



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 606 OF 2014

BETWEEN

CHARLES OKELLO NGIELA CLAIMANT

VERSUS

TSIMBA CHILDREN'S HOME..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Charles Okello Ngiela the Claimant in Person

Mr. Otieno Advocate instructed by Omondi, Waweru & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant instituted this Claim through a Statement filed in Court on 2nd December 2014. He states he was employed by the Respondent Children's Home as its Manager, on the 1st February 2012. He was issued a written contract of employment. He earned Kshs. 22,000 per month. His contract was terminated by the Respondent in circumstances he feels were unfair and unlawful. He seeks the following Orders against the Respondent:-

a) A declaration that termination was unfair

b) April and August 2012 salary at Kshs. 44,000; 1 month salary in lieu of notice at Kshs. 22,000; off days at Kshs. 56,320; salary for driving duties for 6 months at Kshs. 60,000; reimbursements at

Kshs 33,000; compensation for the unexpired contract period of 6 months at Kshs. 132,000- total Kshs. 347,000.

c) Certificate of service.

d) Costs of the Claim with interest.

2. The Respondent filed its Statement of Response on the 6th May 2015. It states the Respondent was employed by other Entities, Persons or Sponsors, and not the Respondent. The Respondent is a Children's Home, whose Employees if any, are normally engaged directly by the Sponsors. It was not privy to the Claimant's contract of employment. The Claim is without merit, and the Respondent asks the Court to dismiss it, with costs to the Respondent.

3. The Claimant gave evidence on the 11th May 2015. He closed his case on the 8th June 2015. The Respondent called its Manager Justin Masha Baya on the same date 8th June 2015, when proceedings wound up. Parties confirmed the filing of their Submissions at the last mention in Court on the 13th July 2015.

4. The Claimant testified he was employed in November 2011. He was confirmed on 1st February 2012 as the Manager. He earned Kshs. 22,000 per month as salary. He was asked to pack and leave, on the 17th August 2012. The Director Mr. Birgen approached the Claimant in the company of Police Officers. He alleged the Claimant was negligent and used abusive language. The Claimant pleaded with the Employer to allow him the opportunity to remove his personal items from the home; he was not allowed to do so.

5. Cross-examined, the Claimant testified his contract of employment was executed between him, and foreigners Birgit Alexakis and Dr. Antonis Alexakis, both representing an organization called 'Future For Kids.' The organization took care of the Kids. The Home is part income-generating. The Kids are from disadvantaged backgrounds. The Directors were based in Germany. The Claimant has not sued the individuals whose names are in the contract. The Claimant directed his demand letter before filing the action, to Astrid Gudelfenning. The Claimant worked for 8 months. The monthly salary was Kshs. 22,000, and house allowance at Kshs. 7,000. The house allowance was not indicated in the contract; it was promised verbally. He was confirmed in February 2012. The contract was signed on 8th April 2012. Tsimba Children's Home did not appear in the employment documents.

6. Justin Masha Baya told the Court he has been the Manager at the Home from 13th April 2015. The Home takes care of orphaned and other disadvantaged Children. The Children are housed at the Home. The Home is financed through an Organization known as Support for Education Kenya [SUPEDU] which is based in Malindi Kenya. The group receives funds from donors in Germany. The funds are disbursed to the Respondent.

7. There are various Supporters. The Home is a Community-based Organization. It does not employ. Baya himself was employed by the NGO SUPEDU. The contract is between SUPEDU and the Staff. The Home does not generate income. Future For Kids was the predecessor to SUPEDU. This is the organization which employed and dismissed the Claimant. The Claimant should have directed his Claim to Future For Kids, not to the Home. Baya testified on cross-examination that he was hired by SUPEDU locally; he was not hired from Germany. The Home does not have income generating activities. Sponsorship is not rotational. The Witness denied he was in Court merely to protect his interest. He was aware there were 3 Managers of the Home preceding him; he did not know how they left employment. The Community registered the Home. It is not true the Home runs a Sawmill.

8. The Parties' Submissions essentially reiterated their respective positions, as captured in their evidence recorded above.

The Court Finds:-

9. The first issue raised by the Respondent is whether Tsimba Children's Home, is the proper Respondent to shoulder the responsibility of this employment Claim. There is no dispute the contract of employment was signed between the Claimant, and an Organization known as Future For Kids registered in Germany, and which was represented in the contract by Birgit Alexakis and Dr. Antonis Alexakis. He was employed as Manager to oversee the Tsimba Children's Home, then under the Sponsorship of Future For Kids. He earned a monthly salary of Kshs. 22,000. The Court has not seen evidence of an additional sum of Kshs. 7,000 in house rent allowance as suggested by the Claimant. There was no mention of house rent allowance in the Statement of Claim.

10. The letter of summary dismissal dated 17th August 2012, again originated from the organization Future For Kids, and is signed by Birgit Alexakis.

11. It is accepted both Future For Kids and its principals, the Alexakises, are foreigners. They are Germans. They are not within the reach of their former Employee, Mr. Charles Okello Ngiela. They designated him to work at the Home, which was then, under their effective control. His contract and letter of dismissal show he was to work for the Home, and worked for the Home.

12. The Court does not hold the view that in the absence of the Alexakises and the Future For Kids, the Employee is to be left dangling in the wind, without an Employer against whom to direct his grievance against. The Home, as testified by Mr. Baya, is a registered Community Based Organization. It enjoyed the services of the Claimant. It is an identifiable Employer, fitting the description of the term 'Employer' under Section 2 of the Employment Act 2007.

13. The Alexakises and Future For Kids were merely factors of the Tsimba Children's Home. They acted on behalf and for the benefit of the Home, in employing Ngiela. The Respondent is properly sued.

14. It is wrong for the Respondent to enjoy the services of the Claimant, and not take responsibility for his employment Claim. It is similarly objectionable for the Home to seek the sympathy of the Court. The Court got the impression the evidence of Baya in particular, was aimed at eliciting sympathy from the Court. It is not material to the dispute that the Home is caring for the orphaned and disadvantaged Kids; that it is community based; or that it does not generate income. The Claimant was not employed as Charity Worker; the Home, through its Sponsors engaged him as a regular Employee, with rights and obligations contained in the contract of employment and the Employment Act 2007.

15. The Court has emphasized in past decisions that Employees must not be hampered in accessing industrial justice, by the legal and business forms, adopted by their Employers in the structuring of their enterprises. Employers have no reason in shielding themselves from employment liability, under the blanket of such principles as privity of contract espoused by the Respondent in its Submissions. The Respondent must assume liability for the labour which the Claimant rendered. Frequently, Employers organize their businesses, institutions and enterprises in multiple legal and business forms with the objective of avoiding regulatory burdens such as taxes and labour obligations. This trend is rife even within charitable entities. They must not be allowed to deprive Employees of their hard-gained employment rights.

16. The 2nd question is whether the Claimant has demonstrated he was unfairly dismissed. The letter of dismissal cites the reasons for dismissal as negligence of duty; use of abusive language towards the Employer; destroying of home property; and many other reasons. There was no evidence shown by the Respondent to substantiate these grounds as is required under Section 43 and 45 of the Employment Act. The contract states the applicable law is the employment law of Kenya. There was no substantive justification in terms of this law of Kenya, preceding the letter of dismissal.

17. There was no suggestion from the Respondent that the Claimant was heard in the manner provided for under Section 41 of the Act. The letter of dismissal simply advises the Claimant that the Employer's decision is taken "*following a series of complaints and proven accusations.*" There is no hint of an investigation and hearing in which the Claimant was a participant.

18. Consequently the Court finds termination was unfair both in substance and procedure. ***The Claimant is granted 6 months' salary at Kshs. 132,000 as compensation for unfair termination.***

19. ***His claim for April and August 2012 salary was not given any serious rebuttal by the Witness for the Respondent and is allowed as prayed at Kshs. 44,000.***

20. Notice pay is merited and granted in law and the contract of employment. ***The Claimant is granted 1 month salary in lieu of notice at Kshs. 22,000.***

21. There was no evidence or material placed before the Court to support the claims for salary for driving duties for 6 months, off days, and re-imburements. Where are the supporting receipts for re-imburements and what was the money used for? If the Claimant undertook driving duties, it would in the view of the Court reasonably fall within his managerial docket. His contract does not state he would be driven around in fulfilling his role, or that he would be paid extra salary for driving. These claims have no foundation.

22. ***The Respondent shall release to the Claimant his Certificate of Service under Section 51 of the Employment Act, forthwith.***

23. ***Lastly the Court orders the Parties to shoulder their costs of the Claim, and the Award is satisfied within 60 days of its delivery.***

IN SUM, IT IS ORDERED:-

[a] Termination was unfair

[b] The Respondent shall, within 60 days, pay to the Claimant 6 months' salary in compensation for unfair termination at Kshs. 132,000; arrears of salary at Kshs. 44,000; and 1 month salary in lieu of notice at Kshs. 22,000- total Kshs. 198,000

[c] The Respondent shall release to the Claimant his Certificate of Service forthwith

[d] The monetary Award shall be satisfied within 60 days from the date the Award is delivered

[e] Parties to meet their costs of the Claim

Dated and delivered at Mombasa this 11th day of September, 2015

James Rika

Judge