



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NUMBER 208 OF 2014

BETWEEN

ELIJAH BULIBO ATULO CLAIMANT

VERSUS

1. JONATHAN OKUTOYI MASONGOLE

2. FRANCIS WETTA OKUTOYI t/a WESTKAY SERVICES RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Ms. Rajab Advocate, instructed by Kadima & Company Advocates for the Claimant

Mr. Odongo Advocate, instructed by Odongo B.O. & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on 14th April 2014. He states he was employed by the Respondents' father James Okutoyi Masongole as a Security Guard, in the year 1994. The business passed on to the Respondents on the death of their Father, in 2006. At that time, the business was known as Arrow Ninja Services Limited. It was changed to Westkay Services by the Respondents in 2008. The Claimant continued to work as a Security Guard. On 30th November 2013, the Claimant was given a notice of retirement. He asked the Respondents to pay his terminal dues based on 24 years of service. They told him to continue working as they looked into his request. He worked until 1st December 2013, when the Respondents terminated his contract of employment due to the Claimant's poor health and old age. He earned Kshs. 4,200 per month throughout service. He was not paid terminal benefits. He prays for the following orders against the Respondents:-

a) Terminal dues.

- b) Underpayment of salary for 24 years.
- c) Annual leave pay of 24 years.
- d) House allowance for 24 years.
- e) Costs.
- f) Interest.
- g) Any other suitable reliefs.

2. The Respondents filed their joint Statement of Response, on 5th March 2014. They deny proprietorship of Westkay Services. The Claimant includes claims against a company called Arrow Ninja, which the Respondents state was folded up. The Respondents were never part of the management of Arrow Ninja. They were young school boys at the time their Father passed away. They never issued the Claimant notice of retirement in November 2012, as proprietors of Westkay. To their knowledge, Westkay closed shop in 2008. He was paid Kshs. 42,000 by Westkay on 8th February 2012, after he made demand for terminal dues. The Respondent prays for dismissal of the Claim with costs to the Respondent.

3. The Claimant gave evidence on the 24th October 2014, and called 1 Witness, Reuben Naftali, on the 2nd December 2014 when he closed his case. The 2nd Respondent Francis Wetta Okutoyi gave evidence for the Respondents on the 3rd March 2016, when hearing closed. The matter was last mentioned on the 17th June 2016, when Parties confirmed filing of their Submissions, and decision of the Court reserved for delivery on the 29th July 2016.

Claimant's Position

4. He testified he was employed by the Respondents' Father in 1994. The Father died in 2006. The business continued to be operated by the siblings, Edwin, Francis and Jonathan. The Claimant continued to work. Francis continued to pay the Claimant his salary. The business was named Arrow Ninja. After the death of the patriarch it was renamed New Arrow Ninja. Later on Employees were issued uniforms with the label Westkay Services. The Claimant earned Kshs. 4,200 per month.

5. He indicated his wish to retire, in a letter to the Respondents, dated 30th November 2011. He was asked to continue working as the Respondents looked into his request. He decided to quit in December 2013.

6. He was not paid terminal dues. He reported the dispute to the Labour Office. He was only paid salary for the last month worked at Kshs. 4,200. It is not true that he was paid Kshs. 42,000 as shown in the payment voucher contained in the Respondents' bundle of documents.

7. He never went on annual leave. He only took sick offs. Reuben Naftali was a Director. Naftali did not pay the Claimant's salary; it was paid by Francis.

8. Upon cross-examination, the Claimant testified he was employed by James Okutoyi. Arrow Ninja was a limited liability company. It is still in existence. The Claimant has sued the business. Jonathan is a Director. Francis refused to pay the Claimant's dues. Westkay is a business name. Francis was a Director on New Arrow Ninja.

9. The Claimant saw Francis for the first time in 2006, at the time of the patriarch's death. The Claimant did not know if Francis was in school then. The Claimant was not issued a letter of employment. The retirement letter from the Claimant is dated 30th November 2011. It was addressed to the Managers of WestKay Services Limited. The Claimant was not sure if WestKay was in existence at the time.

10. He was bought work uniform which had the WestKay Trade Mark. Francis, Jonathan and Edwin

worked together for WestKay. Naftali was a Director. The Claimant is sure he sued the right Parties. The Claimant was paid Kshs. 4,200, not Kshs. 42,000 as shown in the salary voucher. The Respondents added zero on the figure of Kshs. 4,200, to create the impression that the Claimant was paid Kshs. 42,000. He confirmed on redirection that Arrow Ninja is a business name. It is a functional business. The 2 Respondents are the active Partners. Francis paid to the Claimant Kshs. 4,200, not Kshs. 42,000.

11. Reuben Naftali testified he has known the Claimant since the Claimant was in school. The Claimant was employed by Arrow Ninja, a Company owned by the late James Okutoyi Masongole. The Respondents are heirs to Masongole. Naftali and Masongole were Partners in another security business, New Lanet Security Services Limited. Masongole left New Lanet, and started Arrow Ninja.

12. Edwin refused to work with his siblings. Naftali and Francis established WestKay under Business Registration Act, to assist siblings who were left out by Edwin. Naftali left Francis and Jonathan to manage WestKay. He returned to Lanet Security Services Limited. Francis and Jonathan are still running WestKay Limited. The Claimant left the business in 2013. He complained to Naftali that the Respondents had refused to pay his terminal dues. Francis alleged he paid the Claimant Kshs. 40,000. Francis and his Brothers inherited their Father's estate.

13. Naftali denied on cross-examination, that he had been coached by the Claimant to testify before the Court. Arrow Ninja Limited was succeeded by New Arrow Ninja Limited. The new company took over the liabilities of the old. Edwin ran away with New Arrow Ninja. Naftali and Francis formed WestKay. Jonathan is a Manager not a Director of WestKay. Jonathan and Naftali have not been sued in the Claim before the Court.

14. Francis told Naftali he paid the Claimant Kshs. 42,000. The Claimant was complaining he was not paid terminal dues. Naftali doubted what Francis told him on the payment. Francis and Godfrey Okutoyi were shown to be Administrators of the estate of James Okutoyi.

Respondent's Position

15. Francis testified Jonathan is his Brother. The 2 are sons of the late James Okutoyi. The Claimant Elijah Bulibo was a Friend to James Okutoyi.

16. Francis established WestKay Services Limited, with his Brother. They never employed the Claimant. The company closed around 2007/2008. The Claimant nonetheless offered the Respondents expert guidance. He offered such guidance as a Friend of the Respondents' Father. He was paid Kshs. 4,200 monthly, for his advice. The Claimant wrote a letter indicating he wished to retire. He did his own computation of terminal dues, amounting to Kshs. 42,000. He was paid this amount and signed a salary voucher in acknowledgement. He dealt with WestKay Services Limited. Francis was never engaged with Arrow Ninja. He was in school when Arrow Ninja was in operation. He did not know what happened to the Company after his Father died. His Father was a Co-Director of Arrow Ninja with an Israeli gentleman named Crow. Francis did not know if Crow continued to run the business after the death of Francis' Father. Naftali was one of the Partners in WestKay Services.

17. Francis told the Court on cross-examination that he is working in the private security industry, under the WestKay Company Limited. He did not have the registration certificate in Court. He knew nothing of Arrow Ninja. It was a Company owned by his Father. It was not part of the assets inherited from James. Francis conceded later, that indeed he inherited 20% shareholding of Arrow Ninja limited under H.C. at Nairobi, Succession Cause Number 27 of 2008, in the matter of the estate of James Okutoyi Masongole.

18. Francis did not have documents showing dissolution of WestKay Services. The Respondents accepted the services rendered by the Claimant. They did not issue him a letter of employment. He earned Kshs. 4,200 per month. He wrote to the Respondents expressing his wish to go on retirement. The Respondents did not respond to him in writing.

19. Francis did not calculate the terminal dues payable to the Claimant. The Claimant himself did the

computation, and there was an agreement between the Parties that the sum payable was Kshs. 42,000. It is not true that the Respondents changed the amount paid from Kshs. 4,200 to Kshs. 42,000. The voucher was indicated to be 'casual salary voucher.' Francis confirmed the Claimant was employed by his Father. He did not agree with Naftali's testimony that the Claimant worked for all the Respondent's businesses- Arrow Ninja, New Arrow Ninja and WestKay.

20. Francis closed his evidence with the explanation that the Claimant's retirement letter was addressed to WestKay Services Limited. This company is not a Respondent. No other beneficiary of Arrow Ninja shares has been sued. Administrators under the succession cause were named as Francis and Godfrey. Godfrey has not been sued. Francis was in school when his Father was involved in Arrow Ninja. The Respondents pray for dismissal of the Claim.

The Court Finds:-

21. The various companies and firms featured in the proceedings herein: Arrow Ninja; New Arrow Ninja; and WestKay Services are all business vehicles used by the family of James Okutoyi Masongole, in running their private security business. Like in the case of ***Laban Awando Kanyo v. Susan Larsen t/a Utamaduni Craft Centre [2013] e-KLR***, the Court is satisfied the Claimant was an Employee who served in a Family business. The business and legal forms, through which the Family operated, are of no consequence in this Claim.

22. It is of no consequence that Francis was in school, when his Father was running Arrow Ninja. It has been shown the business was passed onto the siblings in a probate cause at the High Court. Even without this, the Claimant has demonstrated he worked consistently for Father and his Sons. The Respondents have been shown to be the persons who actively employed the Claimant, as of the time the Claimant felt it was time to retire. Francis used to pay his salary. It was the Respondents who advised the Claimant to hang on, as they arranged for his departure from the Family business. Francis gave evidence on behalf of his Brother. He and his Brother exercised control over the Claimant. They were the decision makers in the business, and when it came for the Claimant to retire, they made the decision and directed what was to be done. They properly were sued as Employers, and fit the definition of the term 'Employer' given under Section 2 of the Employment Act 2007.

23. The Claimant worked for the Respondent's Family business for 24 years. He retired in December 2012, having worked first for the Respondent's Father in 1994. He was a Friend to the Respondent's Father, and even after the death of the Patriarch, continued to give 'expert guidance' to the heirs. He was paid Kshs. 4,200 monthly.

24. There is no firm evidence that he was paid anything on termination. The Respondent relies on the salary voucher which indicates the Claimant received Kshs. 42,000 as terminal dues.

25. The authenticity of this document as part of the Claimant's employment record is doubtful. The Claimant explained he was paid Kshs. 4,200 which was his normal monthly salary. Someone according to the Claimant, altered the figure on the voucher, by adding zero at the end of Kshs.4,200, to give the impression the Claimant was paid Kshs. 42,000. The Claimant made a report to the Police. The status of the criminal investigation was not revealed to the Court.

26. This is not a document the Court should rely on. Other reasons which demand the Court rejects this piece of evidence include the indication on the face of the document that the document issued to a Casual Employee. There is no evidence from either Party to show the Claimant was in casual employment. The sum of Kshs. 42,000 is not broken down in details. Section 20 of the Employment Act 2007 requires an Employer shall give a written statement to an Employee, at or before the time at which any payment of wages or salary is made to the Employee. The voucher does not show what the amount of Kshs. 42,000 represented.

27. The evidence by Francis was that the Claimant himself made the computation, and forwarded to Francis for payment. This evidence is implausible. It is not usual for an Employee to determine his own

terminal benefits, and forward a figure to the Employer to pay. The Respondents had advised the Claimant to hang on, as they settled him in his retirement. It is strange that the Claimant should in the end compute his own terminal dues, be paid and then dispute payment. Why would the Claimant in any event go about complaining to the other long term James Okutoyi Masongole's friend and business pal Naftali, about the terminal dues?

28. The Respondents should have honoured the relationship they and their late Father have had with the Claimant. They should have recognized the Claimant's long years in service. He worked from 1994. In his retirement notice dated 30th November 2011, he makes it clear he was grateful to the Respondent's Family for having given him the opportunity to work. He asked for his terminal dues, to enable him relocate to his home. The Respondents should have settled his claim amicably. It was imprudent to compel this old man to move through the Ministry of Labour and the Court, in pursuit of dues which he rightfully earned over a period of 24 years.

29. Having said this, the Court does not think the Claimant is justified in claiming underpayment of salary. He worked for a friend and entered into an understanding that he would be paid a certain amount of money as salary. Employment relationships are dynamic. ***In Cause Number 908 of 2011 (Nairobi) between Njoroje Muigai v. System Integration Limited***, the Court stated this about employment in family businesses: ***"It is not preposterous therefore, for employment law to borrow from family law, and encourage the recognition and investment in what relationship the Partners have over the years built."*** The Parties had a strong family relationship, rather than a cold contractual relationship. They should not act, after 24 years, as though they did not have a relationship, beyond the employment relationship. The Claimant is not justified in claiming underpayment for 24 years. Similarly claims for house rent allowance, medical allowance, annual leave pay and meal allowance, all pegged on a service period of 24 years, have no foundation. The details of these claims were not disclosed in the pleadings or the evidence of the Claimant. There are specific figures contained in the submissions filed by the Claimant, such as on salaries allegedly paid to him in the years 1994, 2003 and 2006. These rates were not mentioned in the pleadings and the evidence. The Claimant did not inform the Court whether he made these demands in the lifetime of James Okutoyi Masongole. He worked for those years on the basis that he was serving a Family Friend. He continued to serve after Masongole's death, out of friendship. When he lodged his complaint with the Ministry, he did not make most of the claims he has made in Court. The letter from the Ministry dated 8th December 2013 shows he demanded to be paid service pay and annual leave pay.

30. Given the Parties' long relationship the Court is of the view the Respondents should recognize and reward the Claimant's long years of service to their Family. ***He is allowed service pay at 15 days' salary for each of the period of 24 years completed in service, which is worked out as follows- 15 days' salary = Kshs.2,100 x 24= Kshs.50,400.***

31. The Respondents shall pay to the Claimant the costs of the Claim.

IT IS ORDERED:-

[a] The Respondents shall pay to the Claimant Kshs. 50,400 in service pay.

[b] Costs to the Claimant.

Dated and delivered at Mombasa this 29th day of July, 2016.

James Rika

Judge