



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1080 OF 2013

FREDRICK CHEGE NJUGUNACLAIMANT

VERSUS

**HELLEN OKUBASU T/A HELLENIC SALON AND EXECUTIVE BARBER
RESPONDENT**

JUDGEMENT

1. The suit herein was filed as Civil Suit No.1423 of 2007 before the Chief Magistrate's Court, Nairobi. By a ruling of the subordinate court on 12th October 2012, parties were directed to transfer the suit to the Industrial Court. On 19th March 2013, vide Misc. Application No.26 of 2013; the Claimant was given an order by this Court allowing him to transfer suit no. PMCC 1432 of 2007 from the subordinate Court to the Industrial Court. On 29th January 2014, the Deputy Registrar, industrial court being seized of the matter opened a new file and allocated the matter for hearing under Cause No.1080 of 2013.

2. The claim is that the Claimant was an employee of the Respondent as a Barber, he had a written contract that was terminated without notice, he was not paid his terminal dues, and thus seeking payment for the remainder of his contract period, salary arrears and notice pay all amounting to kshs.396, 000. The Respondent filed a defence on 11th April 2007 denying the claims and lodged a counter-claim seeking payment of kshs.40, 000.00 the Claimant owed the Respondent from an advance to him while in their employment. The Claimant gave his sworn evidence in support of his case and the Respondent called Caroline Mutuku as their witness.

Claimant's case

3. On 14th July 2005, the Claimant was employed by the Respondent and a written contract issued to him. He was to serve as a Barber at the respondent's salon for a period of tow (2) years commencing July 2007. His salary was 45% out of the day's collections payable on monthly basis. The mean pay for the period was kshs.36, 000.00 per month. On 2nd November 2006, the Respondent terminated the Claimant but failed to pay him for days worked in October 2006, there was no notice or payment of the balance of the contract period that was to end in November 2005.

4. The Claimant is seeking;

- a. Payment for the remainder of the contract period between November 2006 to July 2007 at 36,000.00 per month all being Kshs.324,000.00
- b. Salary arrears for October 2006 at kshs.36,000.00
- c. One month's pay in lieu of notice at Kshs.36,000.00

5. In evidence the Claimant stated that upon his employment by the Respondent he was issued with a contract and both parties agreed that upon termination, one month's notice would issue. The contract was to run for two years and payments for work were on a commission of 45% for all work done per day. On average the monthly wage would be Kshs.36, 000.00 and pay slips for the duration of payments are as attached to the memorandum of claim where salary varies between 36,000 to 38,000.

6. On 2nd November 2006 the Claimant was terminated without notice or being given the reasons for the termination. Mrs Okubasu called the Claimant at a hotel along Koinange Street in Nairobi and told the Claimant that she did not want to work with him anymore and that she was not going to pay him anything. There was nothing in writing as notice. The Claimant had worked diligently until this day when he was terminated. He was allowed to collect his personal property and was able to leave.

7. The Claimant is seeking Kshs.396, 000.00 based on unpaid salary for October 2006, notice pay and the balance of time not served under his contract all based on a salary of Kshs.36, 000.00 per month. This matter was filed in 2007, the file got lost, the matter was transferred from the Magistrate's court following enactment of the Industrial Court Act and it has been a long journey to access justice and therefore seek costs of the suit.

8. There is a counter-claim in the defence, to which the Claimant denied that he ever instigated a strike while employed by the respondent. He did not owe anything in terms of an advance or in form of a loan or desert his employment. He was terminated without notice and thus filed his claim. Had he owed anything or been in desertion, the Respondent never filed any claim against him. That the counter-claim should be dismissed with costs.

Respondent's case

9. In defence, the Respondent stated that they had employed the Claimant as a Barber and he had a contract of employment for two years. He did not abscond duty after instigating other employees to go on strike. He is not owed any monies at kshs.396, 000.00 as claimed as there is no such evidence. The Claimant was the one who breached his contract.

10. The Respondent also counter-claimed the sum of Kshs.40, 000.00 being amounts advised to the Claimant when he commenced work with them and by the time of absconding had not repaid the Respondent and this is still due and owing. The Respondent is also seeking Kshs.36, 000.00 being notice pay as the Claimant did not serve them with any notice before abandoning his employment with them. That the total sum of Ksh.76, 000.00 is due and owing and should be paid with interest and costs of the suit.

11. In evidence the Respondent called Caroline Mutuku as their witness. She is the Manager at the Respondent who runs the business on behalf of the Respondent where there is a salon and a barber shop. The proprietor Mrs Hellen Okubasu constantly updates her on anything taking place for and in the business. The witness worked with the Claimant when he was employed and was issued with a written contract which she wrote and made sure all parties signed. The respondent's practice was to issue all staff with contract stipulating the terms and conditions of work. The claimant's contract was done on 14th July 2005 and both parties signed. It was to run for two years which was inserted by hand. The mode of payment was agreed being 45% commission. Clause two indicates there was a loan advanced to the Claimant amounting to kshs.40, 000.00. This amount was to be deducted from the monthly pay. Termination was agreed to be on notice of one months or payment in lieu of such notice.

12. In October 2006 there was an incident at work. The barbers went on strike and the shop was closed and the Respondent could not operate as the business is dependent on the barbers and the beauticians. There were seven barbers in total and were all involved in the strike. The next day all the staff were called to a meeting one at a time to help the Respondent know what the problem was and the cause of the strike. What came out was that from the commissions paid to the barbers, there are those who got a high commission and the Claimant had the lowest. The Claimant was the last to be called to the meeting between the witness and Mrs Okubasu and it emerged that he was the one behind the strike. All

the other barbers were interrogated and the respondents were able to establish that the Claimant was the one behind the strike.

13. At the meeting and hearings, each barber was called on the phone, there was no prior notice as this was an emergency situation that required the Respondent to act first as the business had closed and was making losses. The investigations done were shocking to the Respondent as the Claimant was one of their best barbers at the shop.

14. When the Claimant was called as the last person, the Respondent wanted to know why he had instigated the strike as their investigations found him as the culprit. The Claimant was asked to apologise and promise that such a thing would not occur again and then resume work. After the meeting, the Claimant failed to report back to work. After two days, a client came to the shop looking for the Claimant and upon being told he was always, he called the Claimant from his cell phone. The witness could hear part of the conversation where the client was directed to find the Claimant at Ashley's salon where the Claimant had moved to. The witness was able to surmise that the Claimant had gone back to Ashley's their competitor, a place where the Claimant had come from before joining the Respondent business. When the Claimant was employed by the respondent, he had problems with Ashley's as he had been paid his dues through cheque and when the director knew of his moving out to join the respondent, the cheque was stopped. The Respondent therefore gave the Claimant a loan of Kshs.40, 000.00 to help him as he resolved matters with his former employer.

15. The loan advanced to the Claimant was put in writing but the contract attached to the claim and the one attached to the defence, both are different as the one by the Claimant does not have the amount of 40,000.00, when the witness wrote the contract, she inserted the figure by hand and the writings in both contracts are not similar. In the claimant's contract, at clause two, the loan inserted is missing.

16. The witness also testified that the Claimant was not paid for October 2006 for the 24 days he was at work. He never reported back after meeting with Mrs Okubasu. Had he reported back he would have been paid kshs.75, 000.00 based on the 45% he had worked for. Since absconding, the Claimant never went back to work. He never gave notice. He was not terminated by the claimant. He also never paid the outstanding loan. The Respondent has therefore counter-claimed the sum of Kshs.36, 000.00 from the Claimant as notice pay, the sum of Kshs.40, 000.00 the loan advanced and further the sum of Kshs.23, 000.00 for products the Claimant had taken and did not pay for.

17. The witness also stated that from the incident of strike instigated by the claimant, the Respondent lost business to competitors as clients would come and ask to be attended to by the Claimant and later followed him to his new employer. The Respondent investigations indicated that the Claimant was aware of the strike and instigated it so as to have an exit from the Respondent as soon after the strike, he was employed by his former employer. All along the Claimant knew that the Respondent depended on his good service and when he left, good clients left the Respondent causing massive business losses.

Whether the Claimant was wrongly terminated

Whether the Claimant absconded duty

Whether the remedies sought are due

18. Both parties agree that the Claimant was employed by the Respondent and a contract of employment issued to the claimant. What is disputed is the contract itself. The Claimant gave evidence that his contract had no loan amount inserted while the respondent's witness gave evidence that the contract attached to the defence with a loan amount of kshs.40, 000.00 is the correct contract as this was done in her hand by inserting figures at clause 2. He who alleges must prove, this applies to employment and labour relations matters. The Claimant submitted all his documents in original form when the challenge to his documents was raised, the Respondent did not do likewise. The Respondent is the one who challenged the existence of differences in the contract in their possession and that in the possession of the claimant. The duty thus shifted to the Respondent to bring the different documents to the attention

of the court.

19. That said it has been a labour practice which practice has found affirmation by this court that it is a good labour practice that all documents exchanged within the employment and labour relations should be in writing and the employer should retain copies of the same. This practice has so far gained momentum with the enactment of new labour laws as of 2007 and with the enactment of the industrial Court Act, 2011, the jurisprudence of the court has been that all terms and conditions of work should be in writing. This serves the interests of both parties especially when the terms and conditions are up for review and in some cases where there is a dispute like in this case. The contract of employment submitted by the Respondent is fundamentally different from that submitted by the claimant. The one submitted by the Respondent has clause 1 inserted with dates when the contract commenced, clause 2 has the commission payable as well as the loan advanced to the claimant. This is different from the one the Claimant has as at clause 1, the dates of commencement are not indicated and clause 2 has the commission payable only. The preamble paragraphs have handwritten information inserted which is done by different hands in both documents.

20. Both contracts are only signed on the part of the Claimant but the part of the employer is not signed. For what this document is worth from either side, a fundamental part is omitted, where the employer as the one giving employment and spelling out the employment terms and conditions has not executed the contract. The Claimant signed the contract in the presence of Caroline Mutuku as the respondent's witness but the proprietor said to be Mrs Hellen Okubasu has not signed or caused the employer's part to be signed or commissioned. This renders the document worthless. The oral evidence of both parties therefore becomes important in this case.

21. The claimant's evidence is that he was employed on a two years contract from 14th July 2005. He was terminated on 2nd November 2006 before the expiry of his contract. By 2nd November 2006, the applicable law with regard to the claimant's employment was the Employment Act, Cap 226 laws of Kenya (now repealed). Under the applicable law, an employee could be under a written or oral contract of employment and both were enforceable in law. Where the parties agreed to the terms whether orally or in writing, any breach of the terms by the conduct of the parties or through notice, damages are payable by the party in breach.

22. In this case, the Claimant stated that he was called by the Respondent to a meeting without prior notice or being given any reasons and was terminated. The respondent's witness on the other hand confirm this but give more details that there was an incident at the work place on the 2nd of November 2006, they conducted investigations where the Claimant was found to be culpable for instigating a strike. He was asked to apologise and resume work but he did abscond. Despite this evidence being given under oath, there is nothing to confirm that there was an investigation report and that the investigations were conducted in a manner to allow the Claimant give his defence and that indeed from the investigations the Claimant was found as culpable. In an employment relationship, documentation is a primary requirement and where indeed the Claimant instigated a strike that affected the business of the Respondent to a point that it had to be closed for several days causing massive losses, for the Respondent to causally treat their investigations where the Claimant was found culpable is not acceptable. Such serious matters are to be documented as under the repealed Employment Act and even in the current legal framework. Due process dictates that each party be given a fair hearing and in the absence of evidence that indeed the Claimant was called to the meeting as stated by the Claimant to give his side of the story and in his defence, the court is left with nothing to base the respondent's allegation on.

23. The Claimant was categorical that he was terminated by Mrs Okubasu while the Respondent witness was adamant that she was informed by Mrs Okubasu of all happenings at the business. That after the meeting that was held to interrogate the employees the Claimant failed to tender an apology and simply absconded. Put into cross-examination, the witness was hesitant to confirm as to whether Mrs Okubasu had direct contact with her employees. This therefore left a wide gap in the absence of any evidence from Mrs Okubasu to confirm as to whether there was contact between her and the Claimant with regard to the allegations made against her. In the end, the Claimant stood out as somebody to be believed as unlike the Respondent witness, Caroline Mutuku.

24. From the evidence of both parties, I find the Claimant was under contract of employment with the respondent, his contract was terminated without notice and this was a fundamental breach of the same. Damages in such a breach are payable. This will be assessed at Kshs.200, 000.00

25. On the remedies sought, the Claimant is seeking that he was not given notice before termination. This was confirmed by the Respondent witness that there was no notice necessary as the Claimant absconded. An absconding employee commits a serious breach of the contract of employment. This was alleged by the respondent. Respondent does not state when the Claimant absconded duty. There is no evidence of the Claimant being followed up to report to work. Where there was an employment relationship between the parties, I take it that the Respondent had all the relevant details with regard to the Claimant contact details. When there meeting was held to interrogate the employees due to the strike, each and every one of the 7 barbers were called on the phone. The Claimant was the last to be called. When he is alleged to have absconded duty, there is not effort by the Respondent that they tried to reach to him, call him or issue him with a warning or a sanction for absconding duty.

26. In the circumstances, I find there was no notice issued. The Claimant was entitled to one month's pay in lieu of notice under the Employment Act, Cap 226 (now repealed). This will be assessed at Kshs. 36,000.00.

27. The Claimant is seeking salary arrears for October 2006. This is a right due to any employee who has worked. This was admitted by the respondent. The sum of Kshs.36, 000.00 is confirmed as due to the claimant.

28. There is a counter-claim, in view of the findings as above with regard to the contract that was between the parties, the basis of the claim for 40,000.00 laid as an advance loan abets on the finding that this contract was not properly executed. The Respondent failed in a material way to ensure the document they issued to their employee was properly executed. They cannot therefore be found to rely on the same. Equally, on the finding that there was no notice issued, the Claimant did not abscond as the Respondent alleged; the counter-claim cannot stand on that basis. The same is dismissed with costs to the claimant.

The counter-claim to the defence is hereby dismissed in its entirety and Judgement entered for the Claimant as against the Respondent and court makes the following orders;

- a. **The Respondent is in breach of the employment contract;**
- b. **The Claimant is awarded kshs.200,000.00 in damages**
- c. **The Claimant is awarded Kshs.36,000.00 as notice pay;**
- d. **The Claimant is awarded kshs.36,000.00 as pay for October 2006;**
- e. **Amounts payable at (c) and (d) to be paid with interest;** and
- f. **Costs of the suit awarded to the claimant**

Delivered, dated and signed in open Court at Nairobi this 18th day of November 2014.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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