



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NUMBER 563 OF 2014
BETWEEN
CHARLES GETUNO OMWENGA.....CLAIMANT
VERSUS
HENDERSON MAGARE t/a HENDERSON MAGARE
TIMBER YARD.....RESPONDENT

Rika J

Court Assistant: Benjamim Kombe

Mr. Omuya Advocate instructed by Hezron Gekonde & Company Advocates for the Claimant

Mr. Omari Advocate instructed by D.N. Omari & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

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

1. The Claimant filed his Statement of Claim, on the 7th November 2014. He avers he was employed by the Respondent in January 1990, to perform general duties at the Respondent's Timber Yard. Initially he was posted to Nairobi's Industrial Area, later to Mombasa. He claims he was unfairly and unlawfully dismissed on 9th September 2013. He seeks against the Respondent:-

a. A declaration that termination was unlawful

b. One month salary in lieu of notice at Kshs. 18,000

c. Severance pay [service?] at Kshs. 207,000 based on 15 days' salary for every year completed in service.

d. Public Holidays' pay at Kshs. 175,076

e. 12 months' gross salary in compensation for unfair termination at Kshs. 216,000

f. General damages for wrongful termination

g. Any other suitable relief

h. Costs

2. The Respondent filed a Statement of Response on 29th December 2014. He denies all the averments in the Claim, except on the description of the Parties and the jurisdiction of the Court. Other averments are responded to in general terms.

3. The Claimant gave evidence on 25th May 2015, and called one Witness, his former Workmate Mr. Bernard Nyamwaro Angwenyi. The Respondent testified on 21st July 2014 as did his Wife and Business Partner Mrs. Priscah Kemunto Magare, bringing the hearing to a close.

4. Omwenga testified he was employed by the Respondent as a Salesman. He would buy timber for the Yard. There was no letter of appointment. He started working in 1990. He would source timber from Mt. Kenya, Mt. Kilimanjaro, Uganda and Zaire. He was in Zaire [DRC] in 2010-2013. He was the Supervisor at the workplace, and oversaw banking of the Respondent Business' proceeds. The Respondent had yards in Nairobi Industrial Area, and Tononoka in Mombasa.

5. He was paid Kshs. 18,000 per month. There were no pay slips. Initially, he signed a Voucher. He afterwards signed a Black-book. These payment records were retained by the Employer. The Claimant returned to Mombasa from Zaire, and his contract was terminated on 9th September 2013 by Henderson Magare.

6. The Claimant worked on Public Holidays. The Employer did not pay N.S.S.F and N.H.I.F contributions. The Claimant demanded to be paid service pay. He made the demands to Mrs. Magare who oversaw the business, as Mr. Magare was engaged as a Teacher. Mrs. Magare said the family would discuss, and revert to the Claimant.

7. Mrs. Magare later called the Claimant asking him to go and assist in a new Yard in Nairobi. Mr. Magare went to the Yard in Nairobi, quarreled the Claimant, which compelled the Claimant to inform Mrs. Magare the Claimant could not continue working in the circumstances. The Wife advised Magare gives her Husband time to cool off. She paid the Claimant Kshs. 31,000 at the end January 2014, to enable the Claimant pay his Children's School Fees. The Claimant left work after this. In his 23 years of service, he did not at once get a warning letter. The Claimant exhibited copies of bus tickets indicating he had travelled to Zaire. He also attached Bank Credit Notes and Timber Sale Receipts from Zaire, showing money was sent to him by the Magares and used in purchasing Timber. He testified he was an Employee of the Respondent, was unfairly and unlawfully dismissed, and merits the prayers sought. He did not keep N.S.S.F and N.H.I.F records. These were employment records, which he expected would be in the custody of the Respondent. He did not sign for the sum of Kshs. 31,000 paid by Mrs. Magare; it was to be deducted from his final dues. Questioned by the Respondent's Advocate, the Claimant testified he did not have a letter of employment. At one time he was issued Uniform. He was paid Kshs. 18,000 all-inclusive. He was sent to buy timber. He was not engaged on commission basis. He was not a Broker or Agent of the Respondent. He requested Mrs. Magare to pay him Kshs. 31,000 for School Fees. He was in Zaire 2012-2013. He did not have his Passport in Court.

8. Mr. Angwenyi told the Court he knew the Claimant from 1998. The two worked for the Magares at Tononoka. The Claimant would buy and sell Timber for the Magares. Angwenyi worked for 10 years. In 2007, the work diminished. The Respondent told the Witness there was no more work. Employees used to go on leave. They worked Monday to Friday. They rested on Saturday and worked on Sunday. They

worked on Public Holidays. There were no pay slips. There were no letters of employment. Employees signed a certain book, on receipt of salaries. N.S.S.F and N.H.I.F contributions were not paid. One Helen Mosoti, who has since passed on, was the Supervisor. Angwenyi did not understand what exactly a pay roll is, but confirmed he signed a certain book, on receipt of his salary. He left the book at the workplace. The Claimant was normally at the Yard when not out running errands for the Magares.

9. Cross-examined, Angwenyi testified he worked for the Magares selling Timber. There were about 5 Employees. He did not get a letter of employment. He did not have a document showing he worked there. The Claimant was mostly sent out of the Yard. He represented Magares outside. Angwenyi did not know if the Claimant was paid for this. The Witness did not see the Claimant receive a salary. The Claimant was not on the pay roll.

10. Magare told the Court the Claimant was not his Employee. He came to know the Claimant from 2005. He would send the Claimant to look for timber from the market. Once the Claimant secured the timber, he would get paid by Magare. Magare has Employees, with letters of appointment, who are paid monthly. The Claimant was never such one.

11. The Claimant was running errands for Magare. He would be sent to Nairobi, Busia and even Congo. Magare met the Claimant's costs in the undertakings. He was paid for the work done. The amounts paid depended on the volume of work. The Claimant did not work on a day to day basis. He would hang about the Yard, or go away, until called and assigned a task by Magare. The Claimant was not a regular Employee. He is not entitled to the benefits and compensation claimed. Magare testified he has other Employees, and was not obliged to bring those Employee's records in Court. He confirmed Angwenyi was his Employee. Angwenyi did not file any Claim in Court against Magare.

12. The Respondent testified on cross-examination that he runs the business jointly with his Wife. The business opened in late 1990s. He did not know that his Wife had stated the business was in operation from 1989. He retains a register of Employees. He did not file it in Court. If required, he would avail the same. Employees sign the register on reporting for duty. The Claimant ran errands for Magare. There was no clear contract between the Parties. Magare has 3 Employees based at Mombasa. They were all paid salaries and signed the muster roll on receipt. Magare did not know what he would term the money he paid to the Claimant at the end of the errands, as. The Respondent's Employees do not work on Public Holidays. They are entitled to annual leave. Magare testified he was aware it was the duty of the Employer to keep employment records. He was not out to conceal an employment relationship.

13. Mrs. Magare confirmed she runs the timber business in partnership with her Husband. The business has operated on and off, from 1999. The Claimant ran errands for the Couple. He was never their Employee, paid a salary, as would a regular Employee. Mrs. Magare described the relationship between the Parties as a walk-in, walk-out. The Claimant was paid irregularly, depending on the work he performed. Sometimes he was paid after 3 months, 6 months, or even 8 months.

14. She paid him Kshs. 31,000 in February 2013, for grading timber at the Respondent's Yard in Nairobi. He did not work daily, and did not sign the register. Angwenyi worked for the Respondent and was a regular Employee. He was paid terminal dues after he left, and has not sued the Respondent. The Claimant is being malicious. The Respondent is not under any obligation to meet his Claim. The documents attached to the Claim show the Claimant ran errands for the Respondent; they do not show he was an Employee. Mrs. Magare keeps employment records for valid Employees. The Claimant did not have a letter of appointment, or termination. The Witness testified she did not withhold any information from the Court. Kshs. 31,000 paid to the Claimant was with regard to one transaction.

15. Cross-examined, Mrs. Magare testified she stated in her written statement filed in Court, that the business started in 1989. She could not recall when the Claimant was engaged. She maintained employment records. It was not necessary to bring to Court records relating to the Claimant. Kshs. 31,000 paid to the Claimant was for a particular job done. The Claimant ran errands for the Respondent many times. Records of other Employees working for the Magares were not relevant in the proceedings. The Respondent prays for dismissal of the Claim.

16. There are two main questions arising from this dispute which are: was the Claimant an Employee of the Respondent; and was his contract of employment if there, terminated unfairly and unlawfully by the Respondent?

The Court Finds: -

17. Section 2 of the Employment Act 2007, describes an 'Employee' to be " a person employed for wages or salary, and includes an apprentice and indentured learner." The converse term ' Employer' is much broadly defined to include, "any person, public body, 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."

18. Other Labour Laws – the Labour Relations Act 2007 and the Labour Institutions Act 2007 have similar definitions on the two terms. The contract of employment may be oral or in writing, express or implied, and the period of employment need not be definite. While the terms wages or salary are not defined in the Employment Act, the term 'remuneration' is used, to include the total value of all payments in money or kind, made or owing to an Employee, arising from the employment of that Employee.

19. There is no requirement that wages or salaries are paid at any particular intervals. Section 35 of the Employment Act suggests wages and salaries can be paid daily; they can be paid periodically at intervals of not less than one month; or paid periodically at intervals of, or exceeding one month.

20. The Claimant was engaged by the Respondent and his Wife in 1990, overseeing their Timber Business. The engagement was not reduced into writing, but the evidence of all the Witnesses leaves no doubt in the mind of the Court, that the Claimant was engaged by the Respondents, and occasionally remunerated for his labour.

21. He worked in the Respondent's Yards in Nairobi and Mombasa. He was sent as far as the Democratic Republic of Congo to buy timber. The bus tickets exhibited by the Claimant are not contested, neither are the cross-border financial transactions.

22. The Respondent and his Wife were not able to explain their relationship with the Claimant as anything else, other than an employment relationship. They acknowledged paying money to the Claimant for his services, but were not able to say what the nature of these payments, were. In the view of the Court, the payments comprised remuneration arising from the Claimant's employment. This was true of the Kshs. 31,000 paid by Mrs. Magare to the Claimant, as well as various other sums paid to the Claimant by the Respondent in the long relationship.

23. From the evidence of the Respondent and his Wife, it seems to the Court the Claimant was not a Business Partner. He was not an agent. He was not alleged by the Respondent to be in any of these categories. He appears to have been a long-time friend of the Magares, which friendship may have blurred the employment relationship, from the view of the Magares. Mrs. Magare testified the Claimant was not an Employee. Her position was that he was paid for work done, at intervals of 3, 6 or even 8 months. An employment relationship as observed above does not depend on the intervals at which the Employee is remunerated.

24. The evidence of Bernard Nyamwaro Angwenyi confirmed the Claimant used to buy and sell timber at the Respondent's Yard. He too was not issued a letter of employment. Mrs. Magare confirmed Nyamwaro was Respondent's Employee and was paid terminal benefits on exit.

25. The fact that the Claimant was not always at the Yard would not defeat his claim on the presence of an employment relationship. The nature of his work required he was constantly on the move. He could not run errands for the Magares, to borrow their word, without being constantly out of the Yard.

26. In *Nairobi Industrial Court Cause Number 684 of 2014 between Child Welfare Society of Kenya v.*

Margaret Bwire & Another the Court amplified the definition of an ‘Employer’ to include a person having custody of any employment, place of employment or any employee. An ‘Employee’ is person in the service of another, under any contract of hire, express or implied, oral or written, where the Employer has the power or the right to control, and direct the Employee in material details of how work is performed. The Respondent was in custody of the Timber Business; he directed the Claimant in material details of how to perform his work; the Claimant was controlled and directed by the Respondent; he was sent to places as far as DRC to conduct business; and was paid for his labour. In the view of the Court, the Respondent and the Claimant were in an Employer- Employee relationship. The family friendship may have obscured the employment relationship but did not certainly replace it.

27. Was the Claimant unfairly dismissed, does he merit the prayers sought? The Claimant did not prove that an unfair termination of employment occurred as required under Section 47 [5] of the Employment Act 2007. He explained that he was recalled by Mrs. Magare; worked at Nairobi grading timber; Mr. Magare found him there and quarreled the Claimant; the Claimant felt he could not continue working; and was told by Mrs. Magare to hold on, for Mr. Magare to cool off. After the end of January 2014 the Claimant left work on payment by Mrs. Magare, of Kshs. 31,000. The Claimant did not demonstrate that he was unfairly dismissed, his evidence pointing more to a voluntary decision to quit, based on the discord between him and Mr. Magare. ***The claims for compensation for unfair termination and damages for wrongful dismissal have no basis and are rejected.***

28. ***Similarly the prayer for notice pay has no merit and is rejected.***

29. There was no evidence sufficient to support the case for payment of holiday pay. The Claimant was always on the move, running errands for the Respondent. He was not in one place, and did not show that he reported for duty on any specified gazetted public holiday, at a specific place of work. He claims public holidays for 23 years, while at the same time he testified he was in the DRC for some time. It cannot be that the public holidays in the DRC fall on the same days as in Kenya. ***The claim for holiday pay is rejected.***

30. Service pay, which the Claimant confuses for severance pay, is claimed at 15 days’ salary for every year completed in service. Service pay is granted under Section 35 of the Employment Act 2007, and is a form of social security payment, afforded Employees upon termination, and is important particularly where the Employee has not been placed within the bracket of other social security plans contemplated under this law. The Respondent did not place the Claimant in any form of social security plan. The Respondent and his Wife were not clear on the date they started their Business, or engaged the Claimant in whatever form. In her Statement Mrs. Magare stated the Business started some time in 1989. She came to know the Claimant shortly thereafter. The Claimant testified he was employed in 1990 and worked up to 2013- a period of 23 years. The Court is prepared to accept the dates given by the Claimant in the absence of records from the Respondent. It is acceptable also, as suggested by Mrs. Magare that the Business was on and off. The Claimant does not seem to have worked in continuity, and would occasionally be off work, only to be recalled when the work volume was high. The computation of service pay, based on 23 years of service is therefore not a realistic assessment. The Court shall allow a discretionary service pay calculated at 15 days’ salary for 10 years of service, based on a monthly salary of Kshs. 18,000. ***In total service pay is granted to the Claimant at Kshs. 103,846.*** There shall be no order on costs and interest.

IN SUM, IT IS ORDERED:-

[a] The Respondent shall pay to the Claimant a total sum of Kshs. 103,846 in service pay.

[b] Other prayers are rejected.

Dated and delivered at Mombasa this 23rd day of October, 2015

James Rika

Judge