



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 262 OF 2014

PETER KARIUKI

CLAIMANT

V

WILHAM KENYA LIMITED

RESPONDENT

JUDGMENT

1. For determination in this Cause are, whether the Respondent would be liable for Claimant's contractual entitlements, whether Claimant is entitled to wages for days worked in December 2013 and service pay (an oral application to substitute service pay for severance pay was allowed) and the counterclaim.
2. However, a brief background is in order. The Claimant filed a Memorandum of Claim against Wilham (K) Ltd (Respondent) on 1 July 2014. The Respondent entered appearance on 22 July 2014 and on 8 October 2014, it filed a Response and list of documents. The Claimant filed a rejoinder on 9 October 2014.
3. On the same date, the Court fixed the hearing for 23 March 2015 and directed the Claimant to serve a hearing notice.
4. A hearing notice was served upon the firm of Wekesa & Simiyu Advocates on 21 October 2014, and an affidavit of service sworn by Jalpherts M. Malusi attesting to the service was filed on 28 October 2014.
5. When the Cause was called for hearing on 23 March 2015, Mr. Muthanwa appeared for the Claimant while Mr. Malebe appeared for the Respondent.
6. The Claimant's testimony was that he was employed in 2004 by the Respondent and was working under its subsidiary called Rift Valley Vegetables until he resigned on 23 September 2012, after serving one month notice period.
7. The Claimant stated that he was not paid service pay for the 9 years despite the Respondent having agreed on 12 January 2012 before the Labour office to pay service pay on termination.
8. The Claimant also stated that the Respondent had a practice of paying service gratuity to employees who resigned.
9. During cross examination, the Claimant stated that he was employed by the Respondent at its Rift Valley Vegetables farm though his letter of appointment dated 1 January 2004 and letter was on the letterhead of Rift Valley Vegetables Ltd.
10. He also admitted that he was a contributor to the National Social Security Fund and that the contract of appointment did not provide for gratuity.
11. The Respondent called its Human Resources Officer. He stated that the Claimant was given an appointment letter by Rift Valley Vegetables Ltd which is distinct from the Respondent.
12. The witness also stated that Rift Valley Vegetables Ltd ceased to exist in 2013, and that the Claimant was not an employee of the Respondent.
13. The witness denied receiving the Claimant's resignation letter.
14. In cross examination, when challenged to prove his employer, the witness produced a job identity

card embossed with the name of an entity called Shalimar Flowers Ltd. He stated that the Respondent was part of Shalimar Flowers Ltd but denied that Rift Valley Vegetables Ltd was part of Shalimar Flowers Ltd.

15. The witness further stated that he used to hear of Rift Valley Vegetable farm in Naivasha.
16. When probed further on the companies forming part of the Shalimar Flowers Ltd, the witness was extremely hesitant to answer the question though he admitted that the Claimant's final dues schedule had the name and stamp of Shalimar Flowers Ltd, and Rift Valley Vegetables and that the Respondent and Rift Valley Vegetables had one payroll.
17. In re-examination, the witness relented and admitted that the Respondent and Rift Valley Vegetables were different entities but the ownership was one and that the Claimant was paid his final dues in November 2012.

Liability of Respondent

18. The Claimant's appointment letter produced by the Respondent's witness indicated that the employer was Rift Valley Vegetables Ltd. The witness further produced a schedule of Final Dues paid to some 8 employees. The Schedule was in the name of Wilham (K) Ltd RVV. Among the names in the schedule was that of the Claimant.
19. The Respondent did not explain where and how it got both the appointment letter and the schedule of final dues of the Claimant. Further, no explanation was tendered as to why the Respondent would pay the Claimant (and others) final dues if it had no relationship with Rift Valley Vegetables and the employees.
20. The Court observed the Respondent's witness. He did not appear credible at all. He was evasive. He could not even logically explain why he had a job identity card of Shalimar Flowers Ltd and not Respondent's issued card.
21. The Employment Act, 2007 has defined an employer as means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
22. The Respondent must have paid the Claimant his final dues as an agent or factor of Rift Valley Vegetables. The witness it presented had a job identity card of a different entity. It offered no other plausible explanation and for the purposes of the Employment Act, 2007 it cannot escape liability.
23. In the view of the Court and in the circumstances of this Cause, the Court is satisfied that the Respondent would be liable to any employment entitlements due to to the Claimant.

Wages for December 2013

24. The Claimant pleaded that he was seeking December 2013 wages. However, his testimony was that he resigned in November 2012. Obviously, he cannot claim wages for December 2013.

Service pay

25. Initially the Claimant had sought severance pay. He could not have been entitled to severance pay because his case was one of voluntary resignation and not redundancy.
26. Before the hearing commenced, he made an application to amend the prayer for severance pay to be substituted by one for service pay.
27. The Claimant admitted that he was a contributor to the National Social Security Fund. By dint of section 35(5) & (6) of the Employment Act, 2007, he is not entitled to service pay.
28. The Claimant made a feeble attempt to advance an entitlement to service pay on the basis of custom or practice. He did not prove the existence of any such custom or practice.

Counterclaim

29. The Respondent counterclaimed from the Claimant one month pay in lieu of notice.

30.The Claimant's testimony that he served the one month notice period was not challenged or controverted. The counterclaim therefore has no basis.

31.It appears the Claimant was aware his claim had no merit. He did not even bother to file submissions as directed.

Conclusion and Orders

32.The Claimants has no valid claim to wages for December 2013 and service pay. The heads of claim have no merit.

33.The Court orders the Memorandum of Claim dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 29th day of May 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Malebe instructed by Wekesa & Simiyu Advocates

Court Assistant Nixon Raiback