REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 41 of 2012

DAN BILLY OUMA AMITO …….....……....…...…….. CLAIMANT

V

BAKE 'N' BITE MOMBASA ROAD ……...…….....…..…. RESPONDENT

JUDGEMENT

The Claimant filed a claim against the Respondent alleging unlawful termination of employment by the Respondent. He alleges that he was employed on 2nd March 2010 and was paid a daily wage of Shs.524, that he was promoted to supervisor on 5th January 2011 at a gross salary of Shs.15,000 per month with travelling allowance of Shs.2,000/= per month, but was only issued a formal letter of appointment on 1st August 2011. He alleges that he worked from 6.30 a.m. to 6.30 p.m. during day shift and 6.00 p.m. to 6.30 a.m. during night shift and did not take any day off or annual leave. He further alleges that he was arrested on 23rd September 2011 and incarcerated at Industrial Area Police Station but was discharged at 5.30 p.m. without being charged or recording a statement, that the reason for his arrest was that he allegedly employed one **Francis Mwita** without authority.

He alleges that he was terminated from employment on 26th September 2011 allegedly for poor performance and was never paid any terminal benefits. He seeks payment of the following:-

1. Salary for 26 days worked in September 2011 - Kshs.16.943.33

2. One months notice - Kshs.17,000.00

3. Overtime - Kshs.318,172.99

4. House allowance (2550x9) - Kshs.22,950.00

5. Leave – 42 days - Kshs.23,799.72

6. Service pay (Kshs.19,550x30) - Kshs.22,557.69

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GRAND TOTAL: Kshs.421,423.73

He further seeks the following orders:-

a) A declaration that the termination of the Claimant by the Respondent was unfair and unlawful.

b) An order compelling the Respondent to pay the Claimant his terminal benefits amounting to Kshs.421,423.73.

The Respondent filed a Reply to the Memorandum in which it alleges that the Claimant was employed on 1st August 2011and dismissed on 26th September 2011, that he was on probationary terms of employment and that he was paid for days worked.

The case was heard on 19th September 2012 when the Claimant was represented by Mr. Rakoro while the Respondent was represented by Mr. Maloba.

The Claimant testified on his behalf while **MR. ISAAC OBURU**, a Security and Safety Manager testified on behalf of the Respondent.

The Claimant in his testimony reiterated the contents of his Memorandum of Claim. He denied having been paid terminal benefits and further denied that the signature on the discharge voucher dated 1st October 2011 attached as Respondents Appendix “BNB’2 was his.

Mr. Isaac Oburu testified on behalf of the Respondent. He testified that he knows the Claimant having worked with him for about 2 months and he was a shift supervisor. He testified that the Respondent worked 3 shifts and there was a supervisor for each shift, that the Claimant worked for 8 hours a day for 6 days a week or for 26 days and then took 4 days off. He testified that the Claimant who was a supervisor was dismissed together with George, the other supervisor, for employing a stranger and that both of them were arrested and questioned by police before they were dismissed.

I have considered the pleadings and testimony of the witnesses. I have also considered the submissions by Counsel for both parties and the documents submitted and in my opinion the issues for determination are the following:-

1. When was the Claimant employed and on what terms of employment.

2. Whether the termination of the Claimant's employment was unlawful.

3. Whether the Claimant is entitled to the prayers sought.

1. When was Claimant employed and on what terms.

The Claimant testified that he was employed on 3rd February 2010 although in his Memorandum of Claim it is stated that he was employed on 2nd March 2010. He further testified that his salary was Shs.524/= per day and he worked continuously until 1st August 2011 when he was issued a letter of appointment which stated his date of employment as 1st August 2011 and his terms of employment as probationary for 6 months. The Respondent in both the Memorandum of Reply and through the testimony of its witness insists that the Claimant was employed on 1st August 2011. The Claimant produced bank statements showing that he started receiving payments through his bank account in Co-operative Bank confirming payments from the Respondent from 7th February 2011 which the Respondent did not contest.

Section 10(7) of the Employment Act provides that if in any legal proceedings an employer fails to produce a written contract or written particulars prescribed, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. It is obvious that the employer in its Memorandum of Reply and through its witness did not tell the truth as they insist that the Claimant was employed on 1st August 2011 even though there is evidence that the Claimant was in

employment on 2nd February 2011 and further explained that before that date he was paid cash through salary vouchers which were kept by the Respondent. The Respondent did not produce any documents to disapprove the evidence of the Claimant.

I therefore find that the Respondent has failed to discharge its responsibility to disapprove that the Claimant was employed on 3rd February 2010 as a casual paid a daily wage of Shs.524 per day. Having worked continuously for more than 1 month, his terms of employment automatically converted to monthly contract.

2. Whether the termination of the Claimant was unlawful.

The Claimant's letter of termination states that his termination was due to non performance. The Respondent's witness however confirmed the Claimant's testimony that he was terminated following his arrest for allegations of employing a stranger for which he was never charged or made to write a statement at the police station.

The Claimant was never given an opportunity to defend himself on the allegations of non performance nor has the Respondent produced performance evaluation records or warning letters to prove non performance.

Section 41 requires an employee to be informed of the charges against him and given an opportunity to defend himself before the decision to terminate his employment is made. Section 43 requires the employer to prove the reasons for termination while Section 45(2) requires that an employer proves valid and fair reason as well as fair procedure.

The Claimants employment was without valid reason and the procedure used was most humiliating. He was first threatened by the director, then interrogated by the police, handcuffed and marched to industrial Area Police Station where he was locked up from about 10.00 a.m. to about 6 p.m. went back to the office the following day the 24th of September when he was sent back home and asked to report back on 26th September when he was made to clear before being handed the letter of termination. These facts have not been contested by the Respondent.

I therefore find that the Claimant's employment was unfair both substantively and procedurally.

3. Whether the Claimant is entitled to the prayers sought.

The Claimant prayed for the following:-

a) A declaration that his employment was unfair and unlawful.

b) Payment of Shs.421,423.73 made up as follows:-

(i) Salary for 26 days worked - Kshs.16,943.33

(ii) Notice - Kshs.17,000.00

(iii) Overtime - Kshs.318,172.99

(iv) House allowance - Kshs.22,950.00

(v) Leave - 42 days - Kshs.23,799.72

(vi) Severance pay - Kshs.22,557.69

(c) Costs and interest

I have already declared the termination of the Claimants employment unfair.

(i) Salary for days worked

The Respondent has produced Appendix "BNB"2 which is a discharge voucher alleged to have been signed by the Claimant upon receipt of terminal dues. The Claimant denied ever signing the discharge voucher. He testified that he saw the document for the first time in the Respondents Memorandum of Reply.

The Respondent submitted a report of a handwriting expert which states in part ***"The disputed signature shows evidence of an attempt at disguise, but at the most it shows some features suggestive the known signatures and the disputed signatures came from the same source."***

The report is thus not conclusive. In fact the report does not show the analysis of the two signatures but just a conclusion. The qualifications of the "expert" are not mention at all. The discharge voucher has 2 signatures and must have been prepared by an officer of the Respondent. There is no explanation why the person who signed it from the Respondent Company, or the person who made payment, if any, was not called to testify and to be subjected to cross examination. There is no explanation whether the payment was in cash, cheque or was paid into Claimants account.

I therefore find that the Respondent has not proved payment to the Claimant for days worked.

The Claimant was terminated on 26th September, 2011 and is entitled to payment up-to that date. His salary inclusive of transport allowance was Shs.17,000. This divided by 30 and multiplied by 26 is Kshs.14,733.33. I award him the said sum for days worked.

(ii) Notice

Having been terminated without notice, the Claimant is entitled to 1 month's gross salary in lieu of notice.

I award him Shs.17,000/= accordingly.

(ii) Overtime

The Claimant alleged that he worked overtime for the whole of the period he was in employment. The Respondent did not produce any records to prove the number of hours worked by the Respondent to be 7 or 8 hours as testified by the Respondent's witness. It is not for the Claimant to produce records as an employee does not keep employment records. The law requires the employer to keep such records and to produce the records in any proceedings to prove the facts in contention.

I therefore find that the Claimant worked 12 hours every day from 3rd February 2010 to 23rd September 2011, a period of about 20 months.

According to the law the maximum working hours per week is 52 or 225 hours per month. The Claimant worked for 7,200 hours in 20 months instead of 4,500 hours over the same period. He therefore worked for an extra 2,700 hours. His hourly rate of pay is his basic salary of Kshs.15,000 divided by 225 then multiplied by 2700x1.5. This comes to Kshs.180,000/= which I grant to the Claimant as

overtime.

(iii) House Allowance

The Claimant is not entitled to house allowance. He was on a daily rate of pay from February 2010 to July 2011 which is always inclusive of house allowance. Thereafter he was on a gross salary of 15,000.00 as expressly provided in the letter of appointment.

The claim is therefore dismissed.

(iv) Leave

The Claimant was in employment for 20 months. He is entitled to leave at the rate of 1.75 days per month worked which is 35 days. This amounts to Kshs.17,500 based on his gross pay excluding the transport allowance.

I ward him the same.

(v) Severance Pay

The Claimant did not state that he was not a member of NSSF to be entitled to service pay nor was he declared redundant to become entitled to severance pay.

The claim is therefore not proved and is dismissed.

In summary therefore judgement is entered for the Claimant against the Respondent as follows:-

1. A declaration that the Claimant was unfairly terminated by the Respondent.

2. The Respondent will pay the Claimant the sum of Shs.229.200.

3. The Respondent shall pay costs to the Claimant.

Orders accordingly.

Read in open Court and signed on this 2nd day of May 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

CLAIMANT in person

In the presence of:- _____

MWANGI

_____ Respondent