



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 255 OF 2013

MORRIS KAVALE KASYOKICLAIMANT

VERSUS

NARCOL ALUMINUM ROLLING MILLS LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

This is a case about an alleged wrongful, unfair and unlawful termination of the claimant's employment and failure to pay his accrued benefits by the respondent. The court is being invited to assess and award the accrued employment dues amounting to ksh.158,736.80 in respect of salary in lieu of notice, salary for the remainder of the contract term, service pay, leave and house allowance plus refund of deducted but un-remitted NSSF and NHIF dues. The court is also asked to award damages for unfair termination and certificate of service.

Facts of the case

The claimant avers that he worked for the respondent as a casual worker from June 2008 upto February 2011 when he was given a written contract for 3 months at a monthly salary of ksh.19980. His second contract was given on 15 June 2011 for six months which was to lapse on 15/12/2011. He was however summarily dismissed on 30/8/2011 verbally. According to him the dismissal was unlawful and malicious because he had no disciplinary issues at the workplace. He also accuses the respondent for breach of the employment contract because the respondent dismissed him without prior notice, failing to give him annual leave or pay in lieu; failing to pay employment terminal benefits after the dismissal; failing to remit NHIF and NSSF contributions after deducting them from his salary; and under paying his salary.

In her response the respondent has denied ever signing a contract with the claimant for the period starting 15th June 2011 or even breaching it. She further denied ever terminating the claimants services. The case was heard on 26/2/2014 when the claimant testified as CW1 and the defence called Thomas Rumbai, James Kaviati and Bernard Juma as RW1, 2 and 3 respectively.

CLAIMANT'S CASE

CW1 explained that he joined the respondent in June 2008 as casual earning ksh.250 daily. He however got a written contract of 3 months starting February 2011 followed by a 6 months contract starting 15/6/2011 which he produced as exhibit MKK1. His salary was ksh.12,376 inclusive of house allowance. He was also entitled to 2 days leave per month but he never went for any leave. He was

never paid the salary of ksh.12376 but continued to be paid ksh.8424 which was the salary for the expired contract signed in February 2011.

upon request for the rightful pay, he was asked by Mr. Felix the Assistant Personnel Manager to avail the original copy of the contract letter for him to see to which CW1 complied but after making a copy of the same. When Mr. Felix received the original letter from CW1, he confiscated it and told him verbally that his job was over. On the following day the claimant was denied entry by the security guard who told him that Felix had instructed them to deny him entry.

CW1 was never paid his terminal dues despite demand from his lawyers. He contended that from 2008 to October 2011 he was deducted NSSF and NHIF contribution but the same was never remitted to the authorities. He produced NSSF and NHIF statements as exhibit 2 and 4. He prayed for refund of the unremitted NHIF and NSSF of ksh.4,480 and ksh.11,200 respectively. He also prayed for ksh.19,880 for annual leave plus costs of the suit.

On cross examination he contended that his claim for notice pay should be ksh.12,376 and not 19980 as pleaded. He maintained that the original copy of contract he signed, he gave it to Mr. Felix who dismissed him thereafter. He further maintained that the signature was by thumb printing.

DEFENCE CASE

RW1 is the officer in charge of preparing production reports and contracts at the respondent. He denied ever preparing the claimants contract marked exhibit MKK1. According to him the said contract was false because it did not have a security line or show any figure for special allowances. He however confirmed that contract at the respondent were signed before Mr. Felix the personnel officer.

On cross examination RW1 confirmed that Mr. Felix has left the respondent. He also confirmed that the respondent did not report the forgery of contract to the police.

RW2 is the Assistant Accountant for the respondent charged with duty of preparing payroll for the contracted and also permanent staff. He also does the returns for PAYE, NSSF and NHIF. He confirmed that CW1 was their contracted employee from February 2011 but 2008 till then he was casual. According to him, CW1 must have signed a contract because no pay could have been made to him without signing a contract.

RW2 further contended that CW1's gross salary was ksh.9490 per month, he confirmed that from 2008 to 2010, the respondent used to deduct 5% of the salary and remit it to NSSF as a special contribution but which could not benefit the individual worker. He confirmed however that thereafter, the NSSF advised him to register individual workers and remit their contribution. The said advice to register workers was verbal.

On cross examination, RW2 confirmed that he did not know how CW1 was terminated. He also confirmed that he never prepared the claimants terminal dues because the Personnel office never asked to do so.

RW3 is the personnel officer for the respondent for the last 28 years. He stated that CW1 joined the respondent on 27/5/2008 as casual workers earning ksh.249.90 per day. RW3 later issued contracts to all workers including CW1 through his deputy but his deputy told him that CW1 refused to sign his contract saying that it was better to continue working as a casual. His salary was ksh.365 per day and Ksh.9490 per month which was higher than the Ksh.8724 under the General Wages Order No. 64 of 2011.

RW3 denied terminating the CW1 and contended that he came to know of the termination when he received his lawyer's demand letter asking for ksh.47116. According to RW3, the CW1 was never dismissed but he deserted work on 5/9/2011. RW3 denied the claim for NHIF refund arguing that no NHIF deduction were made from the claimants salary. He denied the claim for notice pay, service pay and income for the remainder of the contract term because the claimant was a mere casual worker. In

addition he maintained that the claimant was a member of NSSF and could not claim service pay.

He denied the claim for leave because the respondent paid CW1 for all his leave. He also denied the claim for overtime saying that it was paid together with salary. He however could not produce any records in court. RW1 confirmed that Felix never told him that CW1 had refused to sign the contract nor did CW1 raise any complaint with him about his contract. RW1 also confirmed that he had no evidence to show that CW1 deserted work. After close of the hearing, both parties filed written submission which the court has carefully considered.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- a. **whether the claimant was a casual worker or under a contract of 6 months**
- b. **whether the claimant deserted work or his services were wrongfully and unfairly terminated by the respondent.**
- c. **Whether the reliefs sought ought to issue.**

Nature of the contract

The claimant pleaded that he was on 6 months contract scheduled to lapse on 15/12/2011. He produced as exhibit a copy of the contract dated 15/6/2011 and contended that the original was retained by Mr. Felix on the day of the summary dismissal. The defence has denied such a contract and dismissed the copy as fake document by pointing out the lack of a security line and lack of signature though thumb printed. He produced a similar copy which he described as the genuine document but which reflected a lesser salary but lacked the claimants signature and thumb print. He did not respond to the claimants allegation that he was only required to put a thumb print as his signature.

That mistake on the part of the claimant raised suspicion that either he was illiterate or he did not understand his obligation at the time of signing the contract. It is a statutory obligation under Section 9 of the Employment Act that an employer should prepare the contract of employment and explain the employee to his understanding. RW1 who is in charge of preparing contracts or RW3 or his deputies never gave any evidence to show that they explained to the claimant the contract. The claimant is therefore to be excused for only thumb printing on the contract. It is also on record that RW3 never received any complaint or feedback from Mr. Felix or the claimant regarding the signing of the contract and did not even know of the claimant's dismissal until he received the demand letter from his advocates.

The RW1 confirmed that he never sought to nullify the alleged fake contract either through civil or criminal proceedings and he did not dispute the signature of the HR Manager on the said contract which in the opinion of the court is much like the signature in the alleged genuine copy produced as exhibit by the defence. To that extent and on a balance of probability this court finds that the contract produced as exhibit MKK1 is a genuine copy and representing the mutual agreement between the parties herein. The court also believes that the original copy of the contract is in the custody of Mr. Felix the deputy to RW3 or the respondent herself.

The court believes that the claimant employment was for a contract of 6 months and not casual as alleged by RW3. In addition it believes the evidence of RW1 and RW2 to the extent that the claimant signed his six months contract before Mr. Felix and that the claimant who continued to draw salary could not have been paid without a signed contract. Such evidence is vital and squarely corroborates the evidence of thumb printed contract by the claimant. In conclusion the court right to hold that the intention of the parties herein was to be bound by a 6 months contract.

Wrongful and unfair termination vs desertion of duty

The evidence by the claimant that he was verbally dismissed by Felix upon return of his original contract letter has not been contradicted. None of the defence witnesses was present and as such the only evidence

to the contrary could have come from the said Mr. Felix. Unfortunately he was not called to testify and the court was not told why he could not be called as witness.

Consequently the court dismissed the allegation of desertion by RW3 and believes the evidence by the claimant that he was dismissed verbally because he was the only witness present at the time the dismissal apart from Felix. The only reason for the dismissal was the claimants demand for the correct salary as provided in the contract of engagement. In order to defeat that right Mr. Felix confiscated the contract letter without knowing that the claimant had already photocopied it.

On a balance of probability therefore the court finds that claimant was wrongfully and unfairly dismissed. The reason for this finding is that no justifiable reason was proved and the procedure followed was not equitable. The dismissal was because the claimant was pursuing his contractual and statutory right to the agreed wages. In addition the claimant was not served with any termination notice in the circumstances. Under Section 35 of the employment Act the claimant was entitled to a notice of at least 28 days prior to termination or wages in lieu.

Reliefs Sought

In view of the foregoing findings the claimant is awarded one month salary in lieu of notice being ksh.12376. The figure is the correct salary under the contract. The claimant is also awarded the refund of NSSF deductions which were never remitted to the authority. The allegation that the respondent was deducting 5% of his salary and remitted to the NSSF without registering the claimant is hereby dismissed for lack of legal basis and for being a lie. The payslips clearly reflect specific NSSF deductions and not a percentage. The money ought to have remitted promptly to the claimants account at the NSSF. If he was not a registered member, the deductions was illegal and the respondent must refund to the claimant in addition to facing criminal charges. In any event, the respondent never produced any employment records to rebut the claim by the claimant and as such, the prayer for ksh.11200 is awarded as prayed. Likewise the prayer for refund of NHIF deductions that was never remitted is allowed. The respondent did not produce any employment record to prove that she remitted the NHIF deductions for the claimant. The claimant has however produced payslips to prove that he was deducted the NHIF contribution by the respondent. He also produced NHIF statement marked exhibit MKK4 to prove that no NHIF contribution deducted from his salary was ever remitted to the NHIF. If that was not extortion it was outright theft of the claimant's money by the respondent. This court will not excuse it. The respondent must refund the money to the poor employee being ksh.4480 as prayed.

On the other hand, the claimant was dismissed before serving all his term. He was willing to continue but was prevented by the respondent through Felix. The court awards the claimant the whole pay for the un-expired contract period being $3\frac{1}{2}$ months from September to 15th December 2011. That is salary of $ksh.12376 \times 3\frac{1}{2} \text{ months} = 43,316$.

The claimant is also awarded service pay for the 3 complete years served at the rate of 15 days per complete year of service. That works to ksh.18564/-. This award was necessitated by the default in remitting NSSF contributions. The claim for overtime and leave allowance is dismissed for lack of particulars and evidence.

The claim for house allowance is also dismissed on ground that it was paid alongside the basic salary.

The claimant will however get his certificate of service as provided under Section 51 of the Employment Act.

DISPOSITION

In view of the findings made above, judgment is entered for the claimant against the respondent as follows:

- a. Ksh.89,936 plus interest since date of dismissal at court's rate.

- b. Certificate of service.
- c. Costs and interest.

Orders accordingly.

Dated, Signed and delivered this 25th day of April 2014.

O.N. Makau

Judge