



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 118 OF 2014**

**EDWIN MANDELA SHUJA.....CLAIMANT**

**v**

**YAKO SUPERMARKET LTD.....RESPONDENT**

**JUDGMENT**

1. The issues for determination in this judgment are, *when was Edwin Mandela Shuja (Claimant) employed by Yako Supermarket Ltd (Respondent), what was Claimant's occupation/designation, whether the Claimant's services were terminated or he absconded from work, if Claimant's services were terminated whether it was unfair and appropriate relief.*
2. The Court will set out each party's respective cases under each of the identified issues. The Court has also considered the submissions filed by the parties.

**When was Claimant employed by the Respondent**

3. The Claimant pleaded that he was employed by the Respondent on 2 March 2010. In his oral testimony, he stated that he was employed with effect from the same date and put on a daily wage of Kshs 250/- and after 2 years he was put on a monthly wage. Previously, he had worked in an hotel.
4. The Respondent in its Statement of Defence denied that the Claimant's employment commenced on 2 March 2010 and put him to strict proof.
5. The Respondent's witness Nipul Ramesh Shah testified that the Claimant was employed on 1 September 2012, and he was issued with a letter of appointment (produced as part of list of documents). The witness also stated that the Claimant signed the letter of appointment.
6. During cross examination, the Claimant initially denied but later admitted signing the contract.
7. The parties have given inconsistent dates for commencement of the employment relationship. The letter of appointment generally should be the primary foundation for identifying the correct date. The Claimant asserted that the relationship commenced before the formal contract was entered into. The Respondent maintained there was no relationship prior to the formal contract.
8. Where the parties give inconsistent positions on the commencement of an employment relationship, the Court can examine and or look at other secondary material to determine exactly when the relationship started.
9. Both parties annexed as part of their documents, the Claimant's National Social Security Fund Provisional Member Statement of Account. The Statements all indicate that the Claimant was employed on 1 September 2010, but was registered for purposes of the Fund on 4 October 2012.
10. The Respondent did not go any further in controverting the Claimant's testimony on effective date of commencement of employment. In consideration of the secondary material and the testimony, the Court finds that the Claimant was employed with effect from 2 March 2010.

## **Shop Assistant or general labourer**

11. The Claimant did not directly plead as to his designation or occupation but merely asserted that he was underpaid. In testimony, he stated that he was employed as a Shop Assistant in 2010. He stated that his duties included packing, carrying goods for customers and arranging goods on the shelves.
12. In cross examination he admitted signing an appointment letter.
13. The Respondent's proprietor on the other hand testified that the Claimant was issued with a written contract, which was produced. According to the witness, the Claimant's duties included cleaning, dusting, sweeping and other general duties.
14. The letter of appointment clearly indicated the Claimant's designation as general labourer. If I understand the Claimant's contention correctly, it is that he was carrying on the duties of a shop assistant and not those of a general labourer.
15. From the narration of duties performed by the Claimant by both parties, I am unable to concede to the Claimant's assertion that he was a shop assistant as opposed to a general labourer.
16. The Claimant sought to rely on the decision of Rika J in Nairobi Cause No. 43(N) of 2009, *Crispol Nguji Kimani v Yako Supermarket Ltd*. Rika J discussed at length the issue of job classification in Kenya generally and at the Respondent's facilities specifically. In the end, Rika J found that the Claimants therein were not general labourers but shop assistants.
17. But the finding was premised on the finding that the Respondent had failed to issue the Claimants with written contracts and had failed to rebut the presumptions under section 10(7) of the Employment Act, 2007 as read with section 74 of the Act.
18. In the present case, the Claimant was issued with and admitted signing a written contract which was in many respects in conformity with sections 9 and 10 of the Employment Act, 2007. I therefore find that the Claimant was a general labourer.

## ***Whether Claimant's services were terminated or he absconded from work***

19. The Claimant pleaded that his services were terminated on 28 October 2013. In testimony, he stated that he fell ill on 28 October 2013, a Sunday and so he did not report to work. The next day when he reported to work, he explained to a Mr. Ramesh but the said Mr. Ramesh instructed him to remove his dustcoat and go home and report the following day. When he reported, he was informed there was no work for him and he was paid Kshs 23,000/-.
20. The Respondent's case on the other hand is that the Claimant was last on duty on 26 October 2013, and he was not dismissed. The Respondent's proprietor stated that he only saw the Claimant again in Court.
21. In cross examination, the witness stated that he did not seek an explanation from the Claimant on the absence because he did not have his contact details and denied chasing the Claimant away.
22. Absence from work without permission or lawful cause is one of the reasons upon which an employer may summarily dismiss an employee. But this is subject to compliance with procedural fairness.
23. The Respondent contends the no explanation was sought from the Claimant because it did not have his contact details.
24. The Court finds this explanation by the Respondent disturbing and unbelievable. The Court cannot comprehend how an employer such as the Respondent would fail to have details of its employees, in the year 2013.
25. Further, a prudent employer would seek to know from its employees reasons for absence from work, not just as a matter of disciplinary process but as a matter of interest in the employee's welfare.
26. On the basis of the material placed before Court, the Court finds that the Claimant did not abscond from duty, and attempted to explain his absence in conformity with clause 7 of the letter of appointment but he was sent away instead by a Mr. Ramesh.

## **Whether the termination was unfair**

27. I have already adverted to the legal position that absence without permission is a ground for

- summary dismissal. But employees who are absent are also entitled to a hearing before dismissal. That is the purport of section 41(2) of the Employment Act, 2007.
28. An employer should make all reasonable attempts to reach the employee and get an explanation on the absence. In the instant case, the Respondent made no attempt to seek explanations from the Claimant, on the basis that it did not have his contact details!
29. The Court finds that the Claimant's services were terminated and he was not afforded a hearing as required by law. The termination was procedurally unfair.

### **Appropriate relief**

#### ***One month pay in lieu of Notice***

30. Having found that the termination of the Claimant's services was unfair, the Court finds that the Claimant is entitled to one month pay in lieu of notice. At time of termination, the Claimant was earning basic pay and house allowance of Kshs 10,378/- and the Court awards him an equivalent sum as pay in lieu of notice.

#### ***Outstanding leave***

31. The Claimant sought Kshs 33,951/90 on account of 21 days leave. How the figure was arrived at was not explained to Court.
32. The records produced by the Respondent show that the Claimant was paid Kshs 5,541/- on account of 21 leave days for 2012, but his name is missing for leave payments for 2013.
33. The Court was not informed of the leave year but it appears to be based on calendar year. The Claimant would be entitled to *pro rata* leave from January 2013 to October 2013.
34. Annual leave should be with full pay. The Court would award the Claimant the equivalent of one month pay on account of leave for 2013 assessed as Kshs 9,024/-.

#### ***Underpayments***

35. The Claimant sought a total of Kshs 154,449/20. This claim was anchored on the position that the Claimant was a shop assistant but was paid as a general worker.
36. Because the Court has rejected this contention, this head of claim must also fail.

#### ***Compensation***

37. The Court has reached the conclusion that the termination of the services of the Claimant was procedurally unfair. An award of a sum equivalent to not more than 12 months gross wages is one of the primary remedies where the Court finds unfair termination.
38. The remedy is discretionary. The discretion is fettered by the factors set out in section 49(4) of the Employment Act, 2007.
39. The Claimant served the Respondent for about 3 years. His contract was for an indefinite period and must have expected to serve the Respondent for some time. At time of hearing, he was working in a construction site.
40. Considering these factors, the Court would award the Claimant the equivalent of 4 months gross wages assessed at Kshs 71,500/- based on the gross wages in the September 2013 pay slip.

### **Conclusion and Orders**

41. From the foregoing, the Court finds and holds that the Claimant was employed by the Respondent with effect from 2 March 2010 as a general labourer and the termination of his services was unfair and awards him and orders the Respondent to pay him

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|------------------------------------|---------------|
| a. One month pay in lieu of Notice | Kshs 10,378/- |
| b. Leave for 2013                  | Kshs 9,024/-  |
| c. 4 months wages compensation     | Kshs 71,500/- |

TOTAL

**Kshs 90,902/-**

42.The claim for underpayments is dismissed.

43.Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 6<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant: Mr. Chepkwony, instructed by Chepkwony & Co. Advocates

For Respondent: Mr. Nyairo & Mr. Makuto instructed by Nyairo & Co. Advocates