



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 728 OF 2011

**BEATRICE WAYEKO (suing as Administratrix of the Estate of
OSCAR SMITH NJINULI-Deceased).....CLAIMANT**

VS

CELLULANT KENYA LIMITED.....RESPONDENT

AWARD

Introduction

1. Beatrice Wayeko, the Claimant herein is the mother of the late Oscar Smith Njinuli who was an employee of the Respondent between 10th May 2007 and 10th April 2009, when he died in a road traffic accident. On the fateful day, the Deceased was traveling in motor vehicle registration number KBA 163E which was involved in an accident along Kiambu Road. The Claimant together with James Njinuli Charles instituted Succession Cause No 482 of 2009 and was issued with a Limited Grant *ad litem* by the High Court of Kenya at Kakamega.

2. The Claimant subsequently filed this claim on 18th May 2011 seeking payment of the terminal benefits due to the Deceased. The Respondent filed a Statement of Reply on 12th September 2012 and the matter was heard on 25th September and 26th November 2013 with Mrs. Keya appearing for the Claimant and Mr. Ahisi for the Respondent. The Claimant testified on her own behalf and the Respondent called its Head of Business Services, Daniel Ndonge Muasya.

The Claimant's Case

3. In her Memorandum of Claim filed on 18th May 2011, the Claimant states that at the time the accident occurred, the Deceased was in the course of his duties as an employee of the Respondent. The Claimant further states that the Respondent made National Social Security Fund (NSSF) and National Health Insurance Fund (NHIF) deductions from the Claimant's monthly salary but failed to make remittances to the respective statutory bodies.

4. The Claimant therefore claims the following:

- a. Unremitted NSSF contributions.....Kshs. 9,600
- b. Unremitted NHIF contributions.....7,680
- c. Leave pay for 2 years.....25,000
- d. Unpaid salary for April 2009.....25,000
- e. Costs incurred in Succession Cause No 482 of 2009.....41,075
- f. General damages under the Workman's Compensation Act

- g. Cost of this suit
- h. Interest at Court rates
- i. Any other relief the Court may deem just to grant

The Respondent's Case

5. In its Statement of Reply filed on 12th September 2012, the Respondent stated that at the time the Deceased met his death, he was not on duty. According to the Respondent, the Deceased was employed as a Customer Care Representative with the specific duties of responding to telephone queries from the Respondent's customers at the Customer Care Centre in the Nairobi Central Business District and not as a Salesman as pleaded by the Claimant.

6. Consequently by virtue of the nature of the Respondent's business, being provision of mobile phone ring tones through active downloads to its customers' handsets from its offices then located at Kencom House, within the Nairobi Central Business District and the job description of the Deceased, the duties undertaken by the Deceased did not include any travel out of the office.

7. In addition, when the Deceased met his death, he was not engaged in any official duty as the accident occurred on a public holiday way out of the work station of the Deceased and motor vehicle registration number KBA 163E in which the Deceased was traveling when he met his death was not owned, hired or in any other way connected to the Respondent and/or the employment of the Deceased.

8. In response to the Claimant's claim for unremitted NSSF and NHIF dues on account of the Deceased, the Respondent stated that all deductions were duly remitted to the respective statutory bodies. The Respondent also denied owing any accumulated leave or unpaid salary as alleged by the Claimant.

9. According to the Respondent, the Deceased was paid his full salary for the month of March 2009 and the salary for the 9 days worked in the month of April 2009 was paid to the Deceased's designated nominee, Lucy Mukami. The Respondent pleaded that it was a stranger to Succession Cause No 482 of 2009 and the claim for refund of costs incurred by the Claimant in this Cause was therefore unsustainable. It was the Respondent's case that the claim for damages under the Workman's Compensation Act is unknown in law.

Findings and Determination

10. It is not in dispute that Oscar Smith Njinuli was an employee of the Respondent effective 10th May, 2007 until 10th April 2009 when he was involved in a fatal road traffic accident. What is in dispute is his actual job and whether he was on duty at the time the accident occurred. According to the Claimant, the Deceased worked as a Salesman and was on duty when he met his death. The Respondent on the other hand maintains that the Deceased worked as a Customer Care Representative which job did not require him to travel out of the office. Further the date of the fatal accident, 10th April 2009 was Good Friday and being a public holiday, there was no way the Deceased could have been on duty since the Respondent's employees do not work on public holidays.

11. In support of their respective averments in this regard, the Claimant relies on the Certificate of Death which indicates the occupation of the Deceased as Salesman while the Respondent relies on letter dated 8th December 2008 confirming the Deceased to the position of Customer Care Representative.

12. Ordinarily, the terms and conditions of employment of an employee are evidenced by either a letter written by the employer or a contract of employment drawn by the employer and signed by the employee. In my view, where the position held by an employee is expressly stated in a letter issued by the employer to the employee, an entry in a Certificate of Death cannot be used to

counter what is stated in the letter issued by the employer. The Court therefore finds that the Deceased was a Customer Care Representative as stated in the letter confirming employment dated 8th December 2008.

13. The next question is whether the Deceased met his death in the course of employment. The Respondent's case is that by virtue of the nature of its business and the duties assigned to the Deceased, coupled with the fact that the accident occurred away from the office on a public holiday make it impossible for the Deceased to have been on duty at the time of the accident. Conversely, the Claimant maintains that at the time the accident occurred, the Deceased was on duty.

14. In spite of the Claimant being the mother of the Deceased, she did not live with him on a day to day basis and the Court finds that she was not privy to the details of the job held by the Deceased, including schedules of work. Upon evaluation of the evidence submitted by the parties in support of their respective positions on this score, the Court adopts the position of the Respondent that at the time the Deceased met his death, he was not on duty. As a result, no claim for general damages either under the repealed Workman's Compensation Act or the Work Injury Benefits Act can lie against the Respondent.

15. Before addressing the other heads of the Claimant's claim, I need to determine the effect of a Discharge Voucher executed by one Lucy Mukami acknowledging receipt of Kshs. 8, 407 for the Estate of the Deceased and discharging the Respondent from further claims in respect of employment dues accruing to the Estate. The actual relationship between the Deceased and Lucy Mukami was not established. In one instance, she was referred to as a grandmother and in another as a foster mother.

16. The Respondent produced a Staff Information Sheet signed by the Deceased on 4th September 2008. According to this document, the Deceased had nominated Lucy Mukami as his next of kin. The Respondent stated that it was on the strength of this document that Lucy Mukami was paid what the Respondent considered to be full and final dues arising from the employment of the Deceased.

17. The Court noted an apparent difference in the pen used to complete the place for the next of kin and called for the original of the document. From the original, the difference in pen is even more apparent and the Respondent's witness, Daniel Ndonye Muasya explained that the part for the next of kin was completed after the other parts had been completed hence the difference in pen.

18. In the submissions filed on behalf of the Respondent, Counsel submitted that the action by the Deceased to nominate Lucy Mukami to receive his dues upon his death removed the said dues from the ambit of the Law of Succession Act (Cap 160). As a result, the dues ceased to form part of the Estate of the Deceased. I do not agree with this argument.

19. First, the manner in which the Staff Information Sheet was executed puts its authenticity into question. Second, the Sheet only names Lucy Mukami as the next of kin of the Deceased and not necessarily as a beneficiary of the benefits accruing from the employment of the Deceased. Third, by relying on the Staff Information Sheet to distribute the final dues arising from the employment of the Deceased, the Respondent assigned to itself a role that is clearly not within its province.

20. Section 45 (1) of the Law of Succession Act provides that:

(1) Except as far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise inter meddle with, any free property of a deceased person.

21. With regard to employee dues, Section 24(2) of the Employment Act, 2007 provides that:

2. ***Upon the death of an employee during the term of a contract of service, the legal representatives of the employee shall, upon proof of capacity as required by law, be entitled to be paid wages and any other remuneration and property due to the employee as at the date of death within thirty days of submitting the proof.***

22. The Claimant told the Court that she made contact with the Respondent as soon as the death of her son came to her notice and the Respondent even gave some financial assistance towards the funeral expenses. The Court was therefore unable to understand why the Respondent released the final dues of the Deceased to Lucy Mukami whose relationship with the Deceased was not clear.

23. Allegations that the Deceased had severed relationship with his parents were

not proved and the Court therefore ignored them. Even assuming that there was a dispute as to who was entitled to be paid the final benefits due to the Deceased, there was no reason why the Respondent did not avail itself of the provisions of Section 24(4) of the Employment Act, 2007 which allows an employer to deposit benefits due to an deceased employee with a labour officer.

24. For the foregoing reasons, I find that the payment made to Lucy Mukami on account of terminal benefits due to the Deceased was made in error and the Discharge Voucher signed by the said Lucy Mukami is consequently of no effect and the Court has therefore ignored it in determining this claim.

25. It is not in doubt that by the time the Deceased passed away, he had worked for 9 days in April 2009. This claim is therefore allowed. The Respondent did not produce any leave records as required under Sections 10 and 74 of the Employment Act, 2007. I therefore invoke Section 10(7) of the Act and allow the Claimant's claim for accrued leave due to the Deceased.

26. With regard to the claim for NSSF and NHIF dues, the Court agrees with the submissions made by Counsel for the Respondent, that any unremitted dues are payable to the respective statutory bodies. As was held by Mbaru J in the case of ***Stephen Mbuvi Kathoka Vs Parbat Siyani Construction Co. Ltd [2013] eKLR*** NSSF and NHIF deductions are due to the respective statutory bodies and not to claimants and in cases where there is non remittance of NSSF dues, the proper prayer is for service pay under Section 35(5) of the Employment Act, 2007. The Claimant did not include such a prayer in her pleadings and its inclusion in final submissions amounts to an irregular amendment of pleadings. This claim therefore fails and is dismissed.

27. On the claim for refund of costs incurred in Succession Cause No 482 of 2009, the Court finds that the Respondent was not involved in any way in this Cause and cannot therefore be condemned to pay costs in a case in which it was not involved. This claim therefore fails and is dismissed.

28. Ultimately, I make an award in favour of the Claimant in the following terms:

- a. 9 days' salary due in April 2009 (28,023.30/30x9)...Kshs 8,407
- b. Leave pay (28,023.30/30x42).....39,233

Total.....47,640

I further award the Claimant the costs of this case.

The award amount will attract interest at court rates from the date of the award until payment in full

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF

MARCH 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*