



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 253 AND 409 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH WABUKHO IMBAYI.....CLAIMANT

-Versus-

FRIDAH LWILE ONYANGO.....RESPONDENT

AND

JOSEPH MALABA SHIUNDU.....CLAIMANT

-Versus-

FRIDAH LWILE ONYANGO.....RESPONDENT

JUDGMENT

Introduction

This judgment relates to two separate cases, **Cause No. 253 of 2015** filed by **JOSEPH WABUKHO IMBAYI** on 15th July 2015 and **Cause No. 409 OF 2015** filed by **JOSEPH MALABA SHIUNDU** on 23rd November 2015. The two suits are both against **FRIDAH LWILE ONYANGO** the Respondent. The suits were heard together though they were not consolidated.

Facts

Both Claimants were employees of the Respondent. **JOSEPH MALABA SHIUNDU** (hereinafter referred to as **SHIUNDU**) was a driver of tractor registration No. KBL 538M and motor vehicle registration no. KAR 531V make Toyota Rav 4 while **JOSEPH WABUKHO IMBAYI** (hereinafter referred to as **IMBAYI**) was employed as a conductor/assistant to the driver. The tractor was contracted by Mumias Sugar Company Ltd to plough for contracted farmers while the vehicle was used occasionally for collecting fuel. When there was no work at Mumias Sugar Ltd the tractor ploughed for other farmers. Imbayi doubled up as a salesman for the tractor, sourcing for work from private farmers and collecting payments in respect thereof which he remitted to the Respondent.

Imbayi's Case

Imbayi's case is that he was employed by the Respondent in the year 2009 and was paid a monthly salary of Kshs. 7000.

He states that he was forced to quit his job in December 2014 when he quit following non-payment of his salary for 4 months. His claim is for the arrears of salary for the 4 months not paid, pay in lieu of annual leave for the 5 years worked and compensation for loss of employment.

At the hearing of his case Imbayi testified that he worked from 9th June 2010 to December 2014 following non-payment of his salary for 4 months. He testified that he left on his own and had no disagreement with the Respondent.

Under cross examination the Imbayi denied that he stopped working and absconded duty from June 2014 and reported back to work in July then left again.

Shiundu's Case

Shiundu's case is that he worked for the Respondent from 2009 to December 2014 when he was forced to quit his job due to non-payment of his salary. He seeks payment of 4 months' salary, pay in lieu of annual leave for 5 years and compensation for loss of employment.

Under cross examination Shiundu stated that he was employed on 9th June 2010. He stated that he rolled with motor vehicle KAR when he had gone to buy fuel and the vehicle was extensively damaged to the extent that it was written off. After that he worked with the tractor till December 2014. He denied that he did not work from May 2014.

Respondent's Case

In the defence filed by the Respondent she pleads that Imbayi was employed in 2013 as a turn boy at a gross salary of Kshs. 6,500 which was promptly paid every month. That in June 2014 Imbayi collected kshs. 4000 and another kshs. 3200 from a farmer by the name Francis for transmission to the Respondent which he failed to account for and misappropriated. Due to fear of arrest he absconded duty from June 2014 following which his employment was terminated. It is pleaded that the claimant did not work in the month of September to December 2014. It is further pleaded that the Claimant utilised all his leave days prior to absconding duty and has no outstanding leave days.

At the hearing the Respondent testified that Shiundu was initially employed on a salary of Kshs. 6000 which was increased to Kshs. 6500 in 2014. She testified that there was a break in his service over non remittance of money he collected but the issue was resolved and he resumed work at the beginning of 2014. He left employment in June 2014.

For Shiundu the Respondent testified that he worked from June 2010 to August 2014. His last salary was Kshs. 12,000.

Determination

I have considered the pleadings and evidence. The evidence in the pleadings and the testimony in court have several contradictions which the parties failed to reconcile. For example the Claimants pleaded that they were employed in 2009 and left employment in 2014 while in their testimony they testified that they were employed in 2010. The Respondent too pleaded that Imbayi absconded duty while at the same time it is pleaded that his employment was terminated after he failed to account for money he collected on behalf of the Respondent. For Shiundu it is pleaded that he was relieved of his duties after he was involved in an accident with motor vehicle KAR rendering him redundant following the write off of the vehicle while it is in the same breath stated that he left work on his own in August 2014.

From the evidence on record, it is not disputed that the Claimants were both employed on 9th June 2010. It is however disputed when and how they left work and what they are entitled to.

The issues that arise for determination are therefore the following:

1. Whether Imbayi deserted duty in June 2014 or he left employment in December 2014 due to non-payment of his salary;
2. Whether Shiundu left employment in December 2014 due to non-payment of his salary or he was declared redundant after the Toyota Rav. 4 he was driving was written off following a road accident; and,
3. Whether the Claimants are entitled to the orders they prayed for.

Whether Imbayi deserted duty in June 2014 or he left employment in December 2014 due to non-payment of his salary

The Respondent stated that Imbayi's employment was terminated and at the same time that he deserted duty in June 2014. Imbayi on the other hand stated that he left work on his own in December 2014 due to non-pay of salary for 4 months. It is the duty of an employer to keep records and to produce such records whenever required to do so and in any legal proceedings. Section 10(7) provides that-

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

In this case it is therefore the burden of the Respondent to disprove what the Claimant alleges. Having given two different versions of what transpired it is the opinion of the court that the Respondent has failed to discharge her obligation under section 10(7) and holds that the Claimant left employment on his own in December 2014 after the Respondent failed to pay his 4 months' salary.

Whether Shiundu left employment in December 2014 due to non-payment of his salary or he was declared redundant after the Toyota Rav 4 he was driving was written off following a road accident

The Respondent gave different versions of what transpired in the case of Shiundu as in the case of Imbayi. The first version is that Shiundu was declared redundant after the Rav 4 he was driving was written off following a road accident. This contradicts the Respondent's evidence that Shiundu was primarily employed to drive the tractor and only used the Rav 4 to collect fuel occasionally, meaning that it would not be necessary to lay him off if the Rav. 4 was written off as he would still drive the tractor. The second version is that Mumias indicated that there was no work and the Respondent closed work.

Whichever the version is the truth, the bottom line is that Shiundu was laid off. A lay-off is a redundancy under section 40 of the Act. Although the Respondent pleaded that she complied with the section there is no evidence of compliance either procedurally or by payment of the terminal benefits payable in the case of redundancy. The redundancy was therefore unlawful and I hold accordingly.

Remedies

JOSEPH WABUKHO IMBAYI

Imbayi claimed payment of 4 months' salary, annual leave for the period worked and compensation. During cross examination he mixed himself up stating at one point that he took leave and also that he did not take leave. This does not absolve the Respondent from the Responsibility to keep records. Section 10(3)(a)(i) provides that-

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the installment containing them, is given of—

(a) any terms and conditions relating to any of the following—

(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars

given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

Further section 74(1)(f) provides-

(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

(a)

(b)....

(c)

(d)

(e)

(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;

No records have been produced by the Respondent in respect of leave taken and leave due to the Claimant. As provided in section 10(7), it is the employer's burden to disprove what the employee alleges. The Respondent has not discharged the burden and as a consequence must be presumed not to have given the Claimant leave.

I award Imbayi 4 months' salary and annual leave at 21 days per year for 4 years based on salary of Kshs. 6500 at **Kshs. 25,600** and **Kshs.18,200** respectively.

The Claimant testified that his employment was not terminated and he is not entitled to compensation.

Joseph Malaba Shiundu

Shiundu prayed for 4 months salary, pay in lieu of leave and compensation. As in the case of Imbayi I find that he is entitled to annual leave. And as I have already stated above he was declared redundant without due process. I therefore award him pay in lieu of annual leave for 4 years at 21 days per year based on a salary of Kshs. 12,000 per month in the sum of **Kshs. 33,600** and severance pay at 15 days per year worked in the sum of **Kshs.24,000**.

The Respondent shall also pay Claimant's costs which shall be taxed in one file only as the cases were heard together.

Dated and signed and delivered this 27th day of July, 2017

MAUREEN ONYANGO

JUDGE