



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 132 OF 2013
(Originally Nairobi Cause No. 1363 of 2010)

MUNIR ABUBAKAR MASOUD

CLAIMANT

v

KENYA UNION OF COMMERCIAL, FOOD & ALLIED

WORKERS

1st RESPONDENT

VINCENT MANIAGI

2nd RESPONDENT

CHRIS MUTHENDU

3rd RESPONDENT

ALEXIUS SAPARII

4th RESPONDENT

JUDGMENT

1. Munir Abubakar Masoud (Claimant) retired from public service in 1998 as a senior Collector of Customs & Excise with the Kenya Revenue Authority. After retirement, the Claimant proposed the formation of Tax Collectors Union and it appears that the application for registration is still pending before the Registrar of Trade Unions.
2. In 2003, the Claimant joined the Banking, Insurance and Finance Union, Kenya as Executive Officer until January 2006.
3. On 3 November 2010, the Claimant filed a 21 page Statement of Claim against Kenya Union of Commercial, Food & Allied Workers (Union), Vincent Maniagi (2nd Respondent), Chris Muthendu (3rd Respondent) and Alexius Saparii (4th Respondent).
4. The Statement of Claim is a real labyrinth of verbosity and not clear pleading. But the Court must shift through it to determine the real issues in dispute. The Claimant was seeking orders finding that the Union had, failed to amend its constitution to comply with the Labour Relations Act, 2007; had breached its own constitution; failed to render accounts to its members; had failed to furnish annual returns; had failed to render audited accounts; had failed to register an autonomous branch for bank employees; that the oral employment contract between Claimant and Union was valid and binding; that a contract made on 1 April 2009 was unprocedural, improper and unlawful; had employed the Claimant between 1 July 2009 to 15 October 2009 without a valid employment contract; had discriminated against the Claimant by offering him 3 month contract, and to be awarded withheld remuneration and a certificate of service.
5. Together with the Statement of Claim, the Claimant filed a Notice of Motion seeking an order to

- compel the Union to comply with the Labour Relations Act, to fulfil its obligations with the Union's bank employees and to release Claimant's withheld remuneration.
6. The Respondents were served and they filed a Reply on 20 July 2011 through Nyandieka & Associates Advocates leading to the Claimant filing an Answer to Respondents Reply on 2 November 2012.
 7. Through a letter dated 10 December 2012, the Deputy Registrar transferred the file herein to Mombasa.
 8. On 26 February 2013, when the Cause was mentioned before me, Mr. Atela, a Union Official informed me that the file was transferred to Mombasa without an order of Court. After hearing the parties, I reserved my ruling to 15 March 2013.
 9. In my ruling, I established that indeed there was no court order transferring the matter to Mombasa and ordered that the file be taken back to Nairobi. At the same time, I directed the Registrar of Trade Unions to furnish the Court with copies of the Union's audited accounts within 30 days.
 10. On 12 April 2013, Kurauka & Co. Advocates filed a Notice of Change of Advocates to come on record for all the Respondents.
 11. The Registrar complied with the orders and furnished the Court with the Union's audited accounts from 2009 to 2011.
 12. When the file was placed before the Principal Judge in Nairobi he directed that it be returned to Mombasa for hearing and determination.
 13. On 16 December 2013, the parties agreed that the dispute should be determined on the basis of the record and submissions. The Claimant had filed his submissions on 11 November 2013 while the Respondents submissions were filed on 16 December 2013. The submissions were highlighted on 16 December 2013, 12 June 2014 and 17 July 2014.

Evaluation

14. The Claimant has raised broadly two distinct causes of action. One relates to the registration, management and administration of the union. The other relates to his employment relationship with the union as his employer.
15. The Court has agonized over how to deal with these separate causes of action which had been joined in one Statement of Claim. The Court will discuss them seriatim.

Governance/administration of the Union

16. The Claimant has alleged that the union has not complied with the Labour Relations Act, 2007 in terms of amending its constitution and that the officials have not been rendering true accounts to the membership or filing the same with the Registrar of Trade Unions. The allegations relate broadly to the governance and administration of the Union and the conduct of 2nd to 4th Respondents.
17. Under the fifth schedule to the Labour Relations Act, 2007 which deal with the transitional provisions in respect of trade unions registered prior to the commencement of the Labour Relations Act on 26 October 2007, the Registrar of Trade Unions has been given regulatory and oversight mandate.
18. By virtue of the provisions of Parts II, V and VII of the Labour Relations Act, 2007 which provides for management and administration of trade unions, disputes should ordinarily be reported to the Minister for Labour to appoint a conciliator to attempt resolution of the dispute at that level before a party moves to Court.
19. Sections 12 and 15 of the Industrial Court Act also recognise the power of the Court to allow alternative dispute resolution mechanisms to be tried before moving to the Court.
20. In the view of the Court, the Claimant should have initially approached the Registrar of Trade Unions to ensure that the Union was compliant and or reported a dispute to the Minister for Labour to appoint a conciliator. On this score, the Claimant moved to Court prematurely.
21. But that is not all; the Respondents raised the issue of the Claimants locus standi to file judicial proceedings in regard to the governance and administration of the Union.
22. The Claimant urged that Article 22 of the Constitution gave him the locus to present the Cause herein. The Respondents contended that the Claimant lacked locus standi because he was not a

- member or official of the 1st Respondent.
23. The present Cause, in my view is not one for the enforcement of a right or fundamental freedom in the Bill of Rights. It is mainly alleging contravention of statutory provisions and the Union's constitution and therefore the Claimant cannot find umbrage in Article 22 of the Constitution to claim locus standi.
 24. Further Article 41 of the Constitution has enshrined the right of trade unions to determine their own administrative programmes and activities.
 25. The unions should operate independently and unless there are obvious or glaring breaches of the union's constitution or laws of the country, the courts should not be the first port of call.
 26. In my view the allegations by the Claimant that the union's constitution contains many defective rules should be raised at the first instance as an agenda during either the unions Annual General Conference or a meeting specially convened for that purpose or with the Registrar of Trade Unions who has the responsibility to ensure constitutions of trade unions are in line with the requisite laws.
 27. The Claimant as Executive Officer was an employee appointed by the Respondents. He was not an elected official.
 28. Assuming that the Claimant was a member of the Union, though there was no evidence of such membership, he should still have first reported a trade dispute to the Minister for Labour to appoint a conciliator. He did not.
 29. For the above adumbrated reasons, the Court declines the invitation by the Claimant to address the first part of issues raised.

The employment relationship cause of action

Claimant's position

30. The Claimant pleaded that his relationship with the Union started in 1998. But no material was placed before Court to show that this relationship was that of an employer and employee, until he was summoned to Nairobi by the 3rd and 4th Respondents' in 2009 to take up the position of Executive Officer. After meeting with the 2nd to 4th Respondents on 26 February 2009 the Claimant took up employment as Executive Officer of the Finance Branch waiting formalization.
31. In the course of performing his duties, the Claimant sought and the Union paid for his work identity card as Executive Officer (exh at page 26 of Statement of Claim).
32. The Claimant's further case is that the Union gave him a three month written contract of employment dated 1 April 2009 (exh at page 27 of Statement of Claim) at a monthly salary of Kshs 30,000/-. The contract was renewable on expiry.
33. The Claimant impugns the contract for not being in compliance with the requirements of the Employment Act as regards particulars and the unions Constitution, being discriminatory and overriding the verbal agreement reached earlier and that he signed it under duress.
34. In June 2009, the 3rd Respondent informed the Claimant that his salary had been set at Kshs 42,000/- basic and house allowance of Kshs 4,500/-. The Claimant interpreted this new remuneration would be backdated to 1 March 2009.
35. On 15 October 2009 the Union's Secretary General wrote to the Claimant informing him that his services were being terminated effective 1 October 2009. The Claimant contends that this termination was in contravention of the law and unfair and therefore in the Answer to the Reply contends that the remedies under section 49 of the Employment Act become available.
36. The Claimant seeks withheld remuneration, certificate of service, an order that he was discriminated against and was employed without a valid contract.

Respondent's position

37. The Respondent pleaded that the Claimant was employed on a three month fixed term contract and that the Claimant accepted the terms and conditions therein by appending his signature to the contract.
38. The Respondents further pleaded that the contract expired on 30 June 2009 but was not renewed though the Claimant continued to work until termination through a letter dated 15 October 2009

(the Reply indicates the year as 2010) and that the Claimant is entitled to Kshs 45,000/- made up of one month pay in lieu of notice, pro rata leave and a certificate of service.

Challenge to Contract dated 1 April 2009

39. The Claimant impugned the written contract dated 1 April 2009. He contended that he signed it under duress and that it did not reflect the remuneration verbally agreed with the Respondents. He further asserted that the contract did not have the particulars prescribed by the Employment Act, 2007 and was also discriminatory.
40. The contract set out certain particulars. These were the identity of the employer and employee, their contact details, job description, date of commencement and form and duration of contract and remuneration. Although the place of work and hours of work were not mentioned, the Claimant must have been reporting to an office at certain hours.
41. The contract had the essentials required by the Employment Act, 2007 and the Claimant was not prejudiced on the basis of any lack of prescribed particulars not being referred to in the contract. In any case, the statute has provided certain minimum terms and conditions of employment and where a contract does not make provision, the minimum default statutory provisions such as leave, house allowance etc become incorporated into the relationship.
42. The Claimant also urged that there was a verbal contract which overrode or superseded the terms of the written contract and further that he signed the contract under duress.
43. In my view, the Claimant has failed to produce evidence to show that he signed the written contract under duress or that the terms of an oral agreement he reached with some of the Respondents should override what was put in black and white.

Status of Claimant after expiry of contract on 30 June 2009

44. The contract was for three months. It expired by effluxion of time on 30 June 2009. The Respondents allowed the Claimant to continue working without causing to be drawn another written contract.
45. Because the Claimant was still doing the same work, the Court would find that he was still serving on the same terms and conditions of service but still subject to statutory regulation on minimum standards.

Termination

46. The Claimant raised the unfairness of the termination in his Answer to reply. He is a lay person without legal training or experience.
47. On 15 October 2009 the Respondent notified the Claimant that it was terminating his services backdated to 1 October 2009.
48. To my mind the termination of the services of the Claimant was subject to sections 35, 41, 43, 45 and 47 of the Employment Act, 2007.
49. In so far as the Claimant was not given a month's notice or informed of the reasons for termination of his services and afforded an opportunity to be heard, the termination was procedurally and substantively unfair and section 49 of the Employment Act, 2007 comes into play.

Remedies

Compensation

50. One of the remedies for unfair termination is the payment of a sum not exceeding twelve months gross wages as compensation. The remedy is discretionary and the Court is enjoined to consider any, some or all of the factors listed at section 49(4) of the Employment Act, 2007.
51. The Claimant had served the Respondents for a relatively short time. He must have incurred some expenses in bringing a complaint to Court.
52. Considering these factors the Court would award him the equivalent of five months wages

assessed at Kshs 150,000/- as compensation.

One month pay in lieu of notice

53.Pursuant to sections 35 and 36 of the Employment Act, 2007 the Respondent should have given the Claimant one month written notice of termination or one month pay in lieu of notice. The Respondents admitted this claim was payable. The Court would award him Kshs 30,000/- on this head of relief.

Pro rata leave

54.The Respondents also admitted that they were ready to pay the Claimant pro rata leave of Kshs 15,000/- for the period served. The Court would find in his favour in the admitted sum.

Certificate of service

55.A certificate of service is a statutory entitlement of an employee on separation. The Respondent should issue one to the Claimant within 7 days of this judgment.

Conclusion and Orders

56.From the foregoing, the Court dismisses the allegations regarding the governance and administration of the 1st Respondent but finds and holds that the termination of the services of the Claimant was procedurally and substantively unfair and awards him and orders the Respondent to pay him

- | | |
|-----------------------------------|----------------|
| a. Five months wages compensation | Kshs 150,000/- |
| b. 1 month pay in lieu of Notice | Kshs 30,000/- |
| c. Pro rata leave | Kshs 15,000/- |

TOTAL **Kshs 195,000/-**

57.The Respondent to issue a certificate of service to the Claimant within 7 days.

58.Each party to bear their own costs.

Delivered, dated and signed in open Court in Mombasa on this 12th day of September 2014.

Radido Stephen

Judge

Appearances

For Claimant in person

For Respondents Mr. Kurauka instructed by Kurauka & Co. Advocates