



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 716 OF 2015

ISMAIL RAMADHAN JUMA.....CLAIMANT

VS

MAZ DISTRIBUTORS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for the unfair termination of the claimant's employment contract by the respondent on 25.7.2015. The reliefs sought are:-

- a. Salary underpayment of Kshs. 424,545.**
- b. House Allowance of Kshs. 365,585.**
- c. Annual leave of Kshs. 123,595.**
- d. Compensation for unfair termination of Kshs. 296,628.**
- e. One month salary in lieu of notice being Kshs. 24,719.**

2. The respondent has denied ever terminating the services of the claimant and averred that, it is the claimant who refused to do the duties assigned and voluntarily left work. In addition the respondent avers that as a consequence of the abrupt termination of the contract of service by the claimant, she suffered loss and has filed a counter claim for the said loss plus an outstanding loan of Kshs. 20,000 advanced to the claimant in May 2015. Lastly the respondent has denied the allegation that she under paid the claimant's salary and withheld his House allowance for five years.

3. The suit was disposed of by written submissions on the basis of the pleadings, witness statements and documentary evidence filed.

Summary of the claimant's case

4. The claimant stated in his statement filed on 18.9.2015 that he was employed by the respondent from 10.1.2015, and continued until 25.7.2015 when he was dismissed verbally. That the termination was without any reasonable cause and was done without following the due process provided by the Employment Law. That no terminal dues were paid to him after the dismissal despite demand being made

through his lawyer. That at the time of his dismissal he was receiving a salary of Kshs. 17,000 per month.

5. The claimant produced his letter dated 10.1.2011 and letter dated 14.9.2011 from the respondent to the Managing Trustee NSSF requesting for registration of the claimant as a member of the NSSF to prove that he was employed by the respondent. The claimant further produced statement for his NSSF contribution confirming that contributions were remitted from October 2011 to June 2015. The foregoing documents however, went contrary to the claimant's statement in relation to the date when the claimant started working for the respondent. but they are in consonance with the memorandum of claim.

6. Lastly, the claimant has produced a copy of General Wage Order for 2015 to support his claim for under paid wages.

Defence case

7. The respondent has filed 3 witness statements from her Chief Accountant Mr. Abdallah Athman, Sales Representative Mr. Omar Mzamil and a driver Mr. Salim Simba dated 18.2.2016.

8. Mr. Abdallah Athman has admitted in his statement that the claimant was employed by the Respondent as a driver from 1.1.2011 on casual basis until 1.0.2011 when his appointment was confirmed. That his salary was mutually agreed at kshs.18,891 per month but after deductions, the net pay was kshs.17,000. That the said pay was within the minimum provided by the law. On that basis he denied the allegation by the claimant that his salary was under paid.

9. Mr. Athman further stated that on 25.7.2015 the claimant refused to drive motor vehicle registration number KBS 768D which had already been loaded with goods for him to deliver. That after refusing to do the work assigned to him, the claimant went away and returned on 27.7.2015 but again he disappeared. That he reported back on 30.7.2015 and disappeared.

10. In support of the counter claim, Mr. Athman stated that when the claimant absconded duty on 25.7.2015, the respondent incurred loss of business for the day. In addition she further stated that when the claimant went for his leave in May 2015, he requested and was advanced a loan of Kshs. 20,000 which he did not pay back. He then produced a letter dated 13.1.2015 by the claimant applying for a loan of Kshs. 40,000. He has also produced a Petty Cash Voucher dated 5.6.2015 allegedly signed by the claimant to acknowledge receipt of the Kshs. 20,000 loan.

11. Mr. Omar on the other hand has clarified that the claimant was employed as a Canter driver to deliver goods locally. He echoes the statement of Mr. Athman by stating that on 25.7.2015 the claimant failed to perform the duties assigned to him to deliver goods which had already been loaded onto motor vehicle registration number KBS 768D and thereby caused loss of business to the respondent. That on 27.7.2015 and 30.7.2015 the claimant reported to work but again absconded duty.

12. The same evidence was repeated by Mr. Salim Simba in his witness statement.

Analysis and Determination

13. There is no dispute that the claimant was employed by the respondent from January 2011 to July 2015 as a Canter driver whose duty was involved delivery of goods locally. The main issues for determination in this case are:-

a. Whether the claimant was unfairly dismissed or he deserted work without notice.

b. Whether the relief sought in the suit and the counter claim should be granted.

Unfair termination vs Desertion

14. After weighing the evidence presented to the court by the two sides, I find on a balance of probability

that the termination of the employment contract herein was done by the claimant through desertion. In my opinion the evidence by the defence witnesses is consistent in proving that the claimant attended work on 25th July 2015 and refused to perform the duties assigned to him and disappeared only to return on 27th and 30th July 2015 and again refused to work. I also find that the brief statement by the claimant has however fallen short of proving that he was unfairly terminated as provided for under section 47(5) of the Employment Act. The said provision states that:-

“47 (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee...”

Reliefs

15. In view of the foregoing finding that the termination was by the claimant, I further find that the reliefs provided for unfair dismissal by section 49 of the Employment Act are not available to the claimant in this case. Consequently the claims of salary in lieu of notice and compensation for unfair termination are dismissed.

16. The claim for under payment is however allowed only to the extent that the gross pay made was below the statutory minimum published by the Government under section 46 of the Labour Institutions Act. In 2011, 2012, 2013 and 2015 the minimum wage was Kshs. 12,877, Kshs. 16,078, Kshs. 16,602.85 and Kshs. 18,595.20 respectively exclusive of House allowance. Under section 31(1) of the Employment Act, the employer is required to provide reasonable housing accommodation for each employee or pay the employee sufficient money to meet the rent for reasonable accommodation. In this case the respondent never provided housing to the claimant but paid salary which she contends that it was within the requirement set by the minimum wage orders published by the Government under section 46 of Labour Institutions Act. The claimant has however maintained that he was receiving Kshs. 17,000 per month which was below the minimum pay set by the Government and that he was never paid any house arrears.

17. After considering the materials presented to the court and upon perusing the General Wage Orders published by the Government under section 46 of the Labour Institutions Act, I am of the view that the claimant's salary was not under paid during the year 2011-April 2013. The reason for the foregoing is that the undisputed evidence by the defence is that the claimant was receiving a gross pay of Kshs. 18,891 per month. After factoring 15% of the said Kshs. 18,891 as the Housing allowance for a reasonable accommodation which is Kshs. 2,833.65 per month, the basic pay between 2011 and April 2013 was Kshs. 16,059.35. The said gross pay was therefore reasonably within the minimum gross pay prescribed by the Government under section 46 of the Labour Institute Act.

18. However after the Gazettement of higher minimum pay effective May 2013 and another one effective May 2015, the gross pay of Kshs. 18,891 became an underpayment. From May 2013 the minimum basic pay was Kshs. 16,602 and the house allowance was Kshs. 2,490.45 based on the said rate of 15% of the basic pay. That meant that the gross pay for the period May 2013 to April 2015 was Kshs 19,093.30 and as such the total underpayment of the gross pay per month was Kshs. 202.30 after subtracting gross pay of Kshs. 18,891 from the said Kshs 19,093.30. Consequently, during the 24 months period between May 2013-April 2015, the claimant's gross pay was underpaid by Kshs. 4,854.65.

19. As regards the period between May 2015 and July 2015, the basic statutory minimum pay was Kshs. 18,595.20 and the House Allowance was Kshs. 2,789.30 making the gross pay Kshs. 21,384.50. After subtracting the gross pay of Kshs. 18,891 from Kshs. 21,384.50, the under payment per month was Kshs. 2,493.50 and the total underpayment for May, June and July 2015 was Kshs. 7,480.50. Consequently the claimant is entitled to payment of Kshs. 12,335.10 as salary underpayment.

Annual leave

20. The claimant prayed for leave for 5 years. The respondent never produced any leave records to disprove the claimant's claim for leave for 5 years. The claim was filed within 12 months next after the

ceasation of the continuous breach of the right to leave. Although the statement by Mr. Athman alluded that the claimant was advanced Kshs. 20,000 loan before going on leave, no evidence to prove that the claimant indeed went for the leave and that he had utilized all his leave. Without such evidence I will award the prayer for leave at the rate of basic pay under the Government Wage Order for 21 days leave per year. I therefore award him Kshs. 10,400.65 for 2011, Kshs. 12,986.10 for 2012, Kshs. 13,410 for 2013 and 2014 respectively totaling to Kshs. 26,820 and then Kshs. 8,761.20 for the 7 months of 2015. The total award for leave is assessed at Kshs. 58,967.95.

Counter claim

21. The claim for Kshs. 20,000 loan was not contested by the claimant. It is therefore allowed as prayed. However the claim for the loss of business on 25.7.2015 was not properly pleaded and proved in evidence and it therefore dismissed.

Disposition

22. For the reasons stated above I enter judgment for the claimant for Kshs. 71,303.05 less Kshs. 20,000 Counter claimed leaving a net of **Kshs. 51,303.05**. The Claimant will also have half costs and interest.

Signed, dated and delivered this 7th October, 2016.

ONESMUS MAKAU

JUDGE