



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1157 OF 2012

(Before D.K.N. Marete)

ISAAC LUMUMBA OMEGA.....CLAIMANT

versus

MR. BABU & SONS C.S. BHARIJ.....RESPONDENT

JUDGEMENT

By a memorandum of claim dated 9th July, 2012 and filed on the same date, this claim was launched in court. The issue in dispute as cited on the face of the claim is;

Wrongful and unfair termination of the claimant services and failure by the respondent to pay terminal benefits to the claimant

The respondent vide a memorandum in reply dated 10th October, 2012 and filed on 17th instant denies the claim and prays that the same be dismissed with costs.

The claimants case is that on or about 25th June, 2012 he was employed by the respondent at a monthly salary of Kshs.18,000.00 or Kshs.600.00 a day. He was not issued with a letter of appointment as required by the law. He commenced employment on 25th June, 2012 until 4th July, 2012 when he was wrongfully and unlawfully terminated from employment without notice or payment of terminal benefits as follows;

- | | |
|---|----------------|
| a. 3 pay in lieu of notice month (sic) | Kshs.48,000.00 |
| b. Balance | Kshs.8,998.00 |
| c. Under payment mechanic with grade test 1 | |

Right salary as per the act per day (sic) Kshs.8,024.20

- | | |
|--------------------------------|----------------|
| d. Grand total due to omega is | Kshs.56,998.00 |
|--------------------------------|----------------|

He therefore claims a total of Kshs.56,998.00 plus a maximum of 12 months wages plus costs and interest of this suit.

The claimant further submits that his employment was based on an oral contract and despite loyal and diligent service his services were terminated. This termination failed to comply with the dictates of the Employment Act, 2007 in that he was not issued with notice, informed of the reasons for termination or

paid his terminal dues. This to him was unprocedural and unfair.

He prays for;

1. The sum of Kshs.56,998.00 as particularized in paragraph 1 of the claim.
2. Compensation for wrongful dismissal to a maximum of 12 months wages amounting to Kshs.111,996.00
3. Cost of this suit
4. Interest in (i) and (ii) above
5. Any other relief as the court may deem just

The respondent on the onset denies the claim and even the identity of the respondent. He identifies himself as Charanpal Singh Bharij and testifies that he is the sole proprietor of a business known as Hot Wheels, a motor vehicle repair and maintenance garage in Karen, Nairobi. He further denies that demand on notice of intention to sue was made to him and that the purported letter from Kituo Cha Sheria is a forgery and this fact has been reported to Langata Police Station. He also submits that he has received various and multiple telephone harassment from the claimant and these are also reported to the police and are under investigation.

He further submits that a contract of employment was created between himself and the claimant to render services of a mechanic and this is in law an oral contract. This oral contract was terminated on the sixth day of the probation period as the claimant lacked the necessary knowledge, competence, diligence, experience and ability to perform tasks assigned and this was effectively communicated to the claimant prior and during termination in a procedural and fair manner. Further, the termination on grounds of misconduct, poor performance on physical incapacity are not applicable where termination of employment is done during a probationary period in terms of section 42 (i), Employment Act, 2007.

He further submits that this claim is vexatious, frivolous and an abuse of the process of court and only intended to harass him. It is also a product of mischief calculated to serve ulterior motives other than a legitimate claim and is an abuse of the process of court.

The matter variously came to court until the 30th July, 2013 when it was heard and finalized. At the hearing the claimant chose to rely on his claim as a basis of his case. He did not testify, or at all.

The respondent brought in DW1 Charanpal Singh Bharij to testify in his favour. He submitted that he was a garage proprietor in Karen and does not know the respondent, Mr. Babu and Sons. He is C.S. Bharij and proprietor of Hot wheels garage in Karen.

Mr. Bharij further testified and contended that the claimant approached him on a Saturday at his garage and requested for employment. He claimed to be an expert in Range and Land Rovers. He declined but pitied the claimant who looked wasted and needy and told him to report on the following Monday. On reporting it was agreed that he would earn, Kshs.600.00 a day and he was assigned duty which he failed to accomplish. Six (6) days onto the probationary employment he was terminated for being incompetent and unable to perform.

The claimant on termination started harassing Mr. Bharij on weird calls and short text messages in the wee hours of the night and this was reported to Hardy Police Station. He further testified that the claimant is a known trouble maker as is reported by other of his employers and also has a multiplicity of suits against his other 'employers' in this court as follows;

1. Industrial Cause No. 873 of 2012
2. Industrial Cause No. 579 of 2010

3. Industrial Cause No. 1029 of 2012
4. Industrial Cause No. 552 of 2011
5. Industrial Cause No. 1278 of 2010
6. Industrial Cause No. 728 of 2007
7. Industrial Cause No. 1437 of 2010

The issues for determination therefore are;

1. Who is the respondent?
2. Was the termination of the employment of the claimant wrongful and unlawful?
3. Is the claimant a frivolous and vexatious litigant?
4. Is the claimant entitled to the relief sought?
5. Who bears the costs of this cause?

DW1, Charanpal Singh Bharij testified that he does not know the respondent as sued – **Mr. Babu & Sons C.S. Bharij**. He however testified that he is a garage proprietor in Karen and had a short lasting employment relationship with the claimant. His business enterprise is called Hot Wheels. It is therefore discernible that from the onset, the claimant was not able to clearly identify the respondent and sue him accordingly. This poses a problem in the identification and location of the respondent. Mr. Charanpal Singh Bharij is therefore not an appropriate respondent and this court would be justified in upholding his objection as such respondent.

This answers issue number 1 above.

The 2nd issue for determination is whether the claimant's termination of employment was wrongful and unlawful. The claimant does not lay down a case for unlawful or wrongful termination except in stating that he was not issued with notice given reasons for termination. The respondent counter this by stating that the claimant was unable to do his work and was therefore terminated upon being informed of the reasons for such termination. One would firstly wonder why an employer would want to dispose off a worthy employee particularly in a situation like the present case of a garage where its efficacy is based on the quality of staff attending to customers. The case for DW1 – C.W. Bharij comes out clearer than the claimants and I find that despite the humanitarian gesture displayed by the witness, the claimant either deliberately through laxity or otherwise incompetence was not able to sustain his work. The termination was therefore justified and lawful in the circumstances. This issue is therefore determined.

The respondent in his defence submits that the claimant is frivolous and vexatious litigant and that this action is an abuse of the process of court. He testifies that he hired the claimant out of sympathy and pity but this was not reciprocated by the performance of the claimant despite being hired with no evidence of enterprise and tested on the job. The claim is not based on any tangible evidence. He does not call any evidence of performance or abuse by his so called respondents (s). His demeanor during the trial was all telling. This is a case of a profiteer litigants who files matter in court on the lottery of finding a sleepy

judge who in drowsiness awards him in a baseless claim. This is the true meaning of frivolity, vexation and abuse of the process of court.

The nature of the claimant frivolity and abuse of the process of court is further exemplified by the evidence of the respondent's witness, Charanpal Singh Bharij, who testified that the claimant had instituted seven (7) other similar suits in this court against various respondents all involving the same subject. These suits are at various degrees of prosecution in court. Is this not a test on the integrity of the claims? This squarely answers issue number 3 herein.

The claimant therefore is not entitled to the relief sought and therefore an answer to issue No. 4 herein. He should be allowed to reap the fruits of his mischief and these are not yielding.

This is an outright abuse of the process of court. I wish the court had a way of sieving this kind of claims before they clog the court system and therefore release its energies of court to try worthy causes.

I am inclined to therefore dismiss this claim with cost to Charanpal Singh Bharij. All issues are thus met and answered.

Dated, delivered and signed the 31st day of July, 2013

D.K. Njagi Marete

JUDGE

Appearances:

1.Claimant in person.

2.Miss Ogallo instructed by Oraro & Company Advocates for the respondent.