



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1637 OF 2011

TIMOTHY WANDERI CLAIMANT

VERSUS

BATA SHOE COMPANY (KENYA) LIMITED 1ST RESPONDENT

FAST TRUCK MANAGEMENT SERVICES LIMITED 2ND RESPONDENT

JUDGEMENT

1. On 27th September 2011, the claimant Timothy Wanderi filed his claim for wrongful termination and refusal to pay terminal dues by the respondents herein, Bata Shoe (Kenya) Ltd [Bata] and Fast Truck Management Services Ltd [Fast Truck). Bata, the 1st respondent filed their defence on 18th June 2012 noting they had a contract with the 2nd respondent to supply labour and had a contract to that effect and therefore have no knowledge of the claimant or the claim for wrongful termination or payment of dues. On 10th November 2011, Fast Truck, the 2nd respondent filed their defence noting that they employ seasonal workers on short term contract and the claimant was not one other employees as a Mechanical Engineer. In support of his claim, the claimant gave his sworn evidence, Bata called Mr Peter Giathi as their witness and Fast Truck opted not to call any witness. All parties filed their written submission dated 2nd May 2014, 20th May 2014 and 26th May 2014 for the claimant, Bata and Fast Truck respectively.

Claimant's case

2. The claimant is suing Bata a company engaged in the manufacture and sale of shoes and other leather wear while Fast Truck is a company operating within Bata premises at Limuru. The claimant was employed by the respondents at their factory in Limuru in the capacity of mechanical Engineer at a salary of kshs.290 per day which was calculated and paid every fortnight by Fast Truck through his account at Equity bank. The claimant was not privy to the work arrangements between the respondents. He continued to work from August 2007 to 8th September 2010 when the respondents dismissed him from duty; this was without notice or a chance for hearing. While at work, the claimant was exposed to dangers and he was not issued to protective gear and he was dismissed by the manager instead of the human resource manager as was the practice. The claimant seeking the following;

1. One months' pay in lieu of notice – Kshs.8, 400
2. Gratuity at the rate of one months' salary for each completed year of service – 16,800
3. Leave due for two years – 17,640
4. 12 months' salary compensation for loss of employment – 100,800
5. Certificate of service

3. In evidence the claimant stated that he was employed by Bata on 7th August 2007 as a mechanic and placed at 705 maintenance department of Bata. He was verbally told when to report by Mr Giathi the Human Resource Manager (HRM) of Bata and was paid Kshs.290 per day after every two weeks. That he was terminated without notice on 8th September 2009. He reported to work and two people were sent to him, Kihoe and Kiarie to tell the claimant that the Engineers had directed him to leave. That these people were his seniors but gave no reasons for the termination. No letter was issued as notice or disciplinary proceedings held before the termination.

4. The claimant also stated that Fast Truck is sued in this case but he cannot tell in what capacity as he was an employee of Bata but his salary was paid by Fast Truck. The bank statement indicates that the salary was remitted by Fast Truck in the bank account. He worked from 2007 to 2009 without leave or rest and off day from 7a.m. to 5.10p.m for 7 days a week. The Sundays worked were not paid for and he only got Kshs.290.00. he is seeking Kshs.143, 640.00 for leave, notice pay as Mr Giathi employed him but used the department manager to terminate the claimant. The claimant is also seeking gratuity as he was not aware is NSSF dues were paid and compensation for unfair termination. Certificate of service was not issued.

5. On cross-examination by 1st respondent, the claimant stated that he was an Engineer from Kamirithu Polytechnic but did not attach these credentials to the claim. He was an employee of Bata and the only relationship he had with the 2nd respondent was the salary. He applied for the job and was taken and given Bata uniform in mechanical maintenance. He worked on the machines as it was not possible to remove them and work on them from outside the Bata premises in Limuru. Mr Giathi is well known in Limuru, Mr Kiarie was the supervisor but payments were done by Fast Truck and were not sure who the employer was.

6. On cross-examination by the 2nd respondent, the claimant stated that he worked from 2007 to 2009 continuously but made an error in the claim where he noted that he was terminated in 2010. He was paid through petty cash but later through the bank. In 2009, there was no pay in June, July and August. In 2010, there was no pay on August, September and November. In July, the claimant was told to rest without pay. He was stopped for 3 months. Where there was overtime, Bata refused to pay for it as well as time on leave. The daily rate paid was kshs.290.00 which was paid in two weeks at kshs.4000.00 after an addition of Kshs.4.00 per days margin the daily rate kshs.295.00. in January 2020 on 18th January Kshs.5,600.00 was paid but without any explanation, June kshs.4,200.00 was paid without any explanation, March 2010 kshs.3,700.00 was paid without any explanation but the due salary after two weeks was supposed to be kshs.3,920.00. The claimant was not able to explain the different payments and the responds failed to explain as well.

7. That the claimant was terminated by Engineer Mwangi who sent Kiarie to terminate the claimant. The claimant also stated that he was a casual employee and when he was terminated, he went to Mr Giathi who sent him back to the engineer on 20th December 2010.

8. On re-examination, the claimant noted that he was terminated on 8th September 2010 after receiving different payments despite reporting to work daily.

1st respondent's case

9. The 1st respondent stated that on or about 15th February 2009, they entered into a contract for services with the 2nd respondent who agreed to supply manpower services to them upon payment of professional fees and hence outsourced the service. Fast Truck was an independent contractor tasked to recruit, remunerate, discipline and supervise the manpower service. Fast Truck was to provide their staff with uniforms and work gear which would clearly distinguish them from the Bata employees. Bata paid Fast Truck who in turn paid their staff who had access to the Bata premises to carry out their duties but to remain the employees to Fast Truck who was to pay all salaries, control their employees, provide tools and ensure they had an insurance cover. That Bata is therefore a stranger to the claim as they cannot be

held responsible for the staff of Fast Truck and that the claim should be dismissed in its entirety.

10. In evidence, Mr Giathi for Bata stated that as the HRM of Bata since 2004 he does not know the claimant as he was not their employee. Bata was related to Fast Truck by virtue of outsourced manpower services since 2007 that were to supply labour and hire seasonal employees to offer work at the Bata factory in Limuru. In some sections there were Bata employees but in some only Fast Truck had their employees. Bata never hired the claimant and where he was hired, the responsible employer was Fast Truck. A Mechanical Engineer is a highly skilled person and could not have been terminated by Bata or Fast Truck as indicated by the claimant. Joseph Kiarie and Peter Kioi are employees of Bata but had no supervisory role over any other employees at Bata or with Fast Truck and had no authority to terminate. Where Bata offers employment, an employee is given a contract and a copy retained by HRM and in this case there was no such contract with the claimant. There was no employer/employee relationship with the claimant and therefore Bata made no payments to him.

2nd respondent's case

11. The 2nd respondent on their part stated that they employ over 3000 employee on short term basis who are seasonal. The claimant was not in their employment as a mechanical engineer. They keep a record of all employees and have work guidelines on hiring, firing and termination. Once employed, Fast Truck does give its employee protective gear commensurate to the assigned work. And in a case that the claimant was in their employment, he was never sacked but absconded from work and has never been seen. The claim does not meet relevant provisions of the law and should be dismissed with costs.

Submissions

13. The claimant submitted that he worked for the responses from August 2007 to September 2010 when the manager of Bata dismissed him from duty. He was hired by Bata after successful application. The claimant in evidence also stated that he never sought employment from Fast Truck and did not know the relationship between the respondents and the only reason he has sued Fast ruck was due to the fact that he received his salary from them. That the claimant remained at the premises of Bata and was terminated by Engineer Mwangi who sent a fellow employee to inform the claimant that his employment had ceased and should stop work. That the claimant is owed notice pay, gratuity, leave due and compensation for loss of employment.

14. The 1st respondent on their part submitted that the claimant pleaded that he was a mechanical engineer but in his evidence stated that he was a machine operator and was not sure which designation he held. There was no evidence that the claimant was an employee of Bata and the bank stamens indicate he was paid by Fast Truck. Where the claimant was remunerated by Fast Truck, then that was the employer in law and no claim can stand against Bata. That Bata outsourced manpower to Fast Truck who recruited and these employees would mix with Bata employees in the course of their work. Outsourcing is recognised as a business practice and this is the relationship that existed between Bata and fast Truck. The claimant was not dismissed by Bata and when he went to complain to Mr Giathi, he was directed to his employer as he was not their employee. The claimant is therefore not entitled to the claims and should be dismissed with costs.

Who terminated the claimant?

Is the claimant entitled to the remedies sought?

15. The claimant has based his claim on what he states to have been wrongful termination and non-payment of his terminal dues. Wrongful termination is outlawed under the law and when this happens the Court has to relook at the provisions of section 45(2) of the Employment Act;

(2) A termination of employment by an employer is unfair if the employer fails to prove?

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason?

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure

16. The unfair reasons or circumstances of the termination must be established by the party so pleading for the Court to assess the validity of such circumstances and or reasons and further go beyond the rationality of the same by interrogating the conduct of the parties particularly where no reasons are given for the termination. Where such reasons and circumstances do not exist or besides there existence, the Court must look at the procedure followed by an employer that led to the termination. These interrogations require thorough cross-examination of the facts surrounding each case particularly a case like this one.

17. The claimant stated that on 8th September 2009, he reported to work and then two people were sent to him by the Bata Engineer directing him to leave the premises. On cross-examination, the claimant added that in September 2010, he was dismissed by Mwangi of Bata. The claimant also stated that he went to Mr Giathi to notify him of these developments but was sent back to his place of work to report to his supervisor. The claimant does not give further account as to what transpired after his report to Mr Giathi but that, Kiarie and Kioi was senior people at the Bata Company and he thus took their word and does not seem to have gone back to work. Is this what is expected of a diligent employee? Could the claimant have done more in the circumstances?

18. From the claimant's evidence, it is clear that he was well aware that though he was placed at the Bata premises for work; his salary was paid by Fast Truck. At the place of work, he was aware Mr Giathi was the Bata HRM and while at his place of work, he worked closely with Engineer, Mwangi, Kiarie and Kioi. Where the Engineer sent two men to direct the claimant to leave the Bata premises and the claimant decided not to challenge this decision and go to Mr Giathi is not clear. Also, the claimant when he was directed by Mr Giathi to go back to his supervisor, he does not indicate as to what he did in this regard. What is clear is that the claimant lodged his claim in court.

19. Even though the Industrial Court has the original jurisdiction to hear labour claims and make orders as are necessary, parties are encouraged to resolve all industrial disputes at the shop floor between the employer and employee as at the shop floor one will get the best evidence that establish the primary facts as they happen. Where an employee is aggrieved by a decision or a workplace practice, the initial complaint is not before the Court unless there is a matter of urgency that requires be preserving or restraining. Otherwise in a case like this one where the claimant was told to leave his place of work by his peers and despite being directed by a senior person of the HRM like Mr Giathi and he failed to do so, the subsequent departure from the place of work only served as a frustration of his employment as against a case where the claimant was terminated by the employer. The claimant took an option that was detrimental to his own employment by his departure without causing his issue or complaint being handled within the shop floor and before leaving in circumstances that suggest that the two people sent to direct him to leave the Bata premises were not persons authorised to give such instructions. This is compounded further by the claimant's own evidence that he reported to work daily from 2007 to 2009 and beyond to 2010 and if indeed he worked closely with Bata Engineer, Kiarie and Kioi in the capacity of Mechanical Engineer, then he had the capacity to know who his supervisor was and deal with his complaint through his supervisor up to the HRM. To not have done so, creates a strong case for the 1st respondent that the claimant was not their employee who had a contract of service and also confirms the evidence of the 2nd respondent that the claimant was a seasonal employee who deserted his place of work and never came back.

20. I find therefore that the claimant fails to articulate his case as regards the provisions of section 45(2), there was no termination of employment rather this was a case of desertion of work. This is not to be encouraged by this court. Parties must come to this court with clean hands to have their rights

protected and not use the court system to make claims non-existent claim.

On this basis, the claim is hereby dismissed. Each party will bear their own costs.

Delivered in open Court at Nairobi and dated this 11th Day of June 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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