



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1729 OF 2011

BETWEEN

ENOCH NGAIRA LUSALA.....CLAIMANT

VERSUS

JUZAR A. MIYANJI.....1ST RESPONDENT

BURHANI BAKERS 2ND RESPONDENT

Rika J

CC. Leah Muthaka

Ms. Mwila instructed by Omboga & Company Advocates for the Claimant

Mr. Ismael instructed by Kilukumi & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant commenced the proceedings herein by way of a Statement of Claim, filed on 7th October 2011. The Respondents filed their Statement of Response on 19th October 2011. Mr. Lusala testified, and closed his case on 26th September 2012. Mr. Miyanji gave evidence on 24th October 2012, while the last Witness for the Respondents, Mr. Gona Mwamumba Dzombo, testified on 26th March 2013 when the hearing closed.

2. The Claimant's position is that he was employed by the Respondents as a Cook, way back on 27th March 2002. He earned Kshs. 2,000 per month. His contract was terminated by the Respondents verbally and illegally, on 2nd July 2011. His last salary was Kshs. 12,000 per month. He was not informed in writing of any misconduct committed by him. He was not paid any terminal benefits. He seeks:-

- a. 1 month pay in lieu of notice at Kshs. 12,000;
- b. Unpaid annual leave at Kshs. 89,992;
- c. Severance pay of 9 years at Kshs. 54,000;
- d. Overtime pay for Monday to Saturday at 12 hours per week for 9 years at Kshs. 478,224;

- e. Overtime for Sundays for 9 years at Kshs. 318,816;
- f. Overtime for 11 days at Kshs. 73,062; and
- g. 12 months' salary in compensation for unfair termination at Kshs. 144,000

Total..... Kshs. 1,170,094

He also prays for earnings/ allowances for the period out of employment to-date and costs of the Claim.

3. The Claimant testified he was a Cook, and Marketing Person. There was no written letter of employment. He was paid Kshs. 400 per day as at the time of termination. He was summoned by the 1st Respondent on 2nd July 2011, and asked to apologize. The 1st Respondent was accompanied by his Brother. On 5th July 2011, he was told he could not continue working, unless he apologized. The Claimant never went on leave for the period in employment.

4. The Claimant sought the assistance of his Trade Union the Kenya Shipping, Clearing and Warehouses Workers' Union. The Union wrote to the Respondents, asking the Respondents to attend a consultative meeting aimed at voluntary settlement. The Respondents did not respond, which compelled the Claimant to approach the Court.

5. Cross-examined, the Claimant stated he worked as a Cook, a Cleaner and a Messenger. He had learnt baking through a Company called Bhai's Bakery. He did not have any papers to show he worked for such a Company. He was employed by the Respondents on 23rd March 2002. He did not have any papers of employment. His Statement of Claim gave the employment date as 27th March 2002. He did not know when Burhani Bakers started operations in Nairobi. The Claimant conceded it was him who wrote his annexure 1 [b], a letter to the Union withdrawing the complaint against the Respondents which had been lodged with the Union.

6. The Claimant's Trade Union Representative Mr. Musungu had asked the Claimant to meet him at Mr. Miyanji's Office. The Claimant did not go as Musungu was unavailable. He did not know if Musungu and Miyanji met, and what was discussed between them. It is true the Claimant's contract was terminated. He did not have any evidence to show it was terminated. The Trade Union made the decision to file the Claim, but in the Claimant's name. The tabulation of the sums claimed was done by the Trade Union. It does not bear the signature of the Trade Union Officials. He seeks Kshs. 1,170,094. His rate was Kshs. 400 per day. It is his right to claim Kshs. 1,170,094.

7. The Labour Officer Mr. R.G. Ngugi wrote to the Managing Director of the 2nd Respondent on 29th July 2011, advising that the records revealed the Claimant was a Casual Employee, and was entitled to a total of Kshs.27,279 as terminal benefits. Lusala moved from the Labour Office to the Trade Union and then to Court. Miyanji had claimed the Claimant stole some cakes and Kshs. 400 from the business. He was told Miyanji had lodged a complaint with the Police. Lusala availed himself at the Pangani Police Station. He was not asked to apologize to the Respondents. The Labour Office was not helpful. The Respondents paid the Claimant's N.S.S.F contributions recently, in one installment. He told the Court on redirection that he was sent to the Bank by Miyanji on 4th June 2011. When he returned, the Respondent alleged he had stolen the cakes and the money. He denied that he did so. He prays the Court to uphold his Claim.

8. The Respondents' position is that the Claimant was a Casual Employee, paid a daily rate. He was caught stealing 3 fruit cakes and one block cake. He admitted theft on 6th June 2011, and was asked to write a formal apology. He failed to do so, and was discontinued. The decision by the Respondents was justified under Section 44 [4] [g] of the Employment Act 2007. The reason for termination was given by the Respondents to be – theft by servant. The Respondents were invited by the Claimant's Trade Union for a consultative meeting. At the meeting, the Respondents reiterated the reason for termination as -theft by servant. The Respondents lodged a formal complaint with the Police for theft by servant. Sections 40 and 45 of the Employment Act 2007 have no application in this dispute, as the Claimant was on casual terms. The Respondents pray for dismissal of the Claim with costs.

9. Juzar Miyanji testified he owns a Bakery Business, with the Head Office at Mombasa and a Branch at Nairobi. His Brother is his Senior Partner. Lusala was not one of the Employees initially working for the Business when it opened in 1978; he was employed in 2005 or 2006. He was engaged on casual basis and worked as a Cleaner and Messenger. He did general duties. He never showed baking skills.

10. On 4th June 2011, Juzar was in his Office paying Employees their wages. One Employee came and showed him some hidden tools of work. There were cakes hidden in them. The Employee told Juzar the Claimant had hidden these. Juzar sent for the Claimant who denied having hidden the cakes. One of the Employees found more hidden cakes. Juzar warned the Employees that by the following Monday, they would have to tell him who had stolen the cakes. On Monday, Lusala went before Miyanji and confessed it was him, who stole the cakes. He called for forgiveness. Juzar asked him to write a letter to this effect. Juzar's Brother asked the Claimant to do the same thing. All Employees were present. The Claimant refused to do so. He left employment at the beginning of July 2011. Juzar reported the matter to Pangani Police Station, and the report was entered in the Occurrence Book of 5th July 2011, an extract of which the Respondents availed to the Court. Juzar reported to the Police because the Claimant did not write the apology. Juzar stated in his statement to the Police that the Claimant left employment on 4th July 2011, but was recorded erroneously as giving the date to be 18th July 2011.

11. The Claimant was paid Kshs. 433 per day. On Saturdays, Employees worked from 8.00 a.m. to 5.00 p.m. and received Kshs. 700 per day. Juzar received a demand from the Labour Office asking him to pay the Claimant Kshs. 27,279. He wanted to negotiate, and understand how the amount of Kshs. 27,279 was arrived at. At the same time there were meetings going on between the Respondents and the Trade Union Representative Mr. Musungu. Amidst the consultations, the Respondents were served with the Court Summons. Juzar intended to pay the Claimant the sum advised by the Labour Office. The Respondents contributed to the Claimant's N.S.S.F Account regularly, not in one installment. The Claimant's signed casual cards. The rate at the time was Kshs. 385 per day. The Claimant was paid Kshs. 433 per day. Juzar wanted to engage Lusala on contract; Lusala said he did not have an identity card. He worked for about 6 to 7 years in total. The incident took place at about 5.00 p.m. on a Saturday. The Claimant cannot have been sent to a Bank at this hour.

12. Cross-examined, Juzar testified the Respondents employed the Claimant around the years 2005 and 2006. He was a General Labourer, not a Baker. He was Casual, on a rate of Kshs. 433 per day. The Casual Labour Vouchers referred to the Claimant as a Bakery Assistant, not Baker Assistant. Termination was on account of theft. Theft was reported to the Police later. Juzar did not know if the Police carried out investigations. No criminal case was filed. Lusala was trustworthy before. He did not have warnings in his record. He was not granted notice on termination. He was casual and worked 6 to 7 years. The voluntary settlement efforts did not bear fruit, and the Respondents received the summons from the Court. Juzar testified on redirection that the Police did not ask him for further assistance. He had forgiven Lusala.

13. Dzombo testified he has worked for the Burhani Bakers as a Cook, from 1996. He was stationed in Mombasa. Nairobi Branch opened in 2002. Dzombo was transferred to Nairobi and was received by Lusala. The Claimant was a Cleaner. He was not involved in baking. Dzombo could not tell if the Claimant knew how to cook.

14. On 4th June 2011, Lusala was moving items 4th clean. Dzombo wished to have a bar of soap to clean his uniform. He was told Lusala had all the washing tools. Dzombo took one of the buckets for his use. On opening the bucket, he found 3 fruit cakes. There was no soap inside. Dzombo called his boss Juzar. Juzar came and demanded the other buckets to be opened. They were opened by the Company Driver Edward. 2 more cakes were recovered. Lusala was not there at the time. He was called. He was apprehensive, and not able to immediately answer why cakes were found in the buckets. Juzar asked all the Employees- 5 in all- to go home because it was a weekend, and the guilty party to seek forgiveness on Monday.

15. Come Monday and Lusala went and confessed before Juzar at around lunch time. All Employees were

called and heard the confession. The Claimant said he was misled by the devil. He asked to be forgiven and to continue working. He was asked by Juzar to apologize on paper. When Zakir, Juzar's Brother came, he asked Lusala to do the same thing. The Claimant dithered. He declined to commit himself to paper and left employment of his own volition. The matter was reported to the Police by Miyanji, and the Witness recorded a statement.

16. In cross-examination Dzombo testified he started working in Mombasa in 1996. He came to Nairobi in May 2006. He found Lusala at Nairobi. He did not know when Lusala was employed. The Claimant worked as a Cleaner. His record was good. On the material day Dzombo found 3 fruit cakes hidden in a bucket. He did not see Lusala remove the cakes. Edward recovered 2 cakes. Dzombo was there when the Claimant left employment, but could not recall the exact date. It was July 2011, after Dzombo had reported theft to Juzar on 4th June 2011. The Respondents waited for the Claimant to make his written apology for almost one month. The Witness did not know if the Claimant's N.S.S.F and N.H.I.F dues were paid by the Respondents. He confirmed on redirection that he did not witness the Claimant take the cakes; he just found the cakes in the bucket. He called Juzar to see for himself, and did not point an accusing finger at Lusala. Lusala himself confessed. The Claimant was present on the material day, and no banking took place at 5.00 p.m. on a Saturday. The incident took place on 4th June 2011, and was reported to the Police after the Claimant refused to apologize on paper. The Respondents urge the Court to dismiss the Claim.

The Court Finds and Awards:-

17. The Claimant testified he was employed by the Respondents. His position and date of employment were contested. He gave his position as 'Cook and Marketing Person,' in the Respondents bakery business. In cross-examination he testified he was 'Cook, Messenger and Cleaner.' Juzar described the Claimant as a 'Cleaner and Messenger, a Casual Employee who did General Duties.' He did not according to Juzar, demonstrate baking skills.

18. The Court does not find the job classification a significant contestation. It is possible through the years, the Claimant was assigned all the roles, as Employers in small enterprises tend to have a degree of flexibility in assignment of duties, and find it in the interest of the business that most Employees have basic skills in most of the functions undertaken by the business. Lusala was therefore a Jack of all the trades at the Bakery. He describes himself as a 'Cook.' The daily rate paid to him was Kshs. 430, as shown in the Petty Cash Vouchers. The rate applicable to 'Cook' as of the date of termination was Kshs. 364. The daily rate for 'Bakery Assistant' was Kshs. 413. All in all there is no significant effect on the Parties' perception of the Claimant's job classification. He was paid well above the rate of the category of 'Cook' to which he claims to have belonged. No prejudice was occasioned to the Claimant by whatever classification he was perceived to belong to.

19. The Claimant gave three different dates of employment: 22nd March 2002; 23rd March 2002; and 27th March 2002. Juzar was not sure of the date the Claimant was employed. He testified the business in Nairobi was still new in March 2003, and was not taking in new Employee. The Claimant probably joined in November 2005 or beginning of 2006. Gona's evidence was that the business in Nairobi opened in 2002. He did not know when Lusala was employed, but when Gona transferred to Nairobi in 2006, he found Lusala at work.

20. The start off point would have legal effect in three ways: one, on the question whether the Claimant was a Casual Employee; two on the amount of severance or service pay; and three on annual leave pay, which is claimed for a period of 9 years.

21. The Court finds whether the Claimant was employed in 2002 or 2005, the cumulative years worked, and given that he worked 6 days a week, is conclusive evidence that he was a regular Employee, not a Casual Employee. Secondly, there was not the slightest evidence that would lead the Court to find termination of the Claimant's contract of employment was necessitated by a redundancy situation. Severance pay claimed on the basis of 9 years, would only be considered under Section 40 of the Employment Act on redundancy. The term 'severance' is sometimes used loosely, or interchangeably,

with service pay. Assuming the Claimant seeks service pay under Section 35 of the Act, this again is unavailable as there is adequate evidence that he was actively subscribed to the N.S.S.F. He would not be entitled to double social security payments. The date of employment is therefore not significant on the issues of the status of the Employee, and on severance or service pay. If these two claims were well founded, the Court would likely have adopted the March 2002 as the date of employment on the ground that it was for the Respondents to issue the Claimant a clear, written contract of employment, with the date of employment disclosed. In considering whether annual leave is payable, the Court adopts the period of 9 years proposed by the Claimant.

22. The Claimant left employment after sometime in July 2011. There was no clarity from the evidence given by both set of Witnesses on the exact date. There was an incident at the workplace where cakes were found concealed in a bucket, on 4th June 2011. The Court is persuaded the Claimant concealed these cakes. The cakes were recovered by Gona. He did not point an accusing finger at Lusala, but Lusala himself owned up, on being confronted by Juzar and his Brother. He confessed in the presence of other Employees. The Court found the evidence of Gona and Juzar consistent and believable. The Claimant sought forgiveness, but was not ready to commit his admission of the offence on paper. He subsequently found the heat too much in the kitchen, and left employment of his own volition.

23. It is unfortunate that the Claimant brought his long years of service to an end in this shameful manner. Five or so fruit cakes should not have caused the Employee to lose his job. He should have been candid with Juzar, and explained in writing what moved him to concealing the cakes. Was he involved in this infraction for his own consumption, or did he intend to sell the cakes? Either way he ought to have made a complete disclosure and made apology in writing, to continue working. Juzar told the Court, and there was no reason to doubt him, that he had already forgiven the Claimant. He only reported the Claimant to the Police after he declined to write the apology and deserted work in guilt. The Employer behaved reasonably. The Employee was unreasonable. Lusala was not subjected to a disciplinary process because the Respondents did not think it necessary and forgave him, only requiring he apologizes in writing. There is no justification in the Claimant seeking compensation for unfair termination and notice pay; he made the choice to terminate the contract, rather than concede to his foibles in writing. ***The claims for compensation and notice pay are rejected.***

24. The claim for overtime was not supported by evidence. The Claimant as shown above was paid above the rate applicable to his position of a 'Cook.' He was paid Kshs. 700 on Saturdays. He did not work on Sundays, although he claims overtime for Sundays. ***His demand for overtime of over Kshs. 700,000 is extortionist and groundless. The demand is refused.***

25. The Respondents however, do not appear to have granted the Claimant annual leave for the entire period worked, believing him to be a Casual Employee. The Court has concluded he was not a Casual Employee; Section 37 of the Employment Act makes his a regular Employee. He would therefore have the full benefits available to regular Employees under the Act, including the right to a minimum of 21 days of annual leave. Adopting the 9 years of service proposed by the Claimant, the Court shall allow him the prayer for annual leave of 9 years. ***This is computed on the basis of Kshs. 430 x 21 days = Kshs. 9,030 x 9 years = Kshs. 81,270. Annual leave pay is allowed at Kshs. 81,270.***

26. *In conclusion, the Court Awards:-*

[a] The Claimant left employment of his own volition, and is not entitled to Notice Pay; Compensation; Severance Pay; and Overtime Pay;

[b] He is granted annual leave pay for the period worked at Kshs. 81,270; and

[c] No order on the costs.

Dated and delivered at Nairobi this 13th day of March 2014

James Rika

Judge