REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 691(N) of 2009

DANIEL MUTISYA MASESI.....CLAIMANT

VERSUS

ROMY MADAN.....1ST RESPONDENT

GENERAL FOODS [KENYA] LIMITED.....2ND RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Kandere instructed by Kandere Opiyo and Company Advocates for the Claimant.

Mr. Wananda instructed by Shapley Barret and Company Advocates for the Respondents.

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The delivery of this decision has been considerably delayed. Two years ago, on 31st March 2011, the Court concluded the hearing. Parties were advised by the Court that the Award would be read on notice. This is a normal practice at the Industrial Court, which ensures that the Court does not give parties dates when the decision would be ready, and some for reason or the other is not able to deliver on the specific date, to the inconvenience of the parties. It also enables the Court to consider the issues in dispute without feeling rushed over some self imposed deadline. It is a system that has served the Court well. Our number of cases however has gone up, and we also seem to have a large number of untrained court staff. Experience has shown that when judicial officers are rushed, they may become prone to making errors that do not engender public confidence in the Court. The system has worked well in the past.

2. The danger in giving the decision on notice, is that the file at the close of the hearing, may be diverted from the Judge's Chambers, either through design or oversight, by the Court Assistants. The parties will rest easy, as they await the decision. The Judge will not know of the matter, until the file is physically brought to his desk. This is what happened to the dispute herein, and the Court must take the earliest opportunity to apologize profusely to both parties for the grave injustice visited upon them, by the inefficiency of we, the judicial staff. The Claimant's Advocates wrote to the Court to enquire on the Award on 21st January 2013. Parties are encouraged to freely enquire about their files, without having to wait for such a long period of time. It is unusual that a decision of any Court would take two years to prepare. The Court would like to assure parties, even as it registers the apology, that it is re-examining the procedure of delivery of decisions on notice, to make it more responsive to the needs of the Court Users.

3. The Statement of Claim was filed on 12th November 2008. This was followed up by a supplementary statement of claim filed on 6th August 2010. The Respondents filed a joint Statement of Response on 8th April 2010 and a Supplementary Statement of Reply on 26th July 2010. The Claimant filed his closing submissions on 13th April 2011 while the Respondent did so on 3rd May 2011.

4. Masesi and Madan both testified and closed their respective cases on 31st March 2011. It was a short hearing, with no additional witnesses, beside the two Principals. Masesi described the 2nd Respondent as a Limited Liability company in the business of selling food, and the 1st Respondent as the owner of the 2nd Respondent. The Respondents employed the Claimant as a driver, on 1st September 1986. His first salary was Kshs. 8,300, gradually raised to Kshs. 9,550 per month. He was initially employed as a general labourer. He testified his contract of employment was terminated on 16th July 2009. The Respondents alleged he had resigned. He did not write any letter resigning. He was not paid terminal benefits.

5. The Claimant was in the course of duty involved in an accident around the museum hill roundabout, in Nairobi. He conceded he was at fault, because he was overtaking. The driver of the other vehicle demanded for Kshs. 2,000 to repair his damaged car. He was paid this by Madan. At the end of the month, Madan deducted Kshs. 5,000 form the Claimant's salary. He told the Claimant that the additional Kshs. 3,000 deducted, was given to the traffic policemen as *'chai',* [tea in Kiswahili, but denoting a corrupt inducement, in this case given to the police to prevent the charging of Masesi in Court for the traffic offence. At one time in Kenya, an old lady charged before a Magistrates' Court misunderstood the meaning of '*chai,'* opting to buy the Magistrate a full packet of tea leaves to secure her freedom. The Magistrate was slighted, and sent her to King'ong'o prison]. Masesi did not agree with Madan on the deduction. He argued that the policemen could not have demanded for more money than the aggrieved driver. The Claimant insisted that instead on deducting the additional Kshs. 3,000, he should deduct an additional Kshs. 2,000 only. This was the genesis of his problems with the Respondents. Madan told him because of his unyielding demand; he could no longer continue working for the Respondents. The contract was terminated. The Claimant fell into financial difficulties after termination. His children had problems with school fees. He returned to Madan, asking to be paid service pay, to mitigate his growing family problems. Madan wrote a letter dated 26th August 2009. He stated that the Respondents had accepted the Claimant's apology and appeal. The letter indicated that the parties had agreed-

§ The Claimant foregoes one month salary in lieu of notice in accordance with the contract of employment;

§ The Claimant is paid a gratuitous amount of Kshs. 55,000, and other benefits made up as follows-

i. Salary to 15th July 2009 at Kshs. 9,550 p.m. adding up at Kshs. 4,775;

ii. Leave balance of 5 days at Kshs. 1,836.50;

iii. Gratuity of Kshs. 55,000;

iv. Less advance taken in July 2009 of Kshs. 4,000;

v. Less account outstanding debt of Kshs. 4,000;

Total: Kshs. 49, 938.50

vi. Less PAYE at Kshs. 8,854.00.

NET DUE: Kshs. 41, O84. 50

6. The Claimant was compelled to sign several papers by Madan before this money was released to him. The money did not reflect the years of service creditable to the Claimant. He had worked from 1986. He

seeks from the Court assistance in the following orders-:

a. One month salary in lieu of notice at Kshs. 9,550;

b. Pro rata leave of 15 days at Kshs. 4,775;

c. Severance pay of 23 years at 15 days' salary for each year completed in service at Kshs. 126,960;

d. House rent allowance at 15% of the basic pay for 23 years at Kshs. 395,370;

e. Salary for 15 days worked in July 2009 at Kshs. 4,775; and,

f. 12 months' salary as compensation for unfair termination at Kshs. 114,600

Total: Kshs. 656,040.

He also prays for costs.

7. On cross-examination, Masesi told the Court he was employed as a General Labourer, then as a Driver. He obtained his driving license in 1996. He did not resign. He would still be in employment, if he agreed to the Kshs. 5,000 deductions. He left and stayed out of work for one month before reverting to Madan. He did not ask for reemployment. He did not throw the car keys at Madan, or insult him. He sues Madan because he owns the company. Masesi admitted he signed the discharge upon being paid Kshs. 41, 084.50. He agreed to sign. The discharge says Masesi would not make further demands on the Respondents. He did not ask for time to read the document before signing. It is true he caused an accident. He understood why he was not charged. Madan paid Kshs. 2,000 to the other driver. The benefits paid to him totaled Kshs. 41,084.50. He did not recall causing any other accident. He was subscribed to the National Social Security Fund. He still is today. When he became a Driver, he was not given a fresh letter of employment. The contract stated the salary was consolidated. He did not understand the contract. He was issued a letter by Madan alleging he was absent from work for 14 days. He does not have anything on record to support 15 days of leave. When he told Madan he objected to additional deduction, Madan threw him out. He did not refer the dispute to the Ministry of Labour. On re-examination he clarified that no-one explained to him the papers he was made to sign by Madan. Employment records are kept by the employer.

8. Romy Madan testified he is also known as Rajy Madan. He conceded he employed Masesi to work for Madan's company. The Claimant was employed in 1986 as a General Labourer/ Turn Boy. He was issued a written contract. He deserted employment in July 2009. None of his claims are merited. Madan protested it was improper to sue him together with the company. He did not employ the Claimant individually. He asked that his name be expunged from the record. The Claimant's salary was consolidated. All employees are paid a consolidated salary. Masesi had numerous accidents. When he caused the accident at the museum hill, police intended to book him in. Parties consulted and it was agreed the Respondents pay the other party Kshs. 5,000 in settlement. The Administration Manager paid. Before payment, it was agreed the Claimant would take responsibility. When it was time to take responsibility, he became rude and belligerent. He said he would not work, threw the car keys at Madan and walked away. He returned after one month and asked for his job back. The Respondents had already employed another driver. It was agreed the Claimant is paid terminal benefits and gratuity of Kshs. 55,000, which after deductions resulted in the final amount of Kshs. 41,084.50 paid to Masesi. The amount of Kshs. 55,000 was not service pay, but a gratuitous payment, given out of benevolence. Deduction of Kshs. 4,000 was owed from another account. He read and signed the terms of payment. He was able to read. From 1986 to 2009, he had been reading various documents. He dealt with about 300 written items daily. He had been advanced a sum of Kshs. 4,000. Application forms showed he had an excess of five days of leave. He cannot claim severance pay. There was no redundancy. He chose to resign, and does not merit compensation for unfair termination.

9. In cross-examination, Madan stated he was not sure about the exact date Masesi started working, but

confirmed it was in 1986. He was a Turn Boy. In April of 2009, there was a fire at the Respondents where all their records were destroyed. Madan did not have the initial contract in hard copy. Certain documents contained in a personnel file, were however recovered. The contract of 1986 gave a consolidated salary. Madan did not have a standard sample of the contract in Court. The Claimant had been issued several warning letters. These were not available in Court. He was given a hearing on return after desertion. He was not given a letter to show cause. He explained himself on the date he left. He voluntarily resigned. The muster roll was filled in everyday. He was advanced Kshs. 4,000. The witness testified he has not come across the term *'resignation'* in the Employment Act. A document containing employee tax deductions indicated against the Claimant's name *'terminated.'* This could be at the instigation of either of the parties. There was no relationship between the advance of Kshs. 4,000 taken in July 2009, and the outstanding debt of Kshs. 4,000 shown in the last account. He knew how to read and write. It was in the evidence of the Claimant that Madan heard him say for the first time, that he was a standard six dropout, who did not know how to read and write. Madan was not at the Police Station when the accident was reported. He did not know if the other driver acknowledged receipt of the money paid to him. Another employee Hannington Okoti was a passenger in the vehicle driven by the Claimant. He was senior to Masesi. He is the one who led the negotiations at the Police Station. Madan preferred to believe him over the Claimant, because Okoti was the senior of the two. Madan released the Kshs. 5,000 upon the request of Okoti. Redirected, Madan stated the fire accident occurred in April 2009, razing down all the records. Masesi resigned, thereby terminating the contract. The mere use of the word terminated in the tax documents made no difference; it is irrelevant to the issue in dispute. The two amounts of Kshs. 4,000 deducted reflected separate items. The Kshs. 5,000 was not reflected in the final tabulation. The Respondents urged the Court to dismiss the Claim.

The Court Finds and Awards-:

10. The Employment Act 2007 does not bar directors and their companies from being joined in the same claim, filed by their employees. This Court has in the past suggested that the doctrine of corporate separateness is not inviolable, particularly in labour law. Employers organize their businesses around multiple layers of insulating personalities- corporate and individual in the attempt to avoid regulatory burdens. The law aims to assist the lesser of the parties in the bargaining equation, by making it possible for the weaker party, to proceed and apportion liability to any of the decision making component in the economic enterprise. The Employment Act defines the term *'employer'* expansively, and does not suggest anywhere that directors cannot be joined with their corporate business vehicles in redressing employment wrongs. The Court looks at the whole economic enterprise, not the legal and business reincarnations behind the enterprise. The objection by Romy Madan, alias Rajy Madan, to being added as a Co-Respondent in the claim is rejected.

11. The Claimant seeks compensation for unfair termination. The Court does not think his contract was unfairly terminated. It was indeed not terminated at the instance of the Respondents. The Claimant admittedly caused an accident at the museum hill. The accident was reported at the Parklands Police Station. At the Station, a senior officer with the Respondent Hannington Okoti, who was a passenger in the vehicle driven by the Claimant, led negotiations to have the matter settled without court intervention. The Claimant does not deny blameworthiness. He was entirely to blame and should not have resisted the deduction of a modest sum of Kshs. 5,000 from his salary, being the amount spent in paying the other driver for the damage. He went on quarreling his employer unnecessarily, saying that the police were bribed, and Kshs, 3,000 paid in bribing them was on the higher side. There was no evidence that policemen were bribed. The statement recorded by Okoti is believable. Kshs. 5,000 was paid to the aggrieved motorist, which saved the Claimant a traffic prosecution, and saved the Respondents other claims in damages. A sensible employee would have been thankful to his employer. Instead, Masesi became angry when the money was deducted from his salary, insulted his employer, threw the car keys at the employer, and deserted. He then realized after one month in the outside world, that he had made a mistake. He returned to Madan and pleaded to have his job back. Another driver had already been employed, making it impossible to re-employ Masesi. The employer quite reasonably suggested the Claimant exits under regular termination. He was offered gratuitous payment of Kshs. 55,000 and other terminal benefits which, after deduction, came to Kshs. 41,084.50. He does not deny he accepted this payment. The sequence of events laid out in this paragraph, do not show unfair termination. The Claimant

wrote his own epitaph. The claim for compensation in unfair termination is rejected.

12. The Court finds that the Claimant initiated termination by voluntarily resigning and deserting work in a fit of anger. He is not entitled to notice pay. He submitted that he is entitled to severance pay. Mr. Kandere emphasized that that the Claimant does not seek service pay; he seeks severance pay under section 40 [1] [g] of the Employment Act 2007. The Court does not see anything in the evidence before it that could be understood as a redundancy situation. Severance pay under section 40 presupposes the presence of a redundancy situation, where the driving role would have to have been phased out or diminished, resulting in the exit of the Claimant. This was not the case. The Claimant resigned and another driver was immediately recruited. There was no redundancy, and the claim for severance pay is not in the least, justifiable. This claim is rejected. The Respondents were under obligation to provide the Claimant with reasonable housing accommodation at or near the place of work, or in the alternative, pay reasonable house rent allowance to the Claimant. The Respondent says the amount paid to the Claimant per month, was consolidated. There was no document to support this, ostensibly because Respondents' employment records, including the Claimant's contract of employment, were consumed in an inferno that occurred at the workplace in April 2009. Madan did not avail to the Court even a simple standard contract of employment, showing that salaries were consolidated. The amount paid to the Claimant was stated to be basic pay in the pay slips. The Court is persuaded that the Respondents did not discharge their obligation on house rent allowance**.** The Claimant has calculated house rent allowance on the strength of a monthly salary of Kshs. 9,550. This was the monthly salary earned at the exit. The General Wage Order guides the Court that house rent allowance, is fixed at 15% of the basic pay. Kshs. 9,550 was not the basic pay earned by the Claimant in 23 years. A fair figure would be the average gleaned from the first salary, and the last salary. The first was Kshs. 8,300, the last Kshs 9,550, giving an average of Kshs. 8,925 per month. 15% of this, in 23 years, amounts to Kshs. 369,495. **The Claimant is Awarded Kshs. 369,495 in accumulated house rent allowances.** The Court is satisfied that the Claimant was paid the correct leave dues, included in the payment of Kshs. 41,084.50. Nothing really turns on the claim for leave pay. Similarly, the salary for 15 days worked in July 2009 was included in the payment of Kshs. 41,084.50. In the end, the Court upholds the claim for house rent allowance, while rejecting all the other claims. ***The Respondents shall pay to the Claimant the sum of Kshs. 369,495, in accumulated house rent allowances, within 30 days of the reading of this Award. It is so ordered.***

Dated and delivered at Nairobi this 12th day of April 2013

James Rika

Judge