He served demand notice through his trade union and later through his lawyer. In response, the respondent denied liability and he brought this suit. He denied the allegation by the defence that he stole 2 dozens of lanterns from the guard's gate house on 22/1/2015 and maintained that he was unfairly terminated. He therefore prayed for compensation, and arrears of his underpaid salary. He also prayed for accrued leave because he was never granted any annual leave.

DEFENCE CASE

5. Mr. Benson Ongoro stated in his written statement that the claimant came to the respondent without any skill and she provided him with space and facilities to learn mechanical engineering with the hope of becoming a Turnboy. That he was always being given ksh.4000 for lunch and transport among other things to facilitate him as he learned his trade. He therefore denied that the claimant was employed by the respondent.

6. He went on to state that on 22/1/2015 the claimant and another intern called Rashid Suleiman stole 2 dozens of lanterns from the security gate house. That the said theft took place during lunch time and it was captured by CCTV. However, the two interns disappeared after the matter was reported to the police for investigations.

ANALYSIS AND DETERMINATION

7. The issues for determination are:

(a) Whether the claimant was employed by the respondent.

(b) If (a) above is affirmed, whether the claimant was unfairly dismissed or he deserted his employment.

(c) Whether the relief sought should be granted.

Employment Relationship

8. No written contract of employment or otherwise produced by either party to prove that the parties herein related either as employer-employee or otherwise. Under Section 9(2) of Employment Act, the burden of preparing a written contract lies in the employer who also has the burden of keeping its custody under Section 10(6) of the Act. Under Section 10(7) of the Act, where in any legal proceedings, the employee makes verbal allegations as to the terms of the contract, the employer shall have the burden of disproving the same by the written contract.

9. The claimant allege that he was employed by the respondent as a Turnboy earning between ksh.2000 per months in 2004 and ksh.4000 in 2015. The respondent verbally alleges that the claimant was not her employee but only an intern learning mechanical engineering and only being given ksh.4000 per month to facilitate his subsistence while learning his trade.

10. Section 2 of the Employment Act defines employee as ***“a person employed for wages or salary and includes an apprentice and indentured learner”***.

11. The concise Oxford English Dictionary defines an apprentice as; *“a person learning a trade from a skilled employer”*.

12. From the foregoing definition, it is clear that the claimant related to the respondent as her employee within the meaning of Section 2 of the Act. In any evident, even the most unskilled person does not need to remain an intern for 10 years to become a mere Turnboy. The claimant herein worked for 10 years earning regular salary every month in line with Section 2 above.

Unfair termination or desertion

13. The claimant contends that he was terminated without any notice for what he believes was due to his agitation for higher pay. The respondent on the other hand contends that the claimant and another intern stole 2 dozens of lantern from her premises and when she reported the matter to the police, they disappeared. The defence alleged that the theft was caught by CCTV but no such evidence was adduced in this case. She has also not proved that any lanterns were kept in the gate house. Lastly, no evidence of the report made to the police was adduced by the defence. Consequently, it is my finding of fact that the defence has failed to prove that any theft of lantern by the claimant or at all took place on 22/1/2015 as

alleged by the defence. It is my further finding that the claimant never disappeared from work in fear of any police investigation but was unfairly terminated by the respondent for agitating for a higher pay.

14. Under Section 45(2) of the Act, termination of employment by the employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason for termination was theft of 2 dozens of lanterns which was captured on CCTV. As observed above the employer has not produced any evidence of such theft or even the presence of the said lanterns at the gate house. Consequently, it is my finding that the said reason for termination has not been proved on a balance of probability.

15. Likewise the employer has failed to prove that she followed a fair procedure before terminating the services of the claimant. Under Section 41 of the Act, before terminating the services of the employee on ground of misconduct, under Section 44 of the Act, the employer must first accord the employee a fair hearing. In this case the respondent did not attempt to prove fair process but merely alleged that the claimant disappeared after the matter was allegedly reported to the police.

16. Having failed to prove valid and fair reason for dismissing the claimant and that she followed a fair procedure, the termination of the claimant's contract of service on 24/1/2015 was unfair within the meaning of Section 45 of the Act.

Reliefs

17. Under Section 49(1) of the Act, I award the claimant one month salary in lieu of notice plus 12 months salary as compensation for the unfair termination. In awarding the compensation, I have considered the fact that the claimant had served the respondent for over 10 years. The award will be based on the minimum wage for General Labourers as at 24/1/2015 which is ksh.9780.95 plus house allowance at the conventional 15% or the same equaling to ksh.11248.10. He will thus get ksh.11248.10 as salary in lieu of notice plus ksh.134,977.10 as compensation for the unfair termination.

18. He is also entitled to ksh.10382.85 as salary for the 24 days worked in January 2015 but he will only get the pleaded amount of ksh.9,313.60.

19. The claimant prays for arrears of salary underpayment for the period between November 2012 and January 2015. He relies on Legal Notice No.71 of 2015 and No. 197 of 2013 as the basis of the said claim. From November 2012 to April 2013, the minimum monthly basic salary for General Labourers was ksh.8,579.30 plus 15% as house allowance equaling to ksh.9866.20. Considering the monthly pay of ksh.4000, the monthly under payment was ksh.5866.20 per month equaling to ksh.35,197.20. From May 2013 to January 2015 the minimum basic monthly salary for General Labourer was ksh.9780.95 plus 15% as house allowance totals to ksh.11,248.10 subtracting the payment of ksh.4000, the net underpayment was ksh.7248.10. The claimant has however prayed underpayment for only 12 month ending in April 2014 equaling ksh.86,977.20. The total award for the salary underpayment is ksh.122,174.40.

20. The claimant has prayed for leave in respect of 36 months. No particulars of the 36 months and the wages applicable under the gazetted Wage Orders have been pleaded. I will therefore allow leave only for the last year of service being 2013/2014 at the rate of the basic monthly pay of ksh.9780.95. Under Section 28(1) (a) of the Employment Act, the employee was entitled to 21 days annual leave equaling to ksh.7900.

21. The claim for certificate of service is allowed as a matter of right to the claimant under Section 51 of the Act.

DISPOSITION

22. For the reasons that the claimant's contract of service was unfairly terminated without payment of his dues, I enter judgment for him in the sum of ksh.286,682.25 plus costs and interest. He will also have certificate of service.

Dated, signed and delivered this 23rd June 2017

O. N. Makau

Judge