



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 38 OF 2013

SAMUEL OMWERI OGECHI

CLAIMANT

V

MINAZINI ENTERPRISES LTD

RESPONDENT

JUDGMENT

1. Samuel Omweri Ogechi (Claimant) through the firm of Hezron Gekonde & Co. Advocates lodged a Memorandum of Claim against Minazini Enterprises Ltd (Respondent) on 25 February 2013 and the issue in dispute was outlined as *non-payment of his final dues which includes the salaries for months of December 2012, which he worked and not paid and a one months notice in leu (sic) of notice of terminating the services. The final dues which includes holidays worked, annual leave not taken, salary arrears and service charges.*
2. The Claimant pleaded that he was employed by the Respondent on 1 June 2009 as a loader at a wage of Kshs 350/- per day which was later converted to a monthly wage of Kshs 14,500/- .
3. Further, the Memorandum of Claim asserted that sometime in January 2013, the Respondent made a false report at Urban Police Station alleging that the Claimant with other employees had cheated on it leading to the arrest and summary dismissal of the Claimant without being paid final dues totalling Kshs 139,998/-.
4. The Claimant therefore seeks the final dues, and *full compensation for the lose of user of the cell phone and inability to get employment due to failure to give certificate of service to claimant.*
5. The Respondent filed a Response to the Claim on 22 March 2013 through the firm of Oduor Okumu & Co. Advocates and it merely denied all the pleas set out by the Claimant and put him to strict proof, except to plead in the alternative that the termination of the Claimant was lawful and occasioned by the Claimant's breach of express or implied terms of contract, involving himself in criminal activities by forging receipts, stealing from the Respondent, incompetence and absconding from duty.
6. The Respondent also pleaded that the Memorandum of Claim was fatally defective for not complying with the provisions of the Labour Institutions Act.

Claimant's evidence

7. The Claimant gave sworn evidence. He stated that the Respondent employed him on 1 June

2009 as a loader, and was being paid Kshs 2,450/- per week. On 7 October 2009 when an employee was dismissed he was made a permanent employee and given duties as a salesman. Again on 31 December 2009 when another employee was dismissed, he was requested to carry out the duties of that employee until 30 October 2010.

8. From October 2010 the Claimant stated he started getting a pay slip (copies were produced).

9. The Claimant also informed the Court that he was a member and contributor of the National Social Security Fund/ National Hospital Insurance Fund and he was also registered as tax payer on 31 December 2009 (certificate produced).

9. In the course of employment, the Claimant informed the Court that he used to work Monday to Monday and pinpointed from the attendance register produced by the Respondent, some Sundays and public holidays he worked.

10. On the circumstances regarding the separation, the Claimant stated that on 12 December 2012 he was arrested by the Police in the presence of the Respondent's Director. The police also took his mobile phone. He was detained and was subsequently released on bond with directions to be reporting to the police.

11. The Claimant also stated that on 28 December 2012 he was served with a summary dismissal letter while at the police station.

12. On why the termination was unfair, the Claimant testified that he was not issued with a notice nor explained to the reasons for the termination. He was also not informed of his right to have a witness before the dismissal nor did he meet the person who terminated his services. He also denied being found with the receipts alleged to have been forged.

13. In cross examination, the Claimant stated that he was not issued with an appointment letter, had no previous warnings, was a salesman at time of termination, he was charged together with one William Tutu before the Magistrates' Court and the case was still pending at time of hearing, did not report to work during police investigations, was not granted weekly rest days/public holidays and took a loan he did not complete repaying.

Respondent's evidence

14. The Respondent called one of its supervisors, Hussein Omar to testify. He confirmed the Claimant was an employee of the Respondent and was issued with a letter of appointment on 28 September 2010 which the Claimant signed (produced).

15. On the termination of the Claimant, the witness stated the Claimant was dismissed for gross misconduct after allegations cropped up that some employees were colluding with customers to take items out of the Respondent's premises without receipts and that a report was made to the Police under OB32/23/10/12.

16. He also stated that during investigations the Claimant was found with receipts (produced) though he was not allowed to have receipts and was subsequently charged. He was not present when the receipts were allegedly recovered.

17. Regarding the process leading to termination, the witness explained that the Claimant was asked to explain and was given an opportunity to clear his name.

18. On the question of leave, the witness testified that for employees who did not wish to go on leave, the same would be commuted into cash and that the Claimant was compensated with Kshs 10,100/- in lieu of his leave on 9 October 2011. He further stated that employees who worked on Saturdays/Sundays would be paid Kshs 800/- in cash at the end of the day and that the Claimant

was paid. However, work on public holidays was not paid for.

19. In cross examination, the witness stated that he did not have records that the Claimant was paid in lieu of leave in 2010 and 2011 and that the Claimant was not charged with stealing but with being found with fake receipts. He also confirmed that the Claimant was given his dismissal letter at Urban Police Station.

20. He also stated that he advised the Claimant to see the Respondent's Director and that he was present when the Claimant met the said Director.

Questions for determination

21. From the pleadings, evidence and submissions, the issues arising for determination are, whether the Claimant was an employee of the Respondent and whether the Claimant is entitled to the reliefs sought.

22. But before discussing the issues identified the Court finds it imperative to address the pleadings as filed.

Pleadings in industrial court

23. Rule 4 of the Industrial Court (Procedure) Rules, 2010 is very succinct on what should be set out in a Statement of Claim. More pertinent is rule 4(d) and (e) which require the facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and any principles or policies, conventions, law or industrial relations issue relied upon.

24. For the practice and procedure of the Industrial Court the said rule is very important and it captures what Majanja J observed in Constitutional Petitions No. 373,426 of 2012, *Stephen Waweru Wanjohi & Others v Attorney General & Others and Kipngetich Maiyo & Others v the Kenya National Land Commission Selection Panel & Others* that *the key purpose of pleadings is to set out facts which constitute a cause of action*

25. With the foregoing in mind it will be necessary to consider what cause of action the Claimant pleaded. The Court is posing this question well aware of the Constitutional imperative for litigants to approach the Court even informally through letters and that a bigger percentage of litigants before it are litigants acting in person and who have no legal training in the practice of law such as trade union officials.

26. In the present case both parties were represented by legal counsel. It is not clear what the cause of action is and even some of the prayers sought are vague. This will become clear when the Court discusses appropriate relief.

Whether Claimant was an employee of the Respondent and from when

27. Although the Respondent denied in the Memorandum of Response that the Claimant was employed by it as a loader with effect from 1 June 2009, the Respondent's own witness admitted that the Claimant was its employee but from 1 October 2010.

28. On the question of when the employment relationship started, the testimony of the Claimant was that he was engaged by the Respondent in 2009. This testimony was not challenged /tested in cross- examination of the Claimant.

29. The Respondent's witness on his part stated that he was employed by the Respondent in 2011 and he found the Claimant already in employment. He did not explain whether his role extended to human resources or personal administration with the responsibility for keeping employment

records of employees.

30. Regarding the letter appointing the Claimant as a sales clerk with effect from 1 October 2010 which was produced by the Respondent but denied by the Claimant, the Court observes that the said letter was not in accord with section 9(2) and (3) of the Employment Act. It does not indicate that it was signed by the Claimant in the presence of a person other than the employer and on this ground, the Court is inclined to believe the Claimant.

31. Further, there was no challenge to the testimony of the Claimant that he was initially employed as a loader and that when an employee was dismissed on 7 October 2009 he was given permanent status as a salesman and that he carried on these duties until 30 October 2010.

32. The Court finds that the Claimant was engaged by the Respondent with effect from 1 June 2009.

Appropriate relief

Salary for the month of December 2012

33. The Claimant seeks the sum of Kshs 14,500/- being wages for the month of December 2012. The letter dismissing the Claimant was dated 28 December 2012 and the only conclusion which can be reached from this is that the Claimant was an employee of the Respondent upto and including 28 December 2012.

34. The Respondent produced the Claimant's pay slips and the one for December 2012 is notably, not signed in acknowledgment by the Claimant unlike the others. This illustrates that the Claimant was not paid his December 2012 wages.

35. Pursuant to sections 17, 18 and 49(1)(b) of the Employment Act, the Claimant is entitled as of right to the earned wages.

Leave allowance

36. Under this head, the Claimant sought Kshs 58,000/- on account of leave allowances for 4 years. By leave allowance, the Court understands the Claimant to be seeking pay in lieu of accrued leave not taken and not leave allowance.

37. The Respondent's witness testified that the Claimant was paid Kshs 10,100/- in commuted leave. Unfortunately, no question was posed to the Claimant in cross-examination as to whether he received such payment. His evidence was that leave was not en cashed.

38. The Respondent did not produce any document to demonstrate the sum of Kshs 10,100/- was paid to the Claimant. The Claimant's pay slips from October 2010 upto December 2012 all indicate the nil for leave.

39. Considering the evidence in this regard and the provisions of sections 10(3) and (7) and 74 of the Employment Act, the Court finds in favour of the Claimant. And because the Respondent did not challenge the formula or how the sum of Kshs 58,000/- was arrived at, the Court holds the Claimant is entitled to the relief.

Holidays worked and not paid

40. Under this head, the Claimant sought Kshs 31,248/-. The Respondent admitted that the employees used to work on public holidays but unlike work on Sundays, these were not paid for.

41. Regulation 8 of the Regulation of Wages (General) Order is explicit that specified holidays

shall be holidays with full pay. And the practice has been that where an employee works on a public holiday, the employee would be entitled to further compensation or overtime payment, at double rate.

42. For similar reasons to those discussed under the relief for leave allowance the Court finds in favour of the Claimant.

Service charge

43. The pleadings were not clear nor did the Claimant explain or clarify in testimony what service charge was and why it was being claimed. No contractual or statutory foundation for this relief was laid either in the pleadings or evidence and it is declined.

One month salary in lieu of notice

44. Because of the way the Claimant's case was pleaded (no pleading of unfair termination or wrongful dismissal) this relief is declined.

Compensation for lose of user of mobile phone

45. This issue was not pursued during the hearing and it should be pursued before the criminal trial Court, which is the appropriate forum because the mobile phone was recovered in the cause of criminal investigations.

Compensation for unfair termination

45. This was raised in written submissions. It was not made one of the gravamen of the Claimants case in the primary pleadings. The Court declines to consider it for reasons stated in the body of this judgment.

Conclusion and Orders

46. In conclusion, the Court declines to determine whether the Claimant was unfairly terminated but finds in his favour in terms of final dues as claimed in the Memorandum of Claim and awards him

(a)	Salary for December 2012	Kshs 14,500/-
(b)	Pay in lieu of accrued leave	Kshs 58,000/-
(c)	Holidays worked	Kshs 31,248/-
	TOTAL	Kshs 107,748/-

40. The Respondent to issue the Claimant with a Certificate of Service.

41. The claims for pay in lieu of notice and compensation are denied.

42. Each party to bear its own costs.

Delivered, dated and signed in open Court in Mombasa on this 11th day of April 2014.

Radido Stephen

Judge

Appearances

Mr. Gekonde instructed by

Hezron Gekonde & Co. Advocates for Claimant

Mr. Oduor instructed by

Oduor Okumu & Co. Advocates for Respondent