



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1340 OF 2012

TIMOTHY AYIEKO OLINGO CLAIMANT

VERSUS

NAIROBI BOTTLERS LIMITED RESPONDENT

JUDGEMENT

1. The claimant Timothy Ayieko Olingo filed this claim on 7th August 2012 for wrongful and unlawful termination and non-payment of his dues by the respondent Nairobi Bottlers Limited. The respondent on the other hand filed their response on the 12th November 2012 and denied all averments in the claim and raised their preliminary objection to the same citing that the claimant was abusing the court process as he was never their employee and the claim is a fabrication. That the claimant has previously made similar allegations and was charged in Criminal Case No. 2620 of 2011 for giving false information to the police concerning the respondent and was convicted and hence this claim should be dismissed with costs. The respondent further filed a supplementary list of documents dated 19th December 2012. In evidence the claimant gave his sworn statement while the respondent called Lillian Khaweya Okomba, the Human Resource advisor, and Martin Esakina Papa, a forensic examiner.
2. From the onset I must note that this was not a smooth trial, the claimant on a number of occasions vehemently raised objections that the respondent was not properly in court having filed their defence late and that the defence herein should be dismissed. The Court had to intervene and lay out the Industrial Court Procedure Rules for the benefit of the claimant who was acting in person. During the claimant's evidence-in-chief, he went out of his way to include matters not related to the suit and in cross-examination, the court had to suspend the hearing and refer the matter to the Labour Officer for a background report on the case.
3. I noted that the claimant was not truthful on a number of matters that were put to him in examination, he had no original documents to support his case, his background information relating to his qualifications related to work and training he alleged to have been undertaken in Uganda and Scotland, which all could not be verified as he alleged to have been assaulted and his documents taken away. I note there were two criminal cases relating to the claimant, one where he reported an assault while at the respondent premises and the other where he was convicted for giving false information against the respondent. In the former case, the claimant said it was ongoing in court but did not provide any records while in the latter he was convicted. However, upon examination of the proceedings and judgement of the lower court in Criminal Case Number 2620 of 2011, I note the two cases were consolidated and in the final analysis of the court, the claimant was convicted.
4. The court went out of its way to ask an Advocate to assist the claimant pro bono and found Waiganjo Advocate, who had time to advice him. This however was not useful as the claimant repeated the same arguments, giving unsubstantiated claims and allegations. From the record I

note the proceeding in Criminal Case Number 2620 of 2011 where the claimant was convicted and Criminal Case No. 3971 of 2011 where the claimant alleges to have been assaulted. The two cases were consolidated by the lower Court, and in conclusion the claimant was found guilty and convicted under section 215 of the CPC [Criminal Procedure Code] and those alleged to have assaulted the claimant were acquitted. There is no appeal in either case. All these put together, as well as the report from the Labour Officer create serious doubts as to the truthfulness of the claim before court, but the evidence on record will be assessed on its own merit.

Role of Labour Officer

5. It will be useful to also note, the Court directed the Labour Officer responsible for the area where the respondent is situated to do a background check on the circumstances of the case. The Labour Officer had also been directed to attend Court for specific instructions to guide the Court in making a good analysis of the issues before it. This was not done but a Labour Officer a Mr. Kinyua managed to file a report dated 25th March 2013. It is not clear if this report was done in consultation with the respondent only in exclusion of the claimant or vice versa. This was not a useful report to the Court at all; it was a waste of valuable time and by the Labour Officer failing to attend court for directions as to what he needed to do was in utter disregard of his duties herein. The Industrial Court Deputy Registrar to share this judgement and the Court opinion on the actions of this officer, [Mr. Kinyua] who in future should conduct his duties as directed by the Court.

Claimant's case

6. in the claim, the claimant states that he was employed by the respondent on 2nd February 2008 to 4th January 2010 on contractual basis as a **Supervisor in charge of Bottle Inspection and Quality Assurance Control** at a salary of Kshs.75, 000.00 per month and that this was revised and he became a permanent employee for the position of Supervisor in charge of Bottle Inspection and Quality Assurance Control at a salary of Kshs.175, 000.00 per month. That when the claimant was on contract, he was not paid his salary for 23 months as stipulated under his contract citing procedural difficulties but he continued working. The claimant also states that when he was employed on permanent basis on 4th January 2010, he became a senior quality control supervisor, in accordance with the respondent management agreement, and that on this position he worked for 15 months without pay and without any explanation from management.
7. The claimant further stated that he raised the issue of not being paid with the respondent which caused him to be frustrated and that the respondent also caused him to be assaulted. On 30th March 2012 the respondent did an internal memo through which they wrongfully terminated the claimant's employment and refused to pay his severance pay and termination benefits. That no letter of termination was ever given to him and he still considers himself an employee of the respondent.
8. The claimant also stated that the respondent committed acts of unfair labour practices against him against laws of Kenya and thus claim severance pay, outstanding payments for leave, salary arrears due for the period he was in employment of the respondent all amounting to kshs.4,350,000.00 which he outlines as follows;
 1. *Salary as per the terms of the contract at kshs.75,000 x 23 = 1,725,000*
 2. *Salary as per the terms of the employment for a period of 3 months at 175,000 x 15 = 2,625,000*
 3. *Total being Kshs.4,350,000*
9. That due to the delay in the payment of the dues, the claimant has suffered and the Court should therefore direct the respondent to pay this amount together with general and special damages and costs of the suit.
10. In evidence the claimant made his sworn statement that he is a chemical engineer and was employed by the respondent by 30th March 2011 as quality controller and was posted to line 8 at the soda plant. While on duty he identified some anomalies with the products he was working on

where there were broken bottles in the soda which if left to go out to the market would have been harmful to the public. He was on the night shift and the supervisor then was Elizabeth Kalungu who accused him of sleeping while on duty even though he had worked for long hours. Present were Patrick, Reuben and Ochieng who were present. Elizabeth ordered those present to whisk the claimant out. In the process, he had his academic documents in his hands and as he was being forcefully removed from his duty station, these documents were taken away and he has never been able to trace them again.

11. That from the force used on him, he suffered injuries but nobody was willing to help him. That his uniform, a pink overall with fanta brand was removed and he was left naked. He was taken to Embakasi Police Station where he reported the assault and since he had the respondent gate pass he gave it as evidence. He then went to the health centre and got a P3 form from Dr. Kamau. The police at Embakasi station were to investigate which took 3 months causing the claimant to go to the PPO Mr. Kibuchi who called the OCPD Embakasi who took over these investigations and visited the site of the assault. That the officer given charge of the matter Mr. Ngetich ended up by arresting the claimant and was charged at Makadara court on 9th June 2011 on charges of giving false information to a government officer, in Criminal case No. 2620 of 2011. That the court found the police to be biased and fresh investigations were to be undertaken and that the DCIO Embakasi was to follow up on the claimant's case No. 3971 of 2011 where he had reported an assault, which case is still pending.
12. That after these cases, the claimant was never paid by the respondent. That he always accessed the respondent premises using a gate pass and he had pay slips for February, March and April 2011 from Career Directions limited (CDL) which is not correct and the details therein are not those of the claimant. That he had two contracts one dated 2nd February 2008 as a temporary employee and then on 4th January 2010 he became a full time employee. He was issued with a letter of employment signed by the respondent. He was taken for a medical examination, his photo taken and was awaiting staff identification and personal number. He was to be on probation for 6 months, which came and passed but he was never paid and when he asked the human resource officer, he was told to wait to avoid the company noting him as stubborn and be laid off. He was also asked to put his complaint down in writing which he did on 4th February 2008 and 4th January 2010 but was not given feedback.
13. On 30th March 2010 the claimant was on duty at 7.30p.m. Stationed at line 8 where he checked the products quality and around 5a.m. he realised there were polluted products in about 47 crates where he informed the team leader Elizabeth Kalungu. The claimant also reported to the production manager who thanked him for saving the company from possible suits but before long the team leader Elizabeth Kalungu came with a mob and started beating him. At the gate that was manned by G4S stopped him from entering the respondent premises again.
14. was arrested; the respondent never paid him and was in breach on the contract. He therefore seeks to be paid as claimed.
15. In cross-examination, the claimant confirmed that he was charged before the Makadara Court but the magistrate there made a wrong decision where he was convicted for giving false information. That in his first contract with the respondent he worked for 23 months but was never paid. He never complained as he feared he would lose his job. The second contract was signed by HR officer.
16. He also confirmed that he was working for CDL part-time who paid him for two months as an outsourced entity by respondent. He wore pink overalls but by 30th March 2011 he was a senior Quality Officer with respondent. On this day he had his academic certificates as the production manager had asked him to bring them so that he could help the claimant apply for a job online.
17. The claimant also stated that on 25th January 2011 he sent a letter applying for a job with the respondent and on 2nd February 2011 he also applied to Coca Cola East Africa where he was seeking assistance to get a job at the respondent company since he is conversant with quality control. However, he did not get assistance. He was assaulted. He had a medical cover with the respondent but he went to Embakasi Medical Centre and then to Dr. Kamau to get his P3 form. He had his medical card but this was lost when he was assaulted while working with respondent. He was also registered with NSSF while at CDL who had his forms under the names of Timothy Edward Olingo, his names which were changed in 1978 when he tried to register through a

computer and was told that it could not take 4 names but this is one and the same person as himself.

18. The claimant also confirmed that he worked for CDL on contract terms inclusive the date he was assaulted. That he worked for Coca Cola at night and CDL during the day. For CDL, he was the Bottle Inspector and for Coca Cola he was the Quality Supervisor. CDL payments were through a signature but no pay slip was issued but for Coca Cola he was a permanent staff but was never paid.

Respondent's case

19. The Respondent on the other hand in their defence stated that as a company they carry out the business of bottling and marketing beverages that are manufactured by the Coca Cola Company under a specified territory within Kenya which territory includes Nairobi. That the claim against them as lodged by the claimant is unsustainable as it is an abuse of the court process as he was not an employee of the respondent and the claim is a fabrication. That the respondent never had a position of a senior control supervisor within their ranks and the claimant's assertions are his own imaginations. That the claimant is a fraudster who has fabricated documents and concocted facts with a view to using the court into defrauding the respondent. The claimant never worked for them, when he gave false information to the police where he was arrested, charged and convicted in Criminal Case No. 2620 of 2011 at Makadara Law Courts. That the Court should dismiss the claim with costs to the respondent.
20. In Evidence Lillian Khaweya Okomba the respondent human resource advisor testified that she has been with the respondent since 2010 and before her current position was the Personal Assistant to the Managing Director. As human resource officer part of the duties to this position are human resource services, keeping records and following with medical policies and procedures, recruitment and induction of new staff, staff welfare at work, promotions, termination or disciplinary issues. These also include staff appraisals.
21. Lillian stated that she knew the claimant after meeting him in court but not as an employee of the respondent. As the human resource officer of the respondent she went through how they undertake recruitment of new staff. The procedure is to do an online advertisement and in the newspapers where people must apply online and do not take hard copies applications, these are shortlisted, a date set for interviews with a panel of 2 to 3 people, and all these records are kept. She has access to all the staff files but none belong to the claimant. Once the right candidate is identified, a contract is issued and an original is filed to the individual personal file but none on record belong to the claimant. In the letter of employment issued to the new employee has mandatory requirement to be provided by each candidate – to bring copies of the national identity card, PIN number, NSSF card, and NHIF card – as these are details that form part of the personal file. The staff member is also added to the respondent medical scheme where photos are required and all these must be signed for as part of the records.
22. That the letters alleged to have been issued to the claimant are not compliant with these basic details as issued by the respondent, the letter dated 2nd February 2008 where he alleges to have been employed as supervisor and quality controller comprise two titles in two different departments of the respondent. That the Inspectors are in the department of production and Quality Control is under Quality Assurance Department. In the claimant's letter these two titles are placed on one person doing the same job that does not exist with the respondent company. That if the claimant had been an employee of the respondent, he could have only been in one department and not in two as they have no position called *Supervisor in Charge of Bottle Inspection* or a position called *Quality Control* in any department of the respondent. That the salary stated in the claimant's appointment is way above the indicated offices as the gross maximum would be Kshs.35, 000.00, and only team leaders earn this much. That from the claimant's letter, it is not possible for a supervisor to report to the Production Manager as there exists no such position at the respondent's company. Also the termination notice is stated to be for one day which only applies to casual labourers at the respondent and not to other offices.
23. The witness further stated that from the letter, the signature of Winnie Mwamburi is not an original as the same is lifted from another document and placed on the letter and the respondent gives an original to all their employees and another original put on file. An identification card is

- issued with a photo, name, and department and identification number with an employment number. Employees are also issued with an electronic card to access the premises as nobody should open the doors without this card. Once all these details are supplied, an employee is entered into the payroll and can access the respondent premises and once there is termination, this card must be shredded to avoid misuse.
24. In this case, the alleged contract given to the claimant is not from the respondent company as the letterhead is not that under use by the respondent in 2010 as there were new directors then. The letter from the claimant has Segun Ogunsanya as the Managing Director instead of D. Davidson who had also changed as the overall MD. The signature is placed on the claimant's letter cutting off the word '*sincerely*'. The respondent has under the medical scheme various places where employees can consult with annual check-ups at Meridian Hospital where employees give their details together with their families and if the claimant had been injured at work, he could have been treated by Dr. Kamau peter. At this time the respondent had AON Insurance where senior staff could go to hospitals like the Aga Khan, Nairobi Hospital and Gertrude's. The respondent could also refer their employees to the nearest hospital and if the claimant had been injured while at the employment of the respondent premises, the nearest hospital was Mater Hospital as KNH was not part of the hospitals under the medical scheme.
 25. That based on the allegations of the claimant, the witness received a team from Makadara law Court who came to assess the claimant's allegations which were found to be false and his case dismissed.
 26. That there is a company called CDL which provides the respondent with casual employees. The respondent has a contract with CDL when they need casual manual jobs; they provide them on specified terms. CDL provides casuals but the respondent gives instructions, uniforms, and the badges when they are deployed at their premises, they are trained on their tasks, they get paid with independent contracts as CDL employees. The respondent has to know these contracts as they have a Guide Supplier Principle – they have to ensure their suppliers pay their staff the minimum wage and must give them pay slips to avoid claims from these employees while at the respondent premises. These pay slips are also meant to ensure CDL complies with statutory requirement and remittances.
 27. In this case, CDL had provided payslips for the claimant for March and February 2011 where the claimant was their employee and NSSF and NHIF dues were remitted for the months he was at CDL. If he was the respondent employee, he should have been on their employee list, which was not the case here.
 28. The witness further stated that, the claimant's claims are not valid as he was never their employee. The Quality Assurance Department is one department of the respondent where their staffs have a different uniform which can be noted by anybody at the respondent premises. The Quality Assurance Team has *white dust coats*, they are all experts and scientists in quality assurance and do not inspect bottles but check on all soda productions comply with the quality required – the bottles are of quality and the caps are of the required diameter and all the other standards. They have a laboratory near the production line and keep checking and sampling – Dasani, Coke, Fanta – record the time each sample is picked and the quality results.
 29. That a pink uniform/overall was mentioned by the claimant but this is worn by casuals who go to change in the rooms but for the Quality Assurance team they change their coats in their offices while the casuals go to the common room to change and place their overalls in lockers and are not allowed to the Quality Assurance Department. Access to the Laboratory is for the Quality Assurance staff identified by their white coats that are few at 28 and are all well known and if one has to go to Quality Assurance they must be accompanied by a staff from that department. The card submitted by the claimant is given to a contractor with a contract with the respondent and CDL have their own badges and give their cards to the casuals and the source of the card from the claimant is unknown. It is given to people who have a contract with the respondent like a plumber, engineer and issued by the HR and produced to the contractor. The card is given to the holder and must surrender their ID at the gate and given the '*contractor*' card and one cannot have both at the same time.
 30. The respondent has a termination process, there is a hearing relating to what has transpired between the parties, notice is given of disciplinary hearing and a panel put in place for hearing and must have minutes. A final decision must be communicated in writing and a copy of this

- termination filed. There was no disciplinary hearing for the claimant and no termination could have arisen as he was never their employee. There is nothing payable to the claimant from the respondent as they did not owe him any pension, salaries or benefits. The case should be dismissed.
31. The next witness was Martin Esakina Papa, a forensic document examiner, who is a former Chief Inspector of Police trained and holder of a certificate in Forensic Document Examination. That he was given instructions from the respondent's advocates to make scientific examination, do a comparison and analyse documents to establish their genuineness, to reveal alterations, additions or deletions and to identify or eliminate the source of handwriting, identify other marks, impressions or relative evidence, and also to write a report in evidence. His instructions were examine the claimant's contract as indicated as having been issued by the respondent and to compare these with provided signatures of the persons listed as their authors. He considered all the natural variations that affect writing resulting from environmental and physical factors, the quality of the materials under use and found that the signatures in the claimant documents did not exhibit any similarity to the samples provided.
 32. The witness therefore came to the conclusion that the signatures were not done by the same hand. The samples and the signatures in the claimant's documents were fundamentally different. There was evidence to indicate the signatures were produced through tracing – a writing made by tracing the model signature – and placed on the document. This could have been made from a carbon paper or transmitted light.
 33. He also found evidence of ghost images appearing on the same documents there being a shadow behind as a guide to the signature. The sequence of the strokes between the prints and the written document indicated the signature was perched on the document as an imported matter into the document. There was also a process of cut and paste and photocopying hence the ghost images and the concealed parts of the document.
 34. The witness, as an expert on the subject charged the respondent advocates the sum of Kshs.25, 000.00 and Kshs.5, 000.00 for the work and report and court attendance respectively. He submitted his invoice in court.

Assessment

35. the claim, at paragraph 10, the claimant state that through an internal memo he was unlawfully terminated. This memo was not attached to the claim or produced in evidence. At the close of the hearing it was not possible to ascertain as to the validity of this claim there beign no evidence of document to confirm that indeed through an internal memo, the claimant was terminated. This is a crucial pre-condition to all the issues herein and the very basis of this claim. This was a material particular and or fact missing from the claimants' case.
36. From the record, the documents produced in evidence have been challenged, not authentic, not from the respondent and through the call of an expert witness; the respondent was able to demonstrate that the documents submitted by the claimant noting that he was an employee of the respondent were not genuine. This evidence was not challenged in any material way. In any event, my casual look at this documents indicate that they could only have been issued to the claimant for a specific job, which the respondent was able to demonstrate that they did not have the position of **Supervisor in charge of Bottle Inspection and Quality Assurance Control** in existence. It is also highly unlikely that the claimant worked for CDL during the day and for the respondent during the night. This is highly impossible in the circumstances of this case. It would be humanly impractical to work on a shift of 8 hours, and then proceed on another shift for another employer for a similar number of hours, all without pay apart from two months. Even where one is able to be productive for over 16 hours a day, it is highly impractical for the same person, a human being to do this kind of work continuously for over 23 months and a further 14 months all without pay. The human body being mortal require rest, nourishment, break and it would be inhumane to oneself to let the human body serve for over 8 hours without a break. In most work places, you have health breaks, tea breaks, or coffee breaks and a one hour lunch break, all not for a luxury, but to give the human body a rest, to recoup more energy to continue work. But this has to be within 8 hours. After these

- 8 hours, a long break is desirable and even where there is overtime, this is not to be continuously for another 8 hours and where this happens, and a repeat is to be avoided to help the body rest. Therefore, in the case of the claimant, I find it not true that he not only went on for these long hours and never complained that he had no pay at the end of it all and opted not to complain.
37. On the other hand, the claimant stated that he did not have original documents in his possession since he was assaulted and his original documents taken away by officers of the respondent. He even reported the matter to the police but there is no record as to what has been done with regard to this report to the police on lost documents. Even if there was a report to the police, this would still be immaterial as the claimant was able to get a new record of the alleged stolen document and had copies in court as filed together with his claim. If indeed the original documents had been stolen from the claim, which was denied, then it goes, it was not possible to make copies of these documents. The fact that the claimant was able to produce some document whose authenticity is in doubt raises serious doubt as to the nature of the whole claim.
 38. Despite the claimant alleging that he was working with the respondent from 2008 to 2010, he could not produce any independent witness to confirm his claims. This matter was adjourned severally to enable the claimant organise his case, he failed to do so. His continued insistence on the use of documents that are not authentic is beyond this court comprehension. This court will agree with the forensic examiner that indeed by the look of the documents presented by the claimant, they bear signature which are juxtaposed on copies and do not form an original record or copies from the original. This is a serious criminal act that should be taken seriously. A party who seeks to use documents in court and purports them to be original or copies of the original well aware that they are not, is not only engaged in fraud but connotes that sheer disregard of the rule of law on the very face of justice, before the Court itself.
 39. The evidence that the claimant was never paid for the entire period he was employed by the respondent, that he was advised by Human Resource to put his complaints in writing which he did in February 2008 and 4th January 2010 but these letters have not been attached. In any event, it is incomprehensible that the claimant would serve for 23 months without pay, then take up a senior position with the respondent at a higher pay without being paid for another 14 months. Before taking up any position if indeed he took it up, he should have ensured that his rights were protected. Nothing prevented the claimant from seeking the court intervention or indeed the Labour Officer responsible in his area to intervene.
 40. Based on these records, the evidence before court, and the assessment thereof, to continue and engage further on this record will be an act in futility for this Court to rely on and a waste of useful judicial time.

Conclusion

I find there was no valid contract as between the claimant and the respondent for the period of February 2008 to 4th January 2010 to justify the claim for unpaid salaries. I will therefore dismiss this claim with costs to the respondent.

The Industrial Court Deputy Registrar to share this judgement and the Court opinion on the actions of this officer, [Mr. Kinyua] who in future should conduct his duties as directors by the Court.

Read in open court this 20th day of August 2013.

M. Mbaru

Judge

In the presence of

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