



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1494 OF 2010

MUTINDA MWITHI.....CLAIMANT

VERSUS

AQUVA AGENCIES LIMITEDRESPONDENT

JUDGMENT

The Claimant herein sued the Respondent by Memorandum of claim dated 22nd November 2010 and filed in court on 8th December 2010. He alleges that he was wrongfully unfairly and unlawfully terminated by the Respondent on 6th February 2005. He seeks payment of Shs. 445,931 made up of notice, leave, house allowance underpayments and Service gratuity.

The Respondent filed its Reply to the Memorandum of Claim in which it denies employing the claimant. The Respondent avers that the Claimant was employed by Aquva Agencies (Mombasa) Limited and not the Respondent who is Aquva Agencies Ltd with its offices in Nairobi. The Respondent further denies owing the sum claimed and avers that the Claimant was lawfully dismissed by Aquva Agencies (Mombasa), who has some association with the Respondent, for absence without permission.

The Respondent further states in its defence that the dispute was reported to the Labour Officer Mombasa who after arbitration found that the Claimant was entitled to Shs. 70,000 on account of accrued leave and overtime. The money was paid to the Claimant through the District Labour Officer Mombasa. The Respondent pleads that the claim is therefore an afterthought, is misconceived, bad in law and discloses no cause of action and should be dismissed with costs.

The Case was heard on 12th March 2014. Mr. Makori instructed by Osoro Omwoyo & Co. Advocates appeared for the claimant while Mr. Mwangi, instructed by Swaleh, Mwangi & Company Advocates appeared for the Respondent. The parties thereafter filed written submissions.

The Claimant testified that he was employed by the Respondent in sales and Marketing on 1st February 1986. He was terminated on 6th February 2004 without notice. He was not paid terminal benefits. He prayed for payment of Shs. 445,931 on account of notice, leave, house allowance underpayments and service gratuity. He also prayed for costs.

Under cross-examination the Claimant admitted that he was employed by Aquva Agencies (Mombasa) and not Aquva Agencies Ltd based in Nairobi. He denied deserting duty between 2nd February 2004 and

6th February 2004. He explained that he had been given permission to take his child to school but on his way back was unable to get transport back to work due to enforcement of “Michuki Rules”. He called the company while at home and explained his predicament. He reported the dispute to the Labour office and after conciliation he was paid Shs. 70,000/- which he collected from the labour office. Out of the amount 10,910/- was on account of leave and Shs. 59,090/- for overtime. He stated that Aquva Agencies (Mombasa) is a branch of Aquva Agencies Nairobi.

The Respondent called Patrick Tinga Mutui who testified that he worked with the Respondent as an Accountant. He testified that the Claimant was never employed by the Respondent but by Aquva Agencies (Mombasa) owned by a relative of the owner of the Respondent, but the two companies are separate entities. He stated that from information he obtained from Aquva Agencies (Mombasa) the Claimant was dismissed for absconding duty and was paid some money through the Labour office, Mombasa. He prayed that the claim be dismissed as the Claimant had sued the wrong party, and had been paid by his former employer.

I have carefully considered the pleadings, the evidence adduced in court, the relevant law and the written submissions filed by the parties. The issues for consideration are the following:-

1. **Whether the Claimant was an employee of the Respondent?**
2. **Whether the claim had been settled at the Labour office?**
3. **Whether the Claimant is entitled to his prayers?**

1. **Was the Claimant employed by the Respondent?**

The Claimant's letter of appointment is from Aquva Agencies (Mombasa). The Claimant testified that the head office of the Respondent is in Nairobi and the Mombasa Office is a branch. The Respondent denied this fact and stated that Aquva Agencies Ltd is a completely separate entity from Aquva Agencies (Mombasa) Ltd. RW1 testified that the two companies have different shareholders. Surprisingly the Respondent was aware about the termination of the Claimant's employment and even attached documents relating thereto ostensibly on the grounds that they obtained the documents from Aquva Agencies (Mombasa) based on their association.

I do not believe the Respondent. The two companies would not have been registered with such similar names if there was no close association. The Claimant worked in Aquva Agencies (Mombasa) for 18 years and it is unlikely that he would not know about the relationship between the two companies. The Claimant attached a letter he wrote to the Respondent on 20th December 2005 titled “complaining letter” where he was asking the Nairobi office to pay his terminal dues. The letter was not contested by the Respondent.

Although the Respondent avers that the two companies have no relationship, it did not produce any records to prove this fact and absolve itself from liability in this case.

I find that the Respondent and Aquva Agencies (Mombasa) are the same company.

2. **Was the Claimant's claim settled at Labour Office Mombasa?**

The Claimant admitted receiving Kshs. 70,000/- through the Labour Office Mombasa. The money was paid pursuant to a dispute he reported at the Labour office for payment of his terminal benefits following dismissal by the Respondent. Form L.D. 64 through which the report was made shows that the claimant was seeking notice, leave, severance pay, overtime and unpaid salaries for 7 days. The receipts show that the payments were in respect of final dues for the Claimant.

In his Memorandum of Claim the Claimant did not make any mention of the payment. He also did not mention the payment in his evidence in chief. He only admitted receiving the payment under cross-examination. I consider this to be material non-disclosure.

The foregoing notwithstanding, I find that the Claimant was paid for only overtime and leave days. This is however not a bar to any further claim as there is no indication that the Claimant agreed with the decision of the labour officer and received the money in full and final settlement of his claim against the Respondent.

3. Is the Claimant entitled to his prayers?

The Claimant prayed for the following:-

- a. One month's salary in lieu for leave.
- b. Leave allowances for 41 days.
- c. House allowance underpayment
- d. Service gratuity

a. One month's salary in lieu of notice

The Claimant explained that he was absent due to "Michuki Rules" which were being implemented at the time. He was away from 31st January to 6th February 2014. For a person who had worked for 18 years the dismissal was indeed very harsh. He stated that he had been granted permission to be away and called the office to explain the situation.

For this reason I find that the summary dismissal was unfair and convert it into a normal termination for which reason the claimant is entitled to one month's salary in lieu of notice.

I therefore award him Shs. 18,624 being his gross salary based on his payslip for the month of December 2003.

b. Leave allowance

Leave days pending was paid at the Labour office. The Claimant has not stated for which years the leave he is claiming herein is in respect of. I find that the claim has not been proved.

The Claim is dismissed.

c. House Allowances

The Claimant was paid house allowance as demonstrated in his payslip. He has not demonstrated that the house allowance was underpaid. He has also not indicated the period for which his claim of Kshs. 255,744/- is made of and a breakdown of how the sum claimed was arrived at.

I find that the claim is not proved and dismiss it.

d. Service gratuity

The claim for service gratuity is made under Section 35 of the Employment Act, 2007. The Act was enacted long after the Claimant's employment was terminated and cannot therefore apply to him.

The Claimant's letter of appointment did not provide for gratuity. He has not demonstrated that there were any other terms of employment applicable to him that provided for service gratuity.

For these reasons I find that the claim has not been proved and dismiss it.

Costs

Having failed to prove his claim except notice, I award the Claimant only 50% of scale fees.

Interest

The Claimant shall be paid interest from date of judgment.

Orders accordingly.

Dated and delivered at Nairobi this 8th Day of May 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Njiru holding brief for Osoro for Claimant

Wachira holding brief for Mwangi for Respondent