



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2564 OF 2012

JAMES MUTEMBEI.....CLAIMANT

VERSUS

LANDMARK HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant in this suit avers that he was employed by the respondent on 10th August, 2004 and worked until 12th November, 2012 as a cleaner. According to initial arrangements, the claimant was to be apprenticed in mechanic and driving skills but instead of doing so, the claimant was assigned a single room for accommodation and allocated duties of cleaning cars.
2. These duties pre-occupied the claimant for a period of eight years. During this period the claimant claimed he was underpaid in most instances, and never proceeded on leave. He therefore sought the order of the Court against the respondent for compensation in that regard.
3. The respondent in its memorandum of response filed on 18th February, 2013 concedes that the respondent joined its services as an apprentice and was only employed in the year 2011. The respondent further averred that the claimant was indeed trained in mechanic skills. The respondent averred that the claimant could not and was not supposed to earn a salary while serving as an apprentice. Concerning leave, the respondent similarly averred that the claimant was not entitled to leave earlier than September, 2011 when he was formally hired. The respondent further averred that on 12th November, 2012 the claimant absconded work without tendering any explanation and the matter was reported to the District Labour Officer.
4. In his oral testimony in Court, the claimant reiterated most of the averments in the memorandum of claim and stated further that at the start, he was paid Khs.4000 per month but split weekly. In September, 2012, he was paid Kshs.1,750 per week. According to him he started working in 2004 and was accommodated by the respondent. His salary was increased to Kshs.7000/= in August 2012 and that from 2011 deductions were made on his pay on account of NSSF. According to him, his services were terminated in November, 2012 over complaints for low pay.
5. In cross-examination, the claimant stated that he started working in October, 2004 and that he agreed to do any work provided the respondent enrolled him for mechanics and driving classes. Upon termination he never demanded his terminal dues immediately but his advocate later did. He further stated that from 2011 he started receiving monthly pay and that was when he was

registered with NSSF.

6. The respondent did not offer any oral evidence since after several adjournments the Court felt the respondent was causing unnecessary delay to the conclusion of the matter by not making its witnesses available to commence defence hearing. The Court therefore ordered that the matter be concluded based on the evidence on record.

7. In his closing submissions before the Court, Mr. Kubai for the claimant submitted that the claimant was not provided with a letter of contract of employment in accordance with the provisions of section 9 and 10 of the Employment Act. He further submitted that the claimant was subjected to work under the pretext of apprenticeship which did not conform with the provisions of section 6,11,19 and 21 of the Industrial Training Act. According to counsel, the respondent was enjoined by the provisions for the Industrial Training Act to first seek permission of the Director of Industrial Training and enter into apprenticeship agreement with the claimant sanctioned by the Director on the duration of the apprenticeship and training schemes to be covered.

8. According to counsel the Employment Act and other Labour statutes define and employee as:-

“a person employed for wages or salary and includes an apprentice and indentured learner”.

9. Mr. Kubai submitted that since the alleged apprenticeship in terms of the agreement was not annexed to the memorandum of response, the Court should ignore the assertion. According to counsel it defeated logic for the respondent to claim putting the claimant on apprenticeship for nearly 8 years and not indicate whether he initiated trade test examinations of the Ministry of Labour to validate the training and give certificate to the claimant as indication of successful apprenticeship training. Counsel therefore urged the Court to find that the claimant was not placed under apprenticeship as alleged but was used as a general labourer without a contract of service as required by the Employment Act.

10. Regarding dismissal, counsel submitted that the letter written by the respondent reporting the dispute to Ministry of Labour was belated since it was written after the respondent had received a demand letter from the claimant.

11. According to counsel, the claimant as an employee of the respondent was from 10th August, 2004 to 12th November, 2012 underpaid, not allowed to go on leave and not provided with a house or house allowance and upon termination, not given notice. Counsel therefore urged the Court to award the Claimant the prayers sought including 12 months' salary as compensation for unfair dismissal.

12. Mr. Kabue for the respondent on the other hand submitted that the claimant was misleading the Court that he was employed as a cleaner from 10th August, 2004 until 12th November, 2012 while the true position was that the claimant joined the respondent as an apprentice and was only employed in September, 2011. According to counsel therefore, the claimant having been employed in September 2011 was neither entitled to leave nor NSSF contributions during his apprenticeship. Further the claimant's services cannot be said to have been terminated wrongfully as alleged as he absconded duties.

13. The question for determination in this suit seem to be whether in 2004 the claimant was engaged as an apprentice or an employee. Second; if so, was there any underpayment and failure on the part of the respondent to observe and honour its statutory obligations towards the claimant as a worker such as allowing him to go on leave and provide housing or allowance in lieu thereof. Thirdly, how far back can this Court make an order for compensation if any to the claimant.

14. Section 6 of the Industrial Training Act provides that:-

6(1) No person shall employ an apprentice without having first obtained written permission of the Director General so to do.

No such permission was annexed to the respondent's memorandum of claim or produced in evidence before the Court hence on this question the Court will say ex facie that the claimant was not an apprentice within the meaning of section 6 of the Industrial Training Act.

15. However, it was common ground that between the claimant and the respondent that the claimant was to receive some skills training in motor vehicle mechanics and driving. This may not have conferred on him an apprenticeship status but was some benefit he was to get as he continued to work for the respondent as a general worker.

16. According to the claimant, he worked for the respondent from 2004 and was paid weekly but at the end of the month. He did not produce any payslip or voucher to prove this. His earnings for the period between August, 2004 to December, 2005 was stated as Kshs.4000/= against General Wages Order for Kshs.4,445/- implying he was paid Kshs.335 less per month for the period upto 2005 and Kshs.1,195 less from the period between 2006 and 2007. The claimant further claimed that he was underpaid in the sum of Kshs.586 per month in 2011 and in the sum of Kshs.1,579.80 per month in 2012 making the total claim for underpayment to be Kshs.61,943/92.

17. Underpayment is a continuing injury and must be brought within 12 months after cessation thereof. The claimant's employment with the respondent the context in which the underpayments took place ended in September, 2012. This suit was filed in December 2012 hence was within the period stipulated by section 90 of the Employment Act. The relationship between claimant and the respondent was continuous and for a long time hence he could no longer be considered a casual employee. His services could therefore only be terminated in accordance with the Employment Act as if he was a regular employee.

18. Further he is entitled to benefits accruing to a regular employee such as leave and overtime. The respondent averred that the claimant absconded duty but did not produce any evidence to show any attempt was made to contact the claimant to show cause why his services could not be terminated on account of absconding duty nor was any allegation made that the claimant left work under circumstances that showed he was not returning to work. The Court can therefore only assume that the claimant's services were terminated as alleged. The Court will therefore award the claimant as follows:-

(a) One month's pay in lieu of notice for

Termination.....8,579.80

(b) Underpayments from 2004-2012.....61,942.92

(c) Leave.....39,543.00

(d) Service pay at the rate of 15 days salary for

Each complete year from 2004 to 2010

(6 years using Kshs.7,000 as monthly pay)....22,500.00

(e) Six months' salary for unfair termination

of services.....51,478.80

19. The respondent shall further issue the claimant with a certificate of service.

20. It is so ordered.

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge