



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.888 OF 2010**

**STEPHEN KARIUKI.....1<sup>ST</sup> CLAIMANT**

**MOSES MWANGI WAMBUI .....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**MICHAEL NJOROGE..... 1<sup>ST</sup> RESPONDENT**

**SANDSTONE LOGISTICS LIMITED/**

**CYLINDER WORKS LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Memorandum of Claim is premised on facts that the claimants were employed by SandStone Logistics and or by Cylinder Workers Limited through verbal agreement on 9<sup>th</sup> November, 2005 and 1<sup>st</sup> April, 2003 for the 1<sup>st</sup> and 2<sup>nd</sup> claimant as Driver and Turn Boy respectively. The respondent is both registered companies. The claimant were earning Kshs.15,000.00 and 12,000.00 respectively per month
2. The 1<sup>st</sup> claimant was terminated from his employment on 26<sup>th</sup> June, 2010 and the 2<sup>nd</sup> claimant was terminated on 19<sup>th</sup> March, 2010 and no terminal dues were paid. There was no warning, notice or hearing before such termination of employment.
3. On 26<sup>th</sup> June, 2010 he had been from Magadi to deliver sand for the respondent site office and upon return to Nairobi, the 1<sup>st</sup> respondent told him to leave the lorry he was driving and go away. He was not given any reason, notice of hearing and to date he has no knowledge of the reasons for termination of his employment. The claimant would work for long hours without pay of overtime and did not take any leave days.
4. On 10<sup>th</sup> February, 2010 the 2<sup>nd</sup> claimant, Moses Mwangi had an accident while at work, he was beaten by a spider and was taken to Magadi hospital near where he had been transferred for work. He was treated for some days but the respondent stopped his salary and terminated his employment which was unfair.
5. The claim is also that the claimants were not issued with letters of employment and their employment was not with benefits under the Regulation of Wages in the building and construction industry Order 2004 of 13<sup>th</sup> August, 2001 and the Employment Act, 2007. The unfair termination was reported to the labour officer but the respondents to settle the matter.
6. The respondent failed to provide reasonable accommodation to the claimants contrary to industry

regulations and the law. The claimants were therefore unfairly terminated from their employment or were unlawfully declared redundant contrary to legal Notice No.94 of 13<sup>th</sup> August, 2004 regulating wages in the building and construction industry.

7. The claimants are seeking notice pay, unpaid leave days, compensation for loss of employment, underpayments, house allowance, severance pay, overtime and work during public holidays. Costs of the suit.

8. In evidence, the 2<sup>nd</sup> claimant testified that upon employment by the 1<sup>st</sup> respondent he was allocated duties by all the respondents and his employment was with any written letter, contract or appointment. He would be paid monthly at Kshs.12,000.00 through a bank deposit. He had no off time and worked during public holidays and was not paid overtime work. He submitted his NSSF and NHIF cards but his dues were never remitted.

9. On 19<sup>th</sup> March, 2010 the claimant was dismissed from his employment with the respondent. While the claimant was at work in Magadi, he was sleeping in a tent and was beaten by a spider on his thigh which started swelling and on 10<sup>th</sup> March, 2010 he informed the site foreman Mr Nderitu and he left to attend at the hospital. He was treated and discharged. The doctor gave him 2 days off and he told Nderitu about it. At the time he was working using a tractor and he asked to have change to lighter duties as his thigh was still in pain. He was sent to see the 1<sup>st</sup> respondent but he never got to meet him. He could not go back to Magadi as he still required further medical attention and thus left for home.

10. The 1<sup>st</sup> claimant testified that upon employment by the respondents he was paid Kshs.15,000.00 monthly and on 26<sup>th</sup> June, 2010 he was dismissed without notice or any reason. The 1<sup>st</sup> respondent had sent him to deliver sand at Magadi and when he returned to Nairobi, he was directed to leave his lorry and go away. On the material day of dismissal, the claimant had been to Magadi for 5 days and was required to take another vehicle but this was not allocated to him. He remained without work for 5 months. Where the claimant was sent to Magadi by the respondent, he attended to all work as required as there was no reliever driver. He was given verbal instruction and thus the claims made.

## **Defence**

11. The respondents in defence deny the claims made by the claimants. The suit is bad in law and an abuse of the court process. The 2<sup>nd</sup> respondents are two legal entities and their liability if any is not joint. There is an apparent misjoinder of parties and thus the claim is defective. The claimants cannot make a joint claim as they are different and distinct.

12. The defence is also that the claims made by the claimant are without proof and the dues demanded are not justified. The claims on notice pay, leave days, earned wages unpaid, house allowances, service pay, rest days, public holidays and overtime hours are denied in toto as there is no evidence by the claimants that they were entitled or had earned such dues.

13. In evidence the respondent's witness was Nelson Nderitu, a supervisor at Sandstone Logistics Limited and the 2<sup>nd</sup> respondent herein. He testified that he is aware of the claims made by both claimants especially the 2<sup>nd</sup> claimant who was taken to his site in Magadi. As the respondent is in construction industry, the witness as the supervisor is in charge of masons, casual, carpenters and related workers. The 2<sup>nd</sup> claimant was a casual under his supervision. He was at the Magadi site for a month and then he disappeared. He had alleged to have been bitten by a spider and was treated at the respondent site. He left without notice or leave application which can be obtained at the head office. All employees were paid a night out allowance and stay in tents while in Magadi was not allowed. He night out allowance was to ensure that the employees accessed accommodation on site and in Magadi such accommodation was available.

14. With regard to the 1<sup>st</sup> claimant, Mr Nderitu testified that he knew him as a Lorry driver and moved

from office to office/site carrying construction materials for delivery. He did not work long hours as alleged and would take a break for the night. No casual was at work on Sunday and all work started at 8am and ended at 5pm.

15. The second witness for the respondent was Michael Kiarie Mungai an accountant with the respondent and testified that he knew the claimants who worked for the respondent. As the accountant he recalls that the 2<sup>nd</sup> claimant was a casual employee for the respondent and was paid his wages in cash or by a bank deposit. His NSSF and NHIF were paid without default. The claimant had been sent to one of the construction sites and he deserted.

16. The witness also testified the 1<sup>st</sup> claimant was a driver and mechanic with the respondent. He was allocated work but he was not available to do it. The claimant would be called when there was work. The respondent thus called the claimant to make a delivery at one site but he failed to attend. He refused to respond to telephone calls to him. As the respondent depended on tender awards and called the claimants but when the claimants failed to show up at their places of work, and the tenders completed, there was no termination of employment by any acts of the respondent.

17. At the close of hearing, the parties filed written submissions.

### **Determination**

18. Several issues raised by the respondent in defence are already addressed by the court through the ruling on the preliminary objections on the challenge to the claim as filed against the various respondents and the claimants making a joint claim.

19. Vide ruling of 7<sup>th</sup> February, 2013 the court held that the respondent had failed to file sufficient evidence or file full particulars in respect of the employment of the claimants for the court to be able to make a determination as who the employer of the claimants was/were. Both parties were directed to file its evidence. The respondent was specifically directed to file full particulars with regard to the employment of the claimants.

20. In the ruling delivered on 3<sup>rd</sup> April, 2013 the court dismissed objections filed by the respondent vide notice dated 6<sup>th</sup> August, 2013. The respondent had not filed employment records with regard to the claimant's employment.

21. Some documents and work records have since been filed but this was after the fact of the ruling noted above. Failure to file work records and material necessary in proceedings such as these offends the mandatory provisions of section 10(6) and (7) of the Employment Act, 2007. The failure to comply and file such records has the implication that the required records are either not voluntarily given or such simply do not exist and were not part of the records when the claimants were in employment. The later seems to be the case here as the claimants were never issued with any employment letters, not payment statements or certificates of service as when they were due. Such are documents required to be issued in terms of section 9, 10, 20 and 51 of the Act. A written contract of employment, particulars of employment, an itemised payment statement and a certificate of service are documents which should be readily issued to an employee in accordance with the law. Where a claim is filed with the court, such are automatic records which should be submitted by the employer, whether the employer is the claimant or the respondent. The duty is vested upon the employer.

22. In this case, where the claimants remained in the employment of the respondents for period over and above the statutory period contemplated under section 37 of the Employment Act, 2007 they became full time employees. The duties performed by the claimants in their nature were continuous, did not end at the end of day and were paid on a monthly basis. The claimants are therefore protected for purposes of their employment rights, termination of such employment and payment of terminal dues.

23. An employee who is sick, unwell or requires attending and seeking medical attention has the right

secured under section 30 and 34 of the Employment Act, 2007. Where the employee is absent from work due to sickness and has proceeded on to seek medical assistance, he must inform the employer of his circumstances within a reasonable time. In this regard, the law allows the employee to use a third party to communicate his circumstances to the employer. Such is to allow an otherwise seriously sick employee have the chance to let the employer know that they are unable to be at work following sickness as held in **Dorothy Ndung'u versus Machakos University [2016] eKLR**.

24. Upon resumption of duty, an employee who has been sick must submit a medical certificate from an authorised medical practitioner. The essence of section 30 and 34 of the Act is essentially to give an explanation for absence from work by providing the requisite documents as otherwise, absence from work without a just cause is a subject for summary dismissal under section 44(4) of the Employment Act, 2007.

25. In this case the 2<sup>nd</sup> claimant urged the court that he had a spider bite and was forced to go to Magadi hospital. He informed his supervisor but the supervisor was categorical in his evidence that the claimant did not state anything about his medical condition save that he was unable to drive his truck and the claimant remained out of work and thus advised him to report to the head office in Nairobi.

26. When put to task to explain the medical records submitted in court, the 2<sup>nd</sup> claimant was not honest. At the end of his testimony, the claimant did not have a medical practitioner's certificate as required under section 34 of the Employment Act, 2007. The claimant's absence from work was therefore without a just cause. He cannot claim he was unfairly terminated from his employment.

27. With regard to the 1<sup>st</sup> claimant, the defence was that he was allocated work and he declined. There is however no record of warning, sanction or a hearing and witnesses to the same.

28. The absence of work records from the respondent to demonstrate the number of hours the claimant was working and the hours he arrived from Magadi and was then required to take up more work is lacking. This leaves a major gap in the defence and the assertions that the claimant declined allocated work thus comes under challenge.

29. Where the 1<sup>st</sup> claimant refused to attend to his duties as required by the employer, the work records, had such been filed would have easily exonerated the respondent. Without work records, the 1<sup>st</sup> claimant's evidence must be taken as the truth.

30. Termination of employment with regard to the 1<sup>st</sup> claimant, the same being without notice, hearing or warning stating his misconduct is unfair.

## **Remedies**

31. The 2<sup>nd</sup> claimant's termination of employment was thus justified. He is only entitled to any salaries he had earned at the time of termination but cannot claim notice pay, compensation or salaries for days not at work. The respondent has confirmed that the record and submission of NSSF and NHIF were remitted for both claimants. As such, no service pay is due.

32. The claim for severance pay though claimed, I find no evidence that this was a case that warrant an award of severance pay as such is only due in a case of redundancy under section 40 of the Employment Act, 2007.

33. The 1<sup>st</sup> claimant was earning Kshs.15, 000.00 before termination of employment. Notice is pay is due under section 35 of the Employment Act, 2007. He is awarded notice pay at kshs.15, 000.00.

34. The claim for leave and overtime hours though claimed, the claimant have not made effort to address the rationale or basis of the computation. Even where these claims are due, the claimants should lay the basis for these claims. The court shall however award leave due for the last year of service in accordance with section 28 of the Employment Act, 2007 all being Kshs.15,000.00 and Kshs.12,000.00 respectively.

35. The claimant seeks salary owing for June, 2010. The evidence on record is that the claimants were employed from 9<sup>th</sup> November, 2005 to 1<sup>st</sup> April, 2003. Save for the 1<sup>st</sup> claimant who testified in courts that he was in employment until June, 2010; he is entitled to the due salary in the absence of contrary evidence by the respondent. He is awarded Kshs.15, 000.00.

36. House allowance is an entitlement to all employees in full and continuous employment for period of over 24 hours and going beyond a full month. Such amount is due in where employment is terminated on account of gross misconduct. The claimants are hereby awarded Kshs.345, 600.00.

37. Compensation is only due to the 1<sup>st</sup> claimant and he is hereby awarded Kshs.180, 000.00 being 12 months gross pay.

**Accordingly, judgement is hereby entered for the claimants against the respondents jointly and severally with an award of Kshs.345, 600.00 as house allowance; and each claimant is awarded as follows;**

**1<sup>st</sup> claimant is awarded notice pay at Kshs.15, 000.00; lave pay kshs.15, 000.00; and compensation at Kshs.180, 000.00.**

**The 2<sup>nd</sup> claimant is hereby awarded leave pay at kshs.12, 000.00.**

**The claimants are awarded costs.**

Delivered in open court at Nairobi this 2<sup>nd</sup> day of October, 2017.

**M. MBARU JUDGE**

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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