



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 390 OF 2014

BETWEEN

ALFRED MUTINDACLAIMANT

VERSUS

RAISONS DISTRIBUTORS LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

Christine Kipsang & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 15th August 2014. He states he was employed by Respondent's predecessor Company, Raisons Trading Company Limited as an Assistant Mechanic, on 1st June 2008. He was initially paid a consolidated monthly wage of Kshs. 9,250. His contract was terminated by the Respondent on 30th June 2014. At this time he was earning a consolidated monthly wage of Kshs. 15,250.
2. He was a trained Mechanic Grade 3, as shown in his Leaving Certificate [Claimant's appendix 2], issued by Mumbuni Engineering & Driving School. He was not paid wages commensurate with his Trade Test Grade. He asked the Respondent to pay him wages in accordance with the applicable wage orders. The Respondent did not comply, resulting in accumulated underpayments by the time the Claimant left employment.
3. He further complains that he was not granted a hearing before termination. He prays for underpayments of salary and compensation the equivalent of 12 months' salary, totaling Kshs. 373,565. He prays for certificate of service, costs and interest.
4. The Respondent filed its Statement of Response on 1st October 2014. Its position is that it paid the correct rate of wages to the Claimant at all times. He was paid in accordance with his contract and the law. The Claim has no merit and should be dismissed with costs to the Respondent.

5. The Claimant gave evidence and closed his case, on 2nd September 2015. The Respondent called its General Manager Khalil Ahmed Malik, who gave evidence on 14th September 2016, bringing the hearing to a close. The dispute was last mentioned in Court on 31st October 2016 when Parties confirmed the filing of their Submissions and Judgment date issued.

Claimant's Case

6. The Claimant reiterated the contents of his Pleadings in his Evidence. The Respondent was initially registered as Raisons Trading Company, later becoming Raisons Distributors. His contract was terminated without notice. He was paid salary for days worked and annual leave pay on termination. He was issued an invalid Certificate of Service, which indicated his period of service as from 1st January 2014 to 30th June 2014.

7. Cross-examined the Claimant told the Court he was employed in the year 2009. He was Mechanic Grade 3. The Leaving Certificate is dated 31st January 2011. He had the qualification on employment. His Claim was filed in August 2014. Underpayments go back to the year 2010. It is not true that termination was on the basis of poor performance. There was no meeting between the Claimant and the Employer, before termination. He explained on redirection that he enrolled for mechanical grade course in February 2007. It is indicated in the Leaving Certificate. The Certificate issued on 31st January 2011. He graduated in 2009. He availed the Certificate to the Respondent. There was no wage review.

Respondent's Case

8. Malik confirmed that the Claimant was indeed employed by the Respondent's predecessor on 1st June 2006, in the position and terms and conditions of employment stated in the Claim.

9. He did not submit formal qualifications to the Respondent on recruitment. The Respondent has never seen Claimant's Leaving Certificate prior to institution of the Claim. The Certificate is dated 31st January 2011, 2 years after the Claimant was employed.

10. He was paid in accordance with the law, as captured in his pay slips. The predecessor Employer was bought by the successor Employer who is the current Respondent. The Claimant continued on the same terms and conditions of employment. He signed to continue working under such. Termination was on the ground of non-performance. There were many faults in his performance. Malik made these known to the Claimant in several meetings. He was paid all his dues, and collected his Certificate of Service.

11. Cross-examined, Malik confirmed the Claimant was employed in 2009. Malik served as General Manager for both Employers. The Respondent assumed the liabilities of its predecessor. There were no performance targets and no appraisal was carried out. The Claimant did not produce any Grade Test Certificate on employment. The Claimant, his Supervisor and Malik met before termination. There were no minutes of the meeting recorded. Malik did not know about the minimum wage, but testified the Respondent paid the Claimant slightly more than he was supposed to earn. Redirected, Malik testified the terms of service with the successor Company took effect in 2014, hence the dating on the Certificate of Service.

The Court Finds:-

12. Malik was forthright in his evidence on date the Claimant was employed, and the continuity of the Claimant's terms and conditions of service, once there was a changeover in the Employer. It is clear the Claimant was employed in 2009 by Respondent's predecessor, and continued in employment under the Respondent, up to the year 2014. There was no need to omit the period served under the previous Company, from the Claimant's Certificate of Service. The General Manager in both Companies remained Malik, and there was essentially no change in the Claimant's duty description or the terms and conditions of service. If it was necessary, the Respondent should have specified the change in the name of the Employer on the Certificate of Service, rather than draw a document cutting off 5 creditable years of

service from the Claimant.

13. It is ordered that the Respondent shall reissue the Claimant with a Certificate of Service capturing the period of service as falling between 2009 and 2014.

14. Was the Claimant underpaid? The Court is not convinced that the documents 'Appointment For Trade Test' and 'Leaving Certificate' were brought to the attention of the Employer, at the time the Claimant was recruited, and during his employment, so as to enable the Respondent pay him wages applicable to Mechanic Test Grade 3.

15. The first document issued way back on 17th October 2008. The Claimant was required to report for trade test at Machakos Technical Training Institute. This letter signed for the Director of Industrial Training, does not mention the Trainer.

16. The Leaving Certificate is dated 31st January 2011, and issued by Mumbuni Engineering and Driving School. The Claimant did not make attempt at explaining the credentials of this Institution as an industrial trainer, under the Industrial Training Act Cap 237 the Laws of Kenya.

17. There is considerable doubt that the 2 documents supplied to the Court by the Claimant, show the Claimant acquired a National Trade Test Certificate of Proficiency. The first document is an invitation to sit a test, the second certifies the Claimant attended and left Mumbuni Engineering and Driving School. None of the documents is a National Trade Test Certificate of Proficiency.

18. The Claimant did not show he held a valid Trade Test Certificate issued under the Industrial Training [Trade Testing] Rules, as submitted by the Respondent. What he holds, even assuming it to be valid proof of his Trade Proficiency was not shown to have been availed to the Respondent, before, at or during employment. It would not be reasonable therefore, to order the Respondent to meet the prayer for underpayments, based on the wage levels of a Mechanic Test Grade 3.

19. There is no merit however in Respondent's submission that part of the claim for underpayment of wages would be time-barred under Section 90 of the Employment Act 2007. The correct position is that every time an Employee is underpaid, there is a renewal in the date the cause of action arises, until the underpayments cease. The Employee is entitled to claim all benefits accrued to him during employment, so long as the Claim in general, is brought within the time given under 90 of the Employment Act.

20. The prayer for underpayments of wages fails on the ground that the Claimant did not show he made it known to the Respondent that he held Mechanic National Trade Certificate Grade 3.

21. Was termination based on valid ground and fairly carried out? Malik told the Court the Claimant performed poorly. He admitted there were no targets set for the Claimant. There was no appraisal carried out at any time. The Court is persuaded the Respondent did not grant the Claimant an opportunity to explain poor performance under Section 41 of the Employment Act 2007. There was no evidence of poor performance. Termination was neither based on valid ground, nor carried out fairly.

22. The Respondent is granted the equivalent of 10 months' salary in compensation for unfair termination at Kshs. 152,500.

23. No order on the costs.

24. Interest granted to the Claimant at the rate of 14% per annum from the date of Judgment.

IN SUM, IT IS ORDERED:-

a. The Respondent shall re-issue Claimant's Certificate of Service indicating the correct period of service as 2009 to 2014.

b. The prayer for underpayment of wages fails.

c. The Respondent shall pay to the Claimant the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 152,500.

d. No order on the costs.

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

Dated and delivered at Mombasa this 19th day of June 2017

James Rika

Judge