



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1175 OF 2011

WYCKLIFFE DANIEL BENGI.....CLAIMANT

VERSUS

M/S REGNAL OIL (KENYA) LIMITED..... RESPONDENT

JUDGEMENT

1. The issue in dispute is the termination of the Claimant and the failure by the Respondent to adhere to the Employment Act.

2. This is a claim dated 15th July 2011 by Wickcliffe Daniel Bengi against M/S Regnal Oil (Kenya) Limited. The claim is based on the alleged termination of the Claimant and failure to adhere to the Employment Act. The Respondent filed their defence on 28th August 2013 and denied having employed the Claimant that the Claimant had filed **Cause No. 75 of 2011** that was dismissed and thus this suit is res judicata and should be dismissed with costs. The matter had been heard ex parte in the absence of the respondent, judgement delivered but this was set aside upon application by the Respondent and on payment of throw away costs to the claimant.

Claimant's case

3. The claim is that on 2nd January 2008 the Claimant was employed by the Respondent as a Foreman/Care Taker at a salary of kshs.52,000.00 per month and it was verbally agreed that all the conditions as contained in the regulation of wages order would apply. The Claimant served the Respondent with dedication but he was never appreciated.

4. The Claimant is thus seeking 3 months' notice pay, pay for 12 days worked in October 2010, annual leave and travelling allowance, severance pay of 3 years, weekday's overtime, off duty pay, work during public holidays and 12 months compensation.

5. In evidence to support his case the Claimant testified that he was employed by the Respondent on 2nd January 2008 on a monthly salary of kshs.52,000.00 on a verbal agreement and it was agreed that labour laws were to apply. He worked until his termination on 28th February 2011 without any good cause. He was not given any notice and his leave days were never paid for. His travel allowances or overtime for time worked on weekends were not paid.

6. The Claimant also testified that he should be compensated at 12 months' pay together with interest and the dues not paid to NSSF and NHIF issued to him. he was also never given his Certificate of Service and demands the same.

The Claimant also challenged the defence as filed noting that he had a relationship with the Respondent as their former employee but was never issued with a letter of employment. all payments were signed on vouchers and he did not keep any despite being the Foreman and Caretaker. That payments made to block 12, 17, 22 and 23 was due to the workers. the Claimant was not recorded in the payment schedules.

7. The Claimant also gave evidence that before his termination he was not given a chance to be heard. That when he sked for payment vouchers for casuals these were never issued to him. his NSSF was paid but NHIF dues were only remitted from 28th August 2009 to 9th October 2010. The Respondent did not follow the law and that is why they refused to issue the Claimant with the termination letter. The basic salary was not Kshs.13, 400.86 as stated in the defence and only the payment vouchers can confirm the amounts paid. The Claimant restated his claim as seeking for 3 months' notice pay, severance pay and items listed in the claim.

8. In cross-examination, the Claimant confirmed that he had filed Cause No. 75 of 2011 that was dismissed by the Court as the same had been filed by a labour consultant and the Court ordered the claimant to file a new suit and that it is not true in that case the Claimant had stated his salary was kshs.2000.00 per day. That some days in October 2010 were never paid for. That he held two jobs that of a Foreman and Caretaker. He signed vouchers of kshs.80,000.00 and noted an advance of kshs.20,000.00 and a retention of 10% on 6th October 2010.

9. The Claimant also confirmed that his name was not on the records of the Respondent for KRA returns and list of employees. He only knew the director of the Respondent and no other employees. He does not have his NSSF or NHIF number to confirm the Respondent made remittances on his behalf as their employee. He was not with the Respondent to build the roof for block 11 and 23. That he put up several roofs while employed by the respondent.

10. Upon the Court putting the Claimant to respond to various issues, he could not remember any of his workmates while employed by the respondent. not their names or the role they played or positions held. He could only remember *Lazarus* and *Ochieng*. However he could not recall what they did as employees. He has no witness to call to confirm whether indeed he was employed by the Respondent on the basis that he had no friends.

Respondent's case

11. In defence the Respondent stated that they never employed he Claimant at all, they never had any relationship whatsoever and no salary at kshs.52,000.00 was ever paid to him. the Claimant had previously filed Cause No. 75 of 2011 as herein which was dismissed on 27th April 2011. In **Cause No. 75 of 2011**, the Claimant had stated that he had been employed by the Respondent as a Care Taker/Foreman at a salary and daily rate of Kshs.2000.00. the claim herein is thus *res judicata*.

12. The Respondent also states that the claim is fraudulent, fake and illegal. There is nothing payable to the Claimant by the Respondent to warrant the commencement of the suit which should be dismissed with costs.

13. In evidence, the Respondent called Hesbon Were Oulo an employee of the respondent. He was employed on 1st April 2010 and never met the Claimant as an employee of the respondent. He is the Accountant at the Respondent with duties to pay suppliers and staff as well as to prepare tax return. He has access to the pay roll for the entire Respondent staff. In the Pay As You Earn (PAYE) preparation o KRA, the system is already tailored on the calculations noting the PIN Numbers and how all the returns must be noted. Where the records are missing, KRA has a penalty hence all details with regard to all employees must be submitted to avoid the penalty that is paid by the employer. Some staff at the Respondent had no PIN numbers, but the PAYE was still remitted to avoid the penalty. in the entire list of the employees the Claimant is not listed as one.

14. The witness also stated that he once saw the Claimant at the Respondent premises when he had come for his payment for work he had done on the roof. That in construction work, the roof is done by

several people upon completion of the structure. The Claimant negotiated with the director and the witness paid him. there was a foreman Mr Yusuf who also supervised the claimant's work where he was paid Kshs.26,000.00 as he was also the driver to the director. The Respondent did not therefore require another foreman or supervisor as the Claimant has stated.

15. The witness also testified that on 9th June 2010 he was at the Respondent and did the NSSF record and noted that some employees were not registered. These employees were asked to register personally to enable the Respondent as the employer submits their dues. Any employee paid Kshs.52,000.00 had to pay NSSF and PAYE as a statutory requirement. In the entire workforce, there was no employee called *Lazarus* or *Ochieng* as alleged by the claimant. where the Claimant was an employee, he must have worked with others.

16. The witness also testified that the house blocks the Respondent was working on were all occupied and construction work complete. The services of the Claimant were not required as an employee of to work on the roof. Where the Claimant worked, there is a voucher for Kshs.80,000.00 that he was paid. He received an advance and the Respondent retained 10% in case the work done was faulty. This was to remain with the Respondent for a year in case there are repairs needed and the 10% would be applied. The claim has no basis as the work the Claimant did was specific and he was paid.

Submissions

17. The Claimant submitted that he is entitled to his claims as outlined in the memorandum of claim. That the Respondent in evidence failed to challenge his evidence noting that the witness called failed to show why his name was not on the pay roll as the accountant. There was no evidence that the Claimant was not the Foreman as the details of the current foreman were not attached. No additional vouchers were submitted to show that the Respondent was not willing to bring vouchers showing payments made to the claimant. The lump sum payment voucher to the Claimant is not indicated as to why and this is evidence that the Claimant was employed by the respondent.

18. The Claimant also submitted that he was not issued with a contract and it was the duty of the Respondent to reduce the verbal agreement into writing which was not done in his case. That the Claimant is entitled to compensation and terminal dues as claimed.

19. The Respondent on their part submitted that the suit is *res judicata* as a similar claim was filed in Cause No. 75 of 2011 and the same was dismissed. in that suit the Claimant had pleaded to have earned kshs.2000.00 per day which changed in this suit to kshs.52,000.00 per month. This discrepancy shows the Claimant as not being truthful.

20. The Respondent also submitted that the work records, tax and statutory deductions returns do not show the Claimant as an employee of the respondent. that the Claimant had been contracted on a temporary, one off basis to work on roofing of particular blocks of houses at its Diamond Park site which the Claimant was paid for services rendered and left the Respondent premises. The Claimant could not remember any employees as he was not such, he only recalled the name of the director who engaged him Mr Mohamed Kulmia. Other alleged employees, *Lazarus* and *Ochieng* are persons unknown to the respondent.

20. The Respondent also submitted that there was no employment relationship between the parties herein and where such existed, section 35 of the Employment Act should have applied with regard to termination notice. There was no proof of employment contrary to sections 107 to 109 of the Evidence Act and in this regard where no proof was called, the burden rested on the Claimant under section 47 (5) of the Employment Act to prove the termination was unfair. In this case therefore there are no payments due to the Claimant as his case is not justified or legitimate.

Determination

Whether the Claim is *res judicata*?

Whether the Claimant is entitled to the remedies sought.

21. Before going through the issues identified above, I need to mention the following. This Court is most desirous of hearing parties, the employee and the employer in any given claim as by call of evidence from both sides, the issues in dispute come out most clear. The Court is hesitant to proceed *ex parte* as in such proceedings, the Court is denied the other side of the case. Therefore when the Respondent filed their defence and called their evidence, the Court was given a chance to weigh both sides and make its balanced decision in view of the records filed and the evidence on record. This is the purpose of the court, to ensure justice is achieved for all the parties before the court.

22. On the question as to whether the suit is *res judicata*, I note the submission by the Respondent that this matter has already been addressed under Cause No. 75 of 2011 which was dismissed on 27th April 2011. That the parties were the same and the claim similar as herein where the Claimant stated that he was employed by the Respondent and paid Kshs.2000.00 per day as a Foreman/Caretaker.

I have extracted Cause No. 75 of 2011, there is a Ruling of the Court on 27th April 2011 that struck out the suit based on the issues raised. On that basis, there striking out of such suit even where the same was filed by the Claimant against the respondent as herein does not bar the suit herein as the suit in Cause No. 75 of 2011 no longer exists. That is not a bar to the Claimant from filing the current suit which is within the limitations of the applicable law.

23. The claim herein is premised on the non-payment of terminal dues only. These terminal dues are claimed on the basis that the Claimant was an employee of the respondent, and was terminated on 28th February 2011 after working for 3 years but was never paid the following;

- a) 3 months' notice pay;
- b) 12 days salary arrears for October 2010;
- c) Annual leave for 3 years;
- d) Severance pay for 3 years;
- e) Weekday's overtime;
- f) Off duties of 4 days a month;
- g) Official public holidays worked for 3 years;
- h) Saturday overtime worked;
- i) 12 months compensations for loss of employment; and
- j) Costs of the suit.

24. Was the Claimant thus an employee of the respondent? it is now appreciated by the Court that there are various forms of employment where an employee can be sourced to work full time and on permanent terms, an employee can be engaged on contract terms based on time or work to be done, on piece work or casual terms as the case may be. These various forms of employment are recognised in the Employment Act especially under section 7 and 8 with regard to service contracts, oral and written contracts, and section 37 on the conversion of oral contracts by operation of the law.

25. In this case, the Claimant states that he was employed on verbal terms between him and the Respondent as a Foreman/Caretaker at a salary of kshs.52,000.00 per month. That is was agreed that the employment regulations and terms were to apply to him.

26. As a Foreman or Caretaker, the Claimant must have been supervising several other staff. If this is true, he must have been in daily contact with majority of staff and should have had friends, acquaintances or persons that he can recall as working or being employed by the Respondent or person he worked closely with. To state that it has been long since he left employment and cannot recall these people or have their phone contacts is a fallacy that does not reflect well on the claimant's evidence.

The Claimant does not challenge the lump sum payment voucher he singled in receipt of cash stated to have been for roofing work done at the construction site allocated by the respondent. such payment was with a retainer in the event the roofing work was faulty and this too is not challenged by the claimant. where indeed the Claimant was in full time employment, he does not give any explanation as to why he received such huge sums of money in one payment. These facts coupled by the issues raised above that he could not recall his workmates raises serious doubts as to the nature of work contract that the Claimant had with the respondent. Upon challenge in the defence of the respondent, the duty then rested upon the Claimant to prove that indeed he was such employed on full time basis and not on piece work or temporary, one off basis.

In evidence, the Claimant stated;

...

In the supplementary record filed by the respondent, I stated to Court that I needed the payment vouchers for casuals from 2nd January 2009 and my payment voucher on how I was paid from 2nd January 2008 to 28th February 2011 when I was terminated. What I got is that NSSF was paid. NHIF was paid from 28th August 2009 to 9th October 2010.

27. Where indeed the Claimant was the foreman/caretaker, then he must have known some of the casual employees or the employees that were under his supervision. He cannot have been an employee at large doing roofing at some point and accepting payment for such, being the foreman at some point and signing vouchers for such and then being caretaker at a different time and now demanding terminal dues for such. The Claimant could have only done so much. The aspect of doing roofing works for the Respondent is not challenged. This then must have been the task he was engaged to undertake.

28. It is not lost to the Court that even where the Claimant is not represented, he bears the responsibility to proof his case on a balance of probabilities. The case being that of non-payment of terminal dues, the burden rested on the Claimant to show how these terminal dues arose with regard to the termination of his alleged employment with the Respondent for the Court to be able to make an assessment. The failure by the Claimant to proof employment relationship is fatal to his claim for payment of terminal dues as where no such relationship existed then the issues with regard to what was legally due does not arise.

29. On the finding that the Claimant has failed to proof employment with regard to his relationship with the respondent, it is noteworthy that, where employers, contractors or sub-contractors take the services of various persons in their business as casuals, one off or temporary employees, it make much logic to reduce the agreed upon terms and conditions into writing to avoid scenarios like this case. Where the nature of work involves exchange of monies in the nature as the Claimant was for kshs.80,000.00 and a retainer of 10%, such an engagement is an indicator that the Claimant was engaged on specific tasks/employment/or contract. Such payment is not commensurate to what would ordinarily be called casual work or a verbal agreement. As in this case, where is the 10% that the Respondent retained upon paying the Claimant the advance. How was the Claimant protected against any eventuality that was not his own making once the roofing work was complete? There exist details that the Respondent can only tell that were not made clear in this case.

That said, this was the claimants' case, it was his duty to call evidence and ensure he established the basis for his claim. Even in an employment case, only the Claimant is best conversant to outline his assertions and none other.

30. On the question of remedies available to the claimant, on the finding that an employment relationship has not been established, any claim for terminal benefits in the nature of notice pay; salary arrears; annual leave pay; severance pay; overtime pay; off duty pay; payment for work on public holidays and Saturday work overtime are all not due. These are claims only an employee can claim where due. I do not find the Claimant as having been an employee of the Respondent to warrant such claims.

31. The Claimant is also seeking compensation for 12 months. a claim for such compensation only arise on the basis that there is termination, which termination must be established to be unfair under the provisions of section 45 of the Employment Act. Not all terminations give rise to compensation. A party seeking such compensation must outline such a case of the unfair circumstances they were subjected to by the employer, which circumstances must demonstrate that there was no valid reason for termination and even where there was a valid reason, the same was not justified in the case or the applicable procedure in law was not followed. Compensation thus due is not automatic. It must be clearly demonstrated to enable the Court make a finding vis-a-vis the applicable law.

32. In this case, there was no claim of unfair termination at all. Not in the pleadings or in evidence. Nothing at all. To then place a claim for compensation at the prayers section is a misnomer. This shall not be awarded.

In the end, the entire claim must fail in its entirety. The claim is dismissed. each party shall bear their own costs.

Delivered in open Court , dated and signed in Nairobi on this 25th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

.....

.....