



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 943 OF 2012

BETWEEN

CALEB OUYA OPULE
CLAIMANT

VERSUS

BHUPENDRA R. BID..... 1ST
RESPONDENT

SERE TRADERS LIMITED 2ND
RESPONDENT

Rika J

CC. Jane Sikulu

Mr. Kandere instructed by S.K. Opiyo & Company Advocates for the Claimant

Mr. Muriithi instructed by King'ori Kariuki & Company Advocates for the Respondents

ISSUE IN DISPUTE: UNLAWFUL AND UNFAIR TERMINATION

AWARD

1. The Claimant commenced the proceedings herein through a Statement of Claim received in Court on 4th June 2012. The Respondents filed their joint Statement of Response on 25th October 2012. The Claimant gave evidence, and closed his case on 16th May 2013, while the Respondents testified through the 1st Respondent on 8th July 2013, bringing the hearing to a close. The dispute was last mentioned in Court on 26th September 2013, when the Parties confirmed the filing of their Final Submissions, and were advised by the Court Award would be delivered on notice.

2. Mr. Opule claims he was employed by the Respondents on 1st March 2010 as a Shop Assistant. His contract of employment was terminated at the initiative of the Respondent, on 16th December 2012. His last salary was Kshs. 9,000. He was asked to collect his terminal dues the following day. During employment he was underpaid, contrary to the Minimum Wages Order contained in Legal Notices Number 98 of 2010 and Number 64 of 2011. Termination was not based on valid reason, and the

Claimant was not heard. He was victimized because he reported to his Trade Union that he was being underpaid. The Claimant seeks the following Orders:-

- a. 12 months' salary for unfair termination at Kshs. 13,364 x 12 = 160,369;
- b. 1 month salary in lieu of notice at Kshs. 13,364;
- c. Severance pay for 2 years, 60 days at Kshs. 13,364;
- d. Underpayment of salary as per the legal notices at Kshs. 69,408;
- e. Overtime, at Kshs. 118,368;
- f. Salary for 16 days worked in April 2012 at Kshs. 7,128;

Total Kshs. 383,001

- g. Any other award the Court may find it fit to grant; and
- h. Costs of the Claim.

3. The Claimant told the Court that the 2nd Respondent is owned by the 1st Respondent. It is involved in the sale of sweets. The Claimant's role was to issue receipts to Customers. He was a Shop Assistant. He would also take Customers' orders. He was issued a notice of termination dated 16th April 2012. He disagreed with his Employer. He reported to duty at 8.00 a.m. and left at 5.30 p.m. He did not serve the notice period. He was not told the reason for termination. He only rested on Sundays, and worked throughout Saturday, from 8.00 a.m. to 5.30 p.m. There was no lunch break. He conceded he received the sums shown in the vouchers attached to the Statement of Response, but maintained overtime was not properly tabulated. He denied that he was a General Labourer; there were 4 Employees- 1 Shop Assistant, 2 Loaders, and 1 Packer. His Employer enrolled him to the N.S.S.F and the N.H.I.F.

4. He disagreed on cross-examination with the suggestion of the Respondents, that, he served as one of the Loaders. He signed the notice of termination. He used to sign the Attendance Register all the time. He asked his Employer about the hours of work. The title 'General Labourer' did not appear in the Registers. He was paid for the last month worked. The Registers indicate there was a lunch break between 12.30 p.m. and 1.30 p.m. He did not have another Witness who could verify this evidence. He did not leave work voluntarily. He was paid Kshs. 9,000 for the whole of April 2012, and signed in acknowledgement of receipt. He asked Bhupendra for reasons for termination and was advised his performance was found wanting. He clarified upon redirection that the issue was not discussed between the Parties before termination. He took lunch break whenever there was not much work. Other registers did not show lunch break. He did not leave voluntarily.

5. The Respondents' position is that the Claimant was engaged as a General Labourer and paid in accordance with the Regulation of Wages Order of 2011. The basic wage in the Order was Kshs. 7,586, while the Respondent was paid Kshs. 9,000 per month. He was issued notice of termination on 16th April 2012. He did not go back to collect his notice pay of 1 month and salary for April 2012. The decision to terminate the Claimant's contract was arrived at by Bhupendra after the Claimant conducted himself disrespectfully at the workplace, conduct which amounted to gross misconduct. Severance pay is not payable. Overtime had already been paid. The prayer for compensation is not merited.

6. Bhupendra Bid testified the Claimant worked for the 1st Respondent from 1st April 2010 to April 2012. He was assisting Customers. The 1st Respondent is a Wholesale/ Retail Business. He would take the goods from the counters. The records did not show his duties, but the Registers gave his description as a 'General Labourer.' He was paid Kshs. 9,000 per month, in conformity to the scale of a General Labourer. He left employment of his own volition on 14th April 2010 at around lunch time. He returned on 16th April 2010, and was issued the notice of termination. He left and did not return. He was paid overtime, even for work done during the lunch hour. The Respondent paid N.S.S.F and N.H.I.F contributions.

7. Bhupendra ran the business with his Co-Director Rahul. The Claimant was employed in 2010, but used to be known to the Witness as he would hang around Shop J7 owned by Rahul. The Claimant was a

General Labourer. There were 7 Employees at the time the Claimant worked. Peter and Victor were General Labourers. The Claimant would prepare receipts when Bhupendra was busy. A General Labourer can write receipts. Only the Witness worked on the ETR machine. All the Employees were General Labourers. The Claimant left employment with a hidden item on him, which item Bhupendra did not come to know what it was.

8. Jankharia filed the Statement of Response saying he is a Co-Director. He is not the Co-Director. Rahul stated termination was after the Claimant was engaged in disrespectful conduct. It was not true that the Claimant was engaged in disrespectful conduct. Bhupendra conceded the letter of termination did not demonstrate the reason for the termination. Termination was because the Claimant refused to reveal the item he was hiding. No stock-taking took place. The Claimant ran away. He was paid April 2012 salary. He was given a chance to explain himself by Rahul. The Claimant is not owed anything by the Respondents. Bhupendra testified on redirection that on 14th April 2012, the Claimant just left and walked away. He was not asked to stop working. His was improper conduct. The Statement of Response was not written by a stranger. The Claimant's duty was basically to ferry goods. He did not deal with cash. He was paid more than his scale merited. The Respondents pray for dismissal of the Claim.

The Court Finds and Awards:-

9. Rule 7 of the Industrial Court [Procedure] Rules 2010 states:

“Where a Claim is referred to the Court in accordance with the provisions of any written law, other than the Labour Relations Act, the Statement of Claim shall-

- a. *be signed by the Claimant, or the Advocate of that Claimant; or*
- b. *if the Claimant is a Body Corporate, be signed by an authorized Officer of the Body Corporate or its Advocate.*

10. The Respondents filed their Statement of Response through a Mr. Laxmichand Fulchand Jankharia, who described himself as ‘Director.’ This man did not give evidence. In the Statement of Response, he states he is a Brother of Bhupendra Bid, with the necessary *locus standi* ‘*to come before this Court and comprehensively represent the interests of my brother.*’

11. It is not clear if he was an authorized Officer of the 2nd Respondent. The information given in the Statement of Response was contradicted by Bhupendra Bid in his evidence in Court. Firstly, Bhupendra told the Court Jankharia is his uncle, not Brother. Even assuming the Rules allow a Brother to file a Claim on behalf of another Brother, Jankharia is not a Brother to Bhupendra as misrepresented in the Statement of Response, and would not have *locus standi* as a Brother.

12. Secondly, Bhupendra testified that Jankharia is not legally part of Sere Traders, the 2nd Respondent. Bhupendra was categorical Jankharia is not a Director of the 2nd Respondent. The author of the Statement of Response had no *locus standi* to draw and file the Statement of Response: he was not an authorized Officer, an Advocate, a Director of the 2nd Respondent; or even Brother of the 1st Respondent assuming a Brother is allowed to file Claim for another Brother. Bhupendra himself appeared and gave evidence. He is not under any form of disability so as to require the comprehensive representation of his ‘Brother.’ After the engagement of Advocates by the Respondents, there was no amendment or withdrawal of the Statement of Response filed by Jankharia. ***The Statement of Response is improperly before the Court, and is expunged from the record.***

13. The Claimant was not a General Worker as stated by Bhupendra, but a Shop Assistant. This Court had the opportunity in ***Industrial Court Cause Number 43 [N] of 2009 between Crispol Ngugi Kimani & 24 Others v. Yako Supermarket Company Limited & Another [UR]***, to examine the job classifications of ‘General Worker’ and ‘Shop Assistant.’ Among the findings was that-

- Job categorization is a fundamental component of the contract of employment. It is the responsibility of the Employers to give the classification in the written contract of employment.
- 'General Labourer' relates to a wide variety of non-skilled tasks. In Legal Notice Number 38 of 2006, these include Cleaners, Sweepers, Gardeners, Ayahs, House Servants and Messengers.
- These classes of workers are mostly known by the Kiswahili term 'Mtu wa Mkono,' in Kenya's labour lexicon.
- Shop Assistant sells the merchandise of his Employer.
- In the ILO International Standard Classification of Occupations [ISCO –08], the term in use is 'Shop Sales Assistant,' an Employee who sells a range of goods and services directly to the public or on behalf of the retail and wholesale establishments and explains the functions and qualities of these goods and services.

13. The Claimant testified he used to prepare receipts for Customers. He would take Customers' Orders. Bhupendra testified the Claimant's job description was not given, but he was described as 'General Labourer' in the Attendance Registers. He testified however that the Claimant assisted Customers. He took goods from the counters.

14. On cross-examination Bhupendra stated Victor and Peter were General Labourers. All his Employees were General Labourers. The Claimant was more specific, testifying that there were 4 Employees-himself as a Shop Assistant, 2 Loaders and 1 Packer.

15. The evidence by the Claimant was more persuasive and his evidence appeared to this Court consistent. He was a credible Witness. The role he performed would not fall in the classification of 'General Labourer.' This Court is not bound by the classification or tags that Employers impose on their Employees, but must examine the duties performed by the Employees and find out if they fit the description given. This is more so in a situation where the Employer has failed to give the Employee a written contract, with specific job classification. The Court is persuaded the Claimant was a Shop Assistant, and should have thus been paid the scale applicable for the period in service, under the classification of 'Shop Assistant' and not 'General Labourer.'

16. The Regulation of Wages [General] [Amendment] Order 2010 [Legal Notice Number 98] came into operation on 1st May 2010. The Claimant was employed in March 2010, and his basic salary from 1st May 2010, ought to have been Kshs. 9, 101. This was the basic minimum monthly wage, excluding the housing component. With 15% of the basic as house rent allowance, he was entitled to Kshs.10,466 per month. The Claimant was paid Kshs. 9,000, which would mean his underpayment per month was Kshs.1,466. Under the Legal Notice Number 98 which lapsed on 30th April 2011, the Claimant is owed Kshs. 1,466 x 12 months = Kshs. 17,593.

17. Under the Regulation of Wages [General] [Amendment] Order 2011 [Legal Notice Number 64] which came into operation on 1st May 2011, the Claimant was entitled to a monthly basic pay of Kshs. 10,239. With 15% of the basic as house rent allowance, the Claimant was entitled to Kshs.11,774 per month. He continued to receive Kshs. 9,000, and therefore had a shortfall of Kshs.2,774 per month. This translates to Kshs.2,774 x 12 = Kshs.33,298 for the period starting 1st May 2011 to 30th April 2012 when the Claimant's contract was terminated.

18. In total the Court finds the Claimant is entitled to underpayment of salaries to the amount of **Kshs.50,891**. The basic monthly wage under the Wage Orders excludes house rent allowance, while the basic daily and hourly rates include house rent allowance.

19. He was issued a notice of termination, but did not serve the period. He claims he was told to leave on 14th April 2012. There was little evidence to contradict this. He is entitled to 1 month salary in lieu of notice at **Kshs. 10,239**.

20. There were no valid reasons given for termination. The Respondents moved from one position to the other, in justifying termination. They stated the Claimant was found to be hiding some item which they

never came to discover what it actually was. He ran away. Another explanation was that he was disrespectful and was terminated for gross misconduct. Bhupendra conceded in cross-examination that the termination letter revealed no reason justifying the decision. The Respondents did not discharge the obligation of the Employer under Sections 43 and 45 of the Employment Act 2007, to give valid reason or reasons in termination. The procedure did not meet the minimum statutory threshold prescribed under Sections 41 and 45 of the Act. Bhupendra testified “ *my brother asked him to explain himself.*” This Brother did not testify, and there is no material on record, capturing any form of a hearing granted to the Claimant. The termination was unfair both on substantive and procedural grounds. The Claimant is granted 10 months’ salary in compensation at **Kshs. 102, 390.**

21. Salary for the 16 days worked in April 2012 is warranted and allowed at **Kshs. 6,300.**

21. There was no sufficient evidence led by the Claimant in support of his claim for overtime pay. Instead, he conceded in his own principal evidence, that he was paid money through vouchers, and that his problem was with the manner of calculation of overtime pay. Even without the Statement of Response which has been struck out, the Claimant gave the Court reason to conclude there is no factual foundation to sustain the claim for overtime. There likewise were no facts shown, suggesting the presence of a redundancy situation so as to justify severance pay. If the Claimant meant to ask for service pay and not severance under this head, it still would not be awardable, as he was actively subscribed to the N.S.S.F. Section 35 (6) of the Employment Act makes him ineligible for additional social security payment. All in all the *Court Awards*:-

[a] The Statement of Response is expunged from the Record of the Court;

[b] Termination was unfair;

[c] The Respondents shall pay to the Claimant, within 30 days of the delivery of this Award, salary underpayments at Kshs. 50,891; 1 month salary in lieu of notice at Kshs. 10,239;

compensation at Kshs.102,390; 16 days’ salary at Kshs. 6,300- total Kshs. 169,820; and

[d] No order on the costs.

Dated and delivered at Nairobi this 10th day of March 2014

James Rika

Judge