



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1292 OF 2013

GORDON GODFREY BARAZA CLAIMANT

VERSUS

PEDESA STATIONERY SERVICES LIMITED RESPONDENT

Claimant in person

Mr. Baabu for Respondent

JUDGMENT

1. The Claimant brought this suit via a Memorandum of claim dated 25th July 2013 seeking payment of terminal benefits to wit;

- a. house allowance not paid for the period of employment in the sum of Kshs.1,750.00;
- b. leave allowance for the period in the sum of Kshs.55,125.00;
- c. service pay upon termination in the sum of Kshs.39,375.00;
- d. overtime in the sum of Kshs.15,750.00;
- e. underpayment in the sum of Kshs.2,093,798.70;
- f. unpaid commissions in the sum of Kshs.97,500.00;
- g. wrongful deductions from salary in 2012, in the sum of Kshs.7,129.00.

Total claim Kshs.2,450,427.70.

2. **Facts of the Claimant's case**

The Claimant avers that he was employed by the Respondent in the position of Salesman / Sales & Marketing Director in May 1997 at a monthly salary of Kshs.4,000.00 per month but was later increased to Kshs.5,000.00 per month.

That in addition he was paid 5% commission on the total value of sales made by him.

3. That the Claimant worked diligently with loyalty until the 4th February 2013. When he resigned from the employment due to irregularities and unfair treatment accorded him by the Respondent in that;

- i. he was made to sign different payrolls, indicating different salaries paid to him to conceal the actual salary paid to him;
- ii. his commission was paid in bits and pieces and in instances indicated in the Memorandum of Claim, he was not paid at all;

- iii. the Respondent declined to pay his salary through a bank account hence denying him opportunity to access a bank loan;
- iv. he was underpaid contrary to the relevant wages Remuneration Orders;
- v. his salary was subjected to wrongful deductions.

That inspite of demand to pay, the Respondent returned and or neglected to pay the Claims hence the suit.

4. Memorandum of Response

The Respondent filed its Statement of Defence on 17th September 2013 in which it states that the Claimant was employed by the Respondent as a freelance salesman who would obtain an order and would be paid agreed commission on actualization of the order. This relationship took place between the year 2000 up to the year 2005.

5. That in 2005, the Claimant was placed on a salary of Kshs.5,000.00 per month to enable him earn regularly and join N.H.I.F. whilst carrying out his sales job. That went on until February 2013, when the Claimant resigned from the employ of the Respondent.

6. That at the time of resignation, the Claimant earned a monthly salary of Kshs.11,000.00 per month and in addition was paid a commission of 5% on sales done.

7. That at the time of his resignation, the Claimant had no unpaid commissions or salaries. That he was not underpaid at all as he was not employed as a monthly employee but was only paid commission and allowances to enable him to source business.

8. The Respondent prays that the claim by the Claimant be dismissed with costs.

9. Issues for determination

- i. Whether or not the Claimant was an employee or a sales agent on commission?
- ii. If the answer to question (i) is in the affirmative, whether the Claimant is owed terminal benefits as prayed or at all?

10. Determination

Whereas the Claimant states that he was placed on a monthly salary as from the year 1997, the Respondent admits paying a monthly remuneration to the Claimant between the year 2005 to February 2013. The Respondent states that the decision was made to enable the Claimant join NHIF.

This amounts to an admission that the Claimant had converted from a freelance salesman to a permanent employee with effect from the year 2005. The Claimant's status between 1997 to 2005 is still in dispute.

11. The Respondent admits that, it paid the Claimant a monthly salary of Kshs.11,000.00 as at the time of his resignation in February 2013.

12. In the Affidavit filed by the Claimant in reply to the statement of defence, the Claimant states that he earned Kshs.4,000.00 all along until October 2010 when he received a salary raise to Kshs.5,000.

13. The Claimant states that he refused to sign a payroll stating that he was paid a monthly salary of Kshs.11,000.00 per month, hence he was not paid any salary in January 2013, because of this dispute. This motivated his resignation in February 2013 giving the Respondent one month's notice.

14. In the resignation letter, the Claimant indicates the actual month he started working was May 1992 till 4th February 2013, a continuous period of 15 years. He enumerated the various business he had brought to the company during the period.

15. That he received a monthly salary of Kshs.4,000.00 up to the year 2010 and thereafter Kshs.5,000.00 up to December 2012 and was not paid in December 2012.

16. That the Respondent in different payrolls indicated the Claimant was paid a monthly salary of Kshs.9,000.00 and Kshs.11,600 per month respectively so as to deceive Government agencies during inspection.

17. **Oral testimony**

The Claimant gave oral testimony which supported the averments in the Memorandum of Claim and the various annexures he produced.

18. The Claimant produced N.H.I.F. and N.S.S.F. records which showed that he was employed by the Respondent. He also produced letters written by the Respondent to various companies introducing the Claimant as an employee of the Respondent.

19. The Claimant produced letters in which he was seeking salary increments and the eventual resignation letter due to frustration.

20. The Claimant withstood well very close, cross examination and appeared to the Court as a credible witness. His oral testimony was consistent with the documentary evidence produced and the averments in his pleadings.

21. The admissions made by the Respondent place the Claimant as a protected employee at least as from the year 2005 by the Employment Act, applicable at the time and subsequently by the Employment Act, No. 11 of 2007.

22. The Respondent seemed to have no answer to the evidence that the Claimant worked from 8 a.m. to 5 p.m. daily and was not granted leave nor paid in lieu thereof.

23. The Claimant stated that at times he worked up to 4.30 a.m. on Saturdays hence the claim for overtime.

However, no evidence was led as to the specific Saturdays he had exceeded the time of 1 p.m., which was applicable of Saturdays.

The Claimant did not give particulars of underpayment other than the general allegations of underpayments.

The Claimant did not also give evidence on the basis for the claim of housing allowances.

24. The Claimant told the Court that the commission payments averaged between Kshs.10,000.00 to Kshs.20,000.00 per month for fifteen (15) years. He alleges that he was not paid more than Kshs.97,000.00 of the commission earned but he only had documentary proof of this amount. The Respondent made a general denial in this respect in spite of the specifics given by the Claimant in this regard.

25. The Claimant states that he was forced to sign false pay-slips which showed he had received more salary than had actually been paid to protect his job, but he eventually got tired and quit.

The Claimant signed vouchers upon payment of the commission.

26. The Claimant was hard-pressed however to explain why he waited for fifteen (15) years to quit and lodge his claim. The Claimant however, insisted that he made written claims and hoped the Respondent would pay him in vain.

The salary increment should have matched the statutory minimum but this was not so hence the claim for underpayment.

27. In his oral testimony, Mr. David Kinuthia Kimani, the Director of the Respondent supported the averments in the statement of defence but contradicted others in material respects. He for example stated that the Claimant received a commission only and no salary until the year 2008 when the Respondent started paying him Kshs.10,000 per month in addition to the commission. That the Claimant was paid Kshs.10,000.00 a month until the amount was increased to Kshs.11,000.00 in the year 2011.

28. That the Claimant's productivity went down and he brought no orders to the company by the time he left.

That the Claimant was diverting business to other companies. This evidence is not supported by any averments in the statement of defence or by any documentary evidence written to the Claimant.

29. The witness stated that the Claimant was not harassed and he served the Respondent for fifteen (15) years due to this.

The witness denied the claims made by the Claimant and urges the Court to dismiss the suit with costs.

The witness was unable to refute that the Claimant brought Kenya School of Law business to the Respondent in 1997, and Kenya Airways business in 1998. He said he could not remember. He could only recall the relationship for the year 2000. The witness also denied ever giving the Claimant introduction letters and business cards to show to customers, stating that the Claimant printed them himself. He denied that the Respondent had high turnover of staff due to mistreatment.

30. Findings

It is without a doubt that the Claimant earned a salary from the Respondent for a period of over ten (10) years and was therefore an employee for the purpose of the benefits provided under the Employment Act, since he did not have a written contract of employment with enhanced terms and conditions.

The answer to issue No. (i) is answered in the affirmative.

31. Issue (ii)

What remedies are available to the Claimant?

Having found that the Claimant was a permanent employee for more than ten (10) years but was treated like a freelance agent by the Respondent for the entire period and therefore not granted leave days. The Court finds that this statutory entitlement cannot be extinguished by of time especially the same was evidently demonstrated by 12 employees on 8th April 2011 but the letter was not responded to.

32. The Court therefore finds that the Claimant is entitled to payment in lieu of twenty one (21) days leave for each completed year of service in the sum of Ksh.55,125.00.

33. The Claimant has been unable to show that he was entitled to house allowance and underpayments, he was however, via documentary evidence showed that he was owed Kshs.97,500.00 by way of unpaid commissions. The Court awards him accordingly as prayed in the Statement of Claim.

The Claimant has also demonstrated that he was deducted Kshs.7,129.00 without justification and Court awards him accordingly.

34. It is evident that the Respondent did not contribute to NSSF for the entire period the Claimant was under its employment. The Court awards the Claimant Service Gratuity in terms of **Section 35** as read

with **Section 36** of the Employment Act, 2007 calculated at fifteen (15) days salary for the fifteen (15) days fifteen (15) years completed in employment in the sum of Kshs.39,375.00.

35. The Claims for underpayment and overtime have not been sufficiently proved and the same are dismissed.

Accordingly, the total award to the Claimant Kshs.192,000.00.

The Award is payable with interest at Court rates from date of this judgment till payment in full.

The Respondent is also to pay the costs of the suit.

Dated at Nairobi this 23rd day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Delivered by Hon. Wasilwa on 24th day of April, 2015.

In the presence of