



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI
 CAUSE NUMBER 1374 OF 2011

BETWEEN

TIMOTHY MAKAU MULI.....
 CLAIMANT

VERSUS

MERIDIAN PATISSERIE LIMITED.....
 RESPONDENT

Rika J

CC. Nancy

Mr. Makau Muli Claimant in person

Mr. Gaita instructed by Gaita & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNLAWFUL TERMINATION

AWARD

1. Timothy Makau Muli filed this Claim against Meridian Patisserie Limited on 15th August 2011. He alleges he was employed by the Respondent Business for 14 years, during which he was engaged in purchasing of vegetables, marketing of pastries, taking of orders from customers, supplying customers, and baking of samosas. The Respondent is a food company. His contract came to an end at the instigation of the Respondent, on 30th April 2011. He was not given notice or reason for termination. He claims the following:-

- a. 14 years' accrued leave at the rate of Kshs.8,000 per month, totalKshs.112,000;
- b. Leave travelling allowance @kshs.2,000 for 14 years at
Kshs.28,000;
- c. House allowance arrears for 14 years at
Kshs.588,000;
- d. National Social Security Fund contributions
.....Kshs.761,000

Less

paid

.....
Kshs.10.000

Total

Claimed.....Kshs.751,000/=

2. The Respondent filed its Statement of Reply on 7th October 2011. Its position is that the Claim is legally untenable.
3. Timothy gave evidence and closed his case on 17th June 2013. The Respondent testified through Paulo Munyanga Kisuli, Grace Minno, and Nathaniel Mbugua on 2nd December 2013 when hearing closed.
4. The Claimant testified he was employed by the Respondent on 30th July 1997 as a Laundry Man. He worked for 4 years, and was made a Cook. He was then transferred to the Respondent's Bakery at City Centre Nairobi. On 30th April 2011, his employer called him and told him she was unwell. He was asked to go to the office and be paid annual leave pay, house allowance and leave travelling allowance. He was paid Kshs.10,000 by the Respondent's Clerk, and advised Kshs.8,000 was his salary, and Kshs.2,000 leave travelling allowance. He thereafter found his dues tabulated based on 10 years, rather than 14 years worked. When he instructed an Advocate, the Respondent offered him terminal dues at Kshs.80,461.
5. On cross-examination, Timothy revealed he was employed in 1997 by Mrs. Nurbranu Amirali Madhany wife of the Director of the Respondent. He washed clothes at her residence in Jirani Estate. Among his contemporaries in the domestic service of the Madhanys were Grace and Paul. Paul was a cook. Timothy was promoted by Mrs. Madhany and sent to work at the City Centre in 2007. He had worked for her for 10 years. He worked at the Meridian Bakery for 4 years, 2007 -2011. Meridian Patisserie Limited was incorporated in 2001. Timothy earned Kshs.6,000 not Kshs.750 per month, in 1997, and Kshs.8,000 on leaving. He was not issued a letter of termination. He conceded he started off as a domestic servant. He declined the offer of Kshs.80,461 from the Madhanys. He did not go on leave. He did not have evidence to support his claims for N.S.S.F. deductions.
6. Paulo Kisuli testified he worked with the Claimant as a domestic servant in the residence of the Madhanys. He knew the Claimant from 1997. Timothy was a Messenger. There were about 4 domestic servants. Timothy was not involved in sale of any items. Kisuli did not know what Timothy did outside the residence. It is not true that Timothy sold Kebabs and Samosas for the Respondent. Grace Minno worked with Timothy as a domestic servant for the Madhanys from 1997. He was a Messenger. He also washed clothes. She agreed on cross-examination that Mrs. Madhany made cakes and biscuits at home, and the Claimant would take orders, and make deliveries to the customers. She conceded also, that Timothy assisted the Cook in making Samosas and Kebabs.
7. Nathaniel Mbugua testified he works as the Accountant for Nuris Bakery based at Diamond Plaza in Nairobi. Nuris, Burgerland and Meridian have common directors – Mr. and Mrs. Madhany. The Claimant was an employee of Mrs. Madhany. He worked as a Cleaner at her home in Parklands. He was asked to go and assist in the business at Meridian in 2006. He assisted, and would return home to the Madhany residence. Mbugua paid all employees from his office at Burgerland. Timothy was paid Kshs.2,000 per week. His mother worked for the Madhanys, and it was through her, that the son was employed. He left employment after disagreeing with Mrs. Madhany. The Respondent offered to pay him leave accrued of 10 years and leave travelling allowance, totaling Kshs.68,649. He was twice paid Kshs.10,000 and the Respondent is willing to settle his claim by paying the balance of Kshs.48,649/=.
8. Cross-examined, Mbugua testified that the Claimant was a Cleaner, but he could not tell if he was ever promoted. He did not know what the Claimant discussed with Mrs. Madhany on his terminal dues. It is true he was twice paid Kshs.10,000 as leave allowance and salary. No deductions were made on the Claimant's salary, because he was categorized as a domestic servant. The Respondent urges the Court to dismiss the Claim except to the extent conceded by the Respondent.

The Court Finds and Awards:-

1. The common evidence of the parties is that Timothy Makau Muli was employed initially as a Domestic Servant by the Madhany, at their residence in Parklands. He was employed in 1997. His duties included cleaning, cooking, and running errands for Mrs. Madhany in particular. Mrs. Madhany extended her commercial activities to her residence, and it is clear Timothy rendered his labour in baking samosas, biscuits, kebabs and in marketing and selling of these products.

7. He worked fully in the residence for 10 years from 1997 to 2007. From 2007 to 2011, he worked in the more commercially distinctive Meridian Patisserie, one of the three commercial vehicles operated by the Madhany. In view of the Court these vehicles together with their individual owners – the Madhany were properly and collectively the employer of Timothy, from 1997 to 2011. The Claimant was therefore right in claiming to have worked for the Respondent for 14 years. This Court has stated in its past Awards that legal separateness in business formations counts for little in labour and employment relations. Employees cannot be denied their dues by employers based on concealment of the actual identity of an employer, which is frequently made possible by creation of multi-layered commercial vehicles. In this case, the Madhany liberally took in employees as domestic servants and used them in their commercial ventures. The individual Madhany or any of their commercial vehicles, could be called to account in an employment claim instituted by such employees.

8. The Claimant did not persuade the Court that he is entitled to arrears of house rent allowance. He was housed in the residence of the Madhany all the 14 years, even after 2007. The law before and after 2007 required, or requires, the employer to provide the employee with reasonable housing accommodation at or near the place of work. In the absence of such accommodation, the employer shall pay the employee reasonable house rent allowance, to enable the employee secure the housing. A domestic servant who lives with the employer has the benefit of reasonable housing accommodation within the residence of the employer, and has no justification seeking to be paid house rent allowance. The claim for Kshs.586,000 in house rent allowance is dismissed.

9. The Claimant appears to have been registered with the National Social Security Fund (N.S.S.F.), but the Statement of Account does not show that the Respondent deducted and made any payments in contribution, on account of the Claimant. The Claimant's remedy lies in payment of service pay for his 14 years under Section 35 of the Employment act, not seeking to be paid what was supposed to be paid to the N.S.S.F. In place of the claim for refund of N.S.S.F. contributions, the Court grants the Claimant service pay at 15 days' salary, based on a rate of Kshs.8,000 per month for 14 years = Kshs.64,615.

10. The Respondent is willing to pay the Claimant accrued annual leave pay based on 21 days for 10 years. The figure adopted in calculating this is a monthly salary of Kshs.8,000 and leave travelling allowance of Kshs.500. The total offered was Kshs.68,649 out of which Kshs.20,000 was paid, leaving a balance of Kshs.48,649, which the Respondent is willing to pay.

11. The correct approach would be to adopt 14 years of service, rather than 10. The result would be 294 days of annual leave. Using the formula in Respondent's appendix RExh. 2, this would be 326.9×294 days = Kshs.116,688.60. Annual leave pay, and leave travelling allowance for the period of 14 years is allowed at Kshs.116,688.60

In sum:-

- a. ***The Respondent shall pay to the Claimant service pay at Kshs.64,615;***
- b. ***The Respondent shall pay to the Claimant arrears of annual leave pay and leave travelling allowance at Kshs.116,688.60;***
- c. ***Kshs.20,000 has already been paid to the Claimant, leaving the total balance at Kshs.161,303.60;***
- d. ***The sum of Kshs.161,303.60 shall be paid by the Respondent to the Claimant within 30 days of***

the delivery of this Award.

e. ***No order on the costs.***

Dated and delivered at Nairobi this 24th day of January 2013

James Rika

Judge