



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 119 OF 2014

RICHARD KIPLIMO KOECH.....CLAIMANT

v

YAKO SUPERMARKET LTD..... RESPONDENT

JUDGMENT

1. Richard Kiplimo Koech (Claimant) commenced legal proceedings against Yako Supermarket Ltd (Respondent) on 23 April 2014, alleging unfair/unlawful termination and seeking a total of Kshs 236,134/- being one month pay in lieu of notice, outstanding leave, service (severance pay) and compensation for unfair termination.
2. The Respondent was served and it filed a Response together with documents on 6 June 2014.
3. On 4 June 2014, the Cause was fixed for hearing on 10 November 2014. The Claimant's case was taken on the said date while the Respondent's case was adjourned to 24 November 2014.
4. On 18 November 2014, the Respondent filed an application under certificate of urgency seeking to have the evidence of the Claimant's second witness expunged from the record. The Court declined the motion and reserved the reasons for the main judgment.
5. Before discussing the main Cause, the Court wishes to give reasons for declining the motion.
6. On the day set for hearing, the witness whose evidence is sought to be expunged was called to the box and sworn. The Respondent was represented by Mr. Makuto, counsel in the firm of the Respondent's Advocate on record.
7. No objection at all was taken to the second witness giving evidence. He gave his evidence in chief and was cross-examined on his testimony.
8. The Respondent in its application contended that the witness statement of the said witness was not served upon it. This should have been raised at the material time but was not.
9. The Industrial Court (Procedure) Rules, 2010 do not expressly provide for filing and serving of witness statements before hearing.
10. However, it has become the practice of the Court that when directions are given before hearing, the parties indicate and the Court directs that witness statements be filed and served. It is a good practice to be encouraged. When the Cause was mentioned on 4 June 2014 before Ongaya J, no directions as to witness statements was sought. Indeed, the Respondent was absent during the giving of directions.

11. On the basis that the Respondent did not raise any objections to the Claimant's second witness at the point of giving testimony, and further on the basis that the Respondent had opportunity to cross examine the witness, the Respondent's application was devoid of merit.

12. Further, the Respondent did not demonstrate that it suffered any prejudice or injustice on the basis of the witness evidence remaining on record.

13. In addition, Section 20 of the Industrial Court Act expressly ousted the direct applicability of the rules of evidence in the Court (position has since changed).

Issues for determination

14. From the pleadings, evidence and submissions, the Court identified the questions arising for determination as, *whether the claim is statute barred, when employment relationship between the parties commenced, whether the services of the Claimant were terminated or he absconded work, if termination, whether the termination was unfair, whether the Claimant was underpaid and appropriate relief/entitlements of the Claimant.*

Whether claim is statute barred

15. The Respondent did not pursue this line of defence which was pleaded in its Response. In any case, the parties both pleaded that the separation occurred on or around 29 November 2013. The Cause was filed on 23 April 2014.

When employment relationship commenced

16. The Claimant's pleaded case was that he was employed by the Respondent on 22 November 2006. In testimony, the Claimant reiterated the pleading as to commencement date of employment.

17. He stated that he was not issued with an appointment letter and was put on a daily wage of Kshs 230/- until June 2007 when he was put on a monthly wage.

18. In cross examination, the Claimant stated that he signed a contract in 2008, without reading it and that the contract indicated the commencement date as 1 October 2008.

19. He further stated that he was a member of the National Social Security Fund.

20. The Respondent's pleaded case was that the employment relationship commenced on 1 October 2008 and it annexed a copy of the contract, to the Response.

21. The Respondent's director who testified on its behalf stated that the employment started on 1 October 2008 and reference was made to the contract of employment which was signed by the Claimant in his (witness) presence.

22. The director also referred to and produced copies of muster roll kept by the Respondent from October 2008.

23. A contract of employment by itself is not conclusive proof of when an employment relationship commenced, at least under the prevailing statutory framework in 2006. There was no mandatory requirement to have a written contract.

24. Even the current Employment Act, 2007 recognises the validity of oral contracts under certain circumstances. It is still open therefore to a Claimant to demonstrate that there was an employment relationship before the signing of a formal/written contract.

25. And to demonstrate there was a relationship, the Claimant may rely on secondary documents. The

Court is also under an obligation to look at the secondary documents if any to establish that there was a relationship.

26. The Claimant produced a copy of a Provisional Member Statement of Account from the National Social Security Fund. According to the statement, the Claimant's employer is indicated as *Yako Supermarket Ltd*. The employee name is Richard Kiplimo Koech and the identity card number is given.

27. The Claimant's date of employment is given as 1 July 2007 and date of registration is stated as 26 July 2007. Contributions in respect of the Claimant appear to have commenced in July 2007 (standard contributions). These contributions would not have been made if there was no relationship. But that is not all.

28. The Respondent annexed as part of its documents, Claimant's National Hospital Insurance Fund contributions (page 105/106 of Respondent's bundle). The statement indicates that the Claimant made contribution of Kshs 100/- for September 2008. Similar contributions were made in respect of October to December 2008.

29. In my view, the Claimant would not have made the National Hospital Insurance Fund contributions for September 2008, if the relationship started on 1 October 2008 as suggested by the contract letter. The contributions should have commenced in October 2008.

30. A further document which helps unravel when the employment relationship commenced is the leave records produced by the Respondent. According to the records, the Claimant was paid Kshs 3,355/- on account of 21 days leave for 2008. If the Claimant was engaged on 1 October 2008, he would have been entitled not to 21 days pay or commuted leave pay but *pro rata* basis.

31. Considering the secondary material placed before Court by both the Claimant and the employer (NSSF, NHIF and leave records), the Court finds that the employment relationship between the parties did not begin when a formal contract was signed on 1 October 2008, but on 22 November 2006 as asserted by the Claimant.

Termination or *abscondment* ?

32. The Claimant's case is that his services were terminated on 29 November 2013. On that day, he stated that while packing goods for a customer, the Respondent's Director called Ramesh called him and told him that he had packed using the *wrong paper* (by using bigger instead of smaller paper). The director told him to leave and he left and he was paid his November 2013 wages totalling Kshs 19,000/- on 30 November 2013.

33. The Claimant denied absconding from work and stated he worked until 2.00pm on the material day.

34. During cross examination, the Claimant stated that according to his pay slip for November 2013, he collected his wages on 3 December 2013.

35. The Respondent on the other hand contended that the Claimant absconded from work on 29 November 2013, and had not given any reason or sought permission.

36. The Respondent's witness stated that the Claimant had never gone back except when he went to collect his wages in early December 2013. The witness denied informing the Claimant not to go back to work.

37. Again it is the word of one against the other. The Court again is faced with a situation where it must examine the surrounding circumstances to establish the true and correct narrative.

38. Among the documents the Claimant annexed to his pleadings was a Grievance Form from the Kenya Union of Commercial Food and Allied Workers Union. The form indicates that the Claimant reported to

the Union on 3 December 2013 about his dismissal.

39. The Branch Secretary of the Union testified and stated that the Claimant reported a dispute to him on 3 December 2013 and a grievance form was filed and a demand letter written to the Respondent. The demand letter from the Union was also annexed to the Claim and it is dated 3 December 2013. According to the Claimant's second witness he gave the demand letter to the Respondent.

40. In cross examination, the witness stated that the letter was posted to the Respondent as a result of which the Respondent's Director called Nipul called him on the phone and told him to move to Court.

41. Although there is an inconsistency as to how the demand letter was delivered, the Court is of the opinion that the Claimant's second witness' testimony and the demand letter make the Claimant's narration that his services were terminated more plausible than the narration by the Respondent that he absconded from work.

42. The Court therefore finds as a fact that the Respondent terminated the services of the Claimant.

Whether the termination was unfair

43. The Respondent had taken the position that the Claimant absconded from work. The Court has found otherwise.

44. The Respondent did not in the circumstances contend that it complied with the requirements of section 41 of the Employment Act, 2007 on procedural fairness.

45. Further, no attempt was made in the pleadings or evidence to prove the reasons for termination as required by section 43 of the Act, or that the reasons were valid and fair reasons.

46. Despite the approach taken by the Respondent in the litigation, the Court is of the view that an employee who absconds work without permission or lawful cause is in most instances entitled to a hearing.

47. Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to section 41 of the Employment Act, 2007, a hearing is necessary.

48. And in my view, it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or effort to reach the employee and seek any explanations to excuse itself from the application of section 41 of the Employment Act, 2007. A prudent employer and an employer such as the Respondent will invariably keep contact details of its employees.

49. There was no suggestion that the Respondent attempted to reach the Claimant to explain his whereabouts or to show cause why he could not be dismissed for absence from work without permission or lawful cause.

50. In the circumstances of this case, the Court finds that the termination of the services of the Claimant was procedurally unfair and did not accord with justice and equity by dint of sections 41 and 45(4)(b) of the Employment Act, 2007.

Appropriate relief

One month pay in lieu of notice

51. The Claimant was paid by the month. Pursuant to section 35(1)(c) of the Employment Act, 2007 and clause 12 of the written contract, he is entitled to one month pay in lieu of notice.

52. The Claimant's basic pay at the material time, according to the muster roll and pay slip produced was Kshs 12,185/-. The Court would award him an equivalent sum as pay in lieu of notice.

Leave dues

53. The Claimant sought Kshs 11, 318/- under this head of claim. The Respondent contended that because the Claimant did not serve for a complete year he would not be entitled to leave.

54. That cannot be the legal and correct position. The Claimant is entitled to *pro rata* leave for 11 months up to November 2013. But he never specified the amount and the Court declines to make an award under this head. In lieu, an appropriate award will be made under compensation.

Service pay (severance pay)

55. Legally and conceptually, service pay and severance pay are distinct and are applicable in different situations. Severance pay is applicable where an employee is declared redundant.

56. Service pay is applicable under the circumstances contemplated by section 35(5) and (6) of the Employment Act, 2007.

57. The Claimant produced documents to show he was a contributor to the National Social Security Fund. Service pay is therefore inapplicable in his case.

Compensation

58. This is one of the primary remedies where the Court finds unfair termination/wrongful dismissal. The remedy is discretionary though the Court's discretion is fettered by the factors set out in section 49(4) of the Employment Act, 2007.

59. The Claimant served the Respondent for about 7 years. Currently he is a farmer. The Court has declined to award accrued leave because the same was not correctly particularized.

60. Considering these outlined factors, the Court would award the Claimant the equivalent of 8 months gross wages as compensation.

61. According to the muster roll produced by the Respondent, the Claimant's gross wages for about 4 months upto November 2013 was Kshs 24,135/-. The Claimant's pay slip for November 2013 corroborates the sum.

62. Using this gross wage, the Court assesses the compensation as Kshs 193,080/-

Conclusion and Orders

63. The Court, based on the foregoing, finds and holds that

- i. The suit is not statute barred.
- ii. The employment relationship commenced on 22 November 2006.
- iii. The Claimant did not abscond from work but had his services terminated.
- iv. The termination of services was procedurally unfair.
- v. The Claimant is not entitled to service and/or severance pay.

64. The Court awards and orders the Respondent to pay the Claimant

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|------------------------------------|----------------|
| a. One month pay in lieu of notice | Kshs 12,185/- |
| b. 8 months wages compensation | Kshs 193,080/- |

TOTAL

Kshs 202,265/-

65. Claimant to have costs of the Cause.

Delivered, dated and signed in Nakuru on this 6th day of February 2015.

Radido Stephen

Judge

Appearances

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

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