



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 220 of 2011

TECHNO SERVICE LIMITED CLAIMANT

VERSUS

MICHAEL KARUE WACHIRA RESPONDENT

J U D G M E N T

Techno Services Limited, the claimant in this suit describe themselves as a limited liability company incorporated under the Companies Act.

By a memorandum of claim filed on 17th February, 2011, they claim from the respondent the sum of Kshs.350,000 on account of training fees incurred on the respondent and a further Kshs.40,000 on account of two months salary in lieu of notice.

The Respondent was an employee of the claimant having been employed in November, 2009.

The suit was triggered by the respondent's departure from his employment which the Claimant contends was in breach of the contract of employment between the parties. According to the claimant, part of the claimant's contract was the training bond which obliged the claimant to train the respondent at a cost of Kshs.350,000 in his area of expertise and that the respondent was bound to remain in the claimant's employ for a minimum of three years after the training in default the respondent was to reimburse the training fee. The claimant further stated in its memorandum of claim that in the event the the respondent was to leave or terminate the contract of employment, he was bound to give two months notice or payment lieu thereof. According to the claimant, the manner in which the respondent left his employment was in breach of both the contract of employment and the training bond. For this reason, the claimant wants this court to order the respondent to reimburse to it, the cost of the training as well as pay two months salary in lieu of notice.

The respondent on his part denied he was either in breach of the contract of employment or the training bond.

According to the respondent, the contract of employment with the claimant together with the training bond were couched in a way that tied the respondent to the claimant's employ for a minimum of three years even where the terms of service became intolerable.

According to the respondent, contrary to the training bond, the claimant never nominated him for the training as agreed therefore could not claim the training fee. The respondent averred that the only training he attended was Nokia Corporation's sponsored training which was for free.

The Respondent further averred that the claimant was using the training bond and the contract of

employment to avoid reviewing its employee's salaries and pay overtime.

At the hearing the claimant called one witness a

Mr. Bulent Gulbahar who stated that he was the claimant's Managing Director and a shareholder.

He testified that the respondent was the claimant's employee and that he signed a training bond as part of the employment contract. He testified that the respondent was to undergo three levels of training. One by Nokia, another was done in house and the third level was to be done by Oasis Trading Company of Dubai and Mohannad Al Tayyan who was the company's consultant. It was his testimony that the respondent underwent all the trainings.

In cross-examination he confirmed that the respondent was trained for free by Nokia. He further stated that he did not have a breakdown of how the training fee of Kshs.350,000 was arrived at.

Concerning the respondent's complaint over failure to review his salary, Mr. Gulbahar testified that there ought to have been an evaluation before the review was done and according to him the respondent's salary must have been increased to Kshs.23,000 as he may not have passed the evaluation. Regarding NSSF and NHIF it was his testimony that these must have been deducted and remitted to the relevant bodies. He however confirmed that the respondent's 2009 NHIF statement did not reflect any remittances. He further confirmed that the respondent was never paid any house allowance.

The respondent on the other hand in his testimony stated that he signed his initial contract when he met Al Tayyan and was informed he would get his copy once the Managing Director signs his part. In December, 2009 he was however given a new contract to sign as the claimant claimed the initial contract had a fault. It is the second contract which had a training Bond.

He stated that the 2nd contract was faulty since it had no provision for house allowance and that 5% service charge was deducted from his pay. It was his evidence that when he enquired from the accountant he was told that it was the company's policy. According to him, salary was paid in bits and that he was never provided with any payslip.

According to him, contrary to the training bond, there was no training on 2nd November, 2009 and further that he was not aware how the figure of Kshs.350,000 apportioned to training was arrived at.

It was his evidence that Nokia did not charge for any training. He attended one such training and Mr. Al Tayyan was not there.

Regarding his salary and remuneration, he testified that he was initially to be paid Kshs.20,000 per month to be revised to Kshs.25,000 after three months but this was not done. He further stated that he was never paid any house allowance. The respondent testified that he attended an oral interview by Al Tayyan and was told he scored 70% and that his salary would be raised by Kshs.2,500 and that the other 2,500 would be added five months later. This was not done by the time he left despite reminders from him. Regarding overtime, the respondent stated that he worked overtime in July and August, 2010 and was paid for July while for August he was only given Kshs.865 instead of Kshs.5,184.

According to the respondent he worked for the month of October 2010 and was never paid so he left since according to him the claimant was in breach of the contract of employment.

The respondent therefore counterclaimed for the unpaid salary and what he called unlawful deductions to his salary among other claims.

In cross-examination, the respondent admitted he signed the training bond and the contract of employment. He admitted that the contract provided for giving of two months notice of termination of employment.

The court having reviewed the pleadings and recording of oral evidence of by the court's predecessor, the issues that stand to be decided by the court are whether the training as was provided for in the training bond was conducted and if so how was it paid for? Second, was the respondent justified in quitting his employment contrary to the express provisions of the contract of employment?

Finally which party is entitled to be awarded his prayers?

Counsel for the claimant Mr. Wandabwa submitted that the Training bond was between the claimant and the respondent and not Nokia. He therefore faulted the respondent's argument that since Nokia did not charge the claimant directly then the claimant could not recover any costs or recoup any losses from the respondent.

The respondent's counsel Mr. Karanja for his part submitted that the training bond was a device to chain the respondent and his colleagues in the claimant's employ regardless of what he termed inhumane, unjust and gross, unconstitutional and unfair labour practice. It was his submission that the claimant had no intention of training the respondent or any body since as soon as the bond was signed, no training was conducted.

It is a settled rule of evidence that he who alleges must prove it. That is to say any person who wants a court or a tribunal to make a finding in his or her favour concerning a question in dispute must as a matter of duty bear the burden of providing facts and evidence to persuade the court or tribunal that they are entitled to a determination in their favour.

The Training Bond provided that:

“whereas the company has nominated the employee for a training programme on 2nd November,2009 in techno Service Ltd., delivered by Nokia, Techno Service a Mr.

Mahannad Al Tayyan of Oasis Trading company FZE-UAE

at a total of 350,000 Ksh.”

The bond was therefore specific in terms of time where the training was to be conducted, who was to conduct it and the cost. Since the respondent disputed that such training was ever conducted and has further averred that trainings by Nokia were free of charge, a fact corroborated by the claimant's witness Mr. Gulbahar, it was incumbent on the claimant to bring evidence to show how the training was planned, structured, conducted and costed. It would have been useful to call as witnesses at least one of the trainers especially Al Tayyan whose name was featured quite frequently in the pleadings and during the trial. Concerning the cost of the training the claimant could have produced at least an MOU or a contract document between it and the trainers to show how the figure of Kshs.350,000 was arrived at and how it was paid or to be paid. The claimant's only witness Mr. Gulbahar did not appear to have full grasp of the going ons at the claimant. His testimony that he did not know how Kshs.350,000 was arrived at created more need to call a witness who was more familiar with how the figure was arrived.

Whereas the court accepts the existence of the Training Bond and that it was signed between the claimant and the respondent, the fact that its implementation has been disputed by the respondent who has averred that no training was ever conducted as agreed and that certain components of training were free, made it incumbent on the claimant to bring more evidence to court. In absence of this, the court while accepting that there was a training bond duly signed between the claimant and the respondent, is doubtful about its implementation and hereby agrees with the respondent that no such training was ever conducted. The claim under this head therefore fails.

Regarding the claim for two months salary in lieu of notice, both parties appear to agree that the respondent left his employment without furnishing the requisite notice.

The respondent on his part claims that he quit because the claimant failed to review his salary as agreed

and that his salary for October 2010 was never paid to him. Whereas the respondent was consistent in asking for salary review (See annexures MKW4 – MKW5), there is nothing about his unpaid October, 2010 salary. In any event it was never pleaded nor prayed for in his counterclaim. The court is therefore of the view that whereas failure by the claimant to review the respondent's salary despite many requests may have been a good ground for leaving his employment, he could only do so as stipulated in the contract of employment between him and the claimant. The claimant is therefore justified in asking for two months pay in lieu of notice as stipulated in the contract and that prayer is hereby granted.

Regarding what the respondent termed unlawful deductions on his salary, no evidence was tabled by him to show such deductions were ever done. According to Mr. Gulbahar, salaries were paid through bank accounts, it would have been helpful in view of the fact that the claimant never gave payslips if the respondent brought a few of his bank statements to show such deductions took place. In absence of this critical piece of evidence, the court has nothing to rely on to come to a reasonable conclusion that such deductions were ever made.

Concerning failure to remit NHIF and NSSF deductions for the respondent's salary, the court finds that these can be pursued by the bodies concerned with the help of the respondent since these dues belong to the said statutory bodies and not the respondent.

In conclusion the court finds that the claimant is entitled to two month's notice of termination of employment or two months salary in lieu thereof which I hereby award the claimant. The claim on refund of the training fee fails for the reasons already advanced.

With regard to the respondent the counterclaim has not been sufficiently proved and is hereby dismissed with costs.

It is so ordered.

Dated at Nyeri this 20th day of February 2013.

Abuodha J. N.
Judge

Delivered this 20th day of March, 2013.

**Delivered in open Court in the presence of for the Claimant and
..... for the Respondent.**

Rika
Judge