



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 404 OF 2009

RICHARD OUMA

CLAIMANT

v

KENBOX INDUSTRIES LIMITED

RESPONDENT

JUDGMENT

1. The Claimant through Nyamodi & Co. Advocates filed a Memorandum of Claim against Kenbox Industries Ltd on 3 August 2009 and the issue in dispute was stated as failure by the Respondent to pay terminal benefits to the Claimant.
2. On 31 August 2009, the file was placed before Chemmutut J. and he directed the Respondent to file a Reply on or before 14 September 2009. He further directed that the Cause be heard on 11 November 2009.
3. The Respondent filed a Memorandum of Response on 14 September 2009 through the firm of Desai, Sarvia and Pallan Advocates.
4. On 11 November 2009, the Respondent sought an adjournment to enable it file supplementary documents. The application was granted and hearing set for 26 January 2010.
5. The record indicates that the Cause came up for mention on 10 February 2010 and not 26 January 2010. The Respondent was not in attendance and Chemmutut J. fixed hearing for 27 April 2010.
6. On 27 April 2010, both parties appeared before Chemmutut J. and the hearing proceeded through submissions by learned counsel for the Claimant and the Respondent. After the submissions, Chemmutut J. directed that an award would be announced on notice.
7. Due to information in the public domain Chemmutut J. and other judges of the then Industrial Court ceased to hold office sometime in 2012 before delivery of the award.
8. New Judges of the Industrial Court took office and as a result the Deputy Registrar of the Industrial Court wrote to the parties on 11 September 2012 to inform them that I had been assigned the Cause and therefore they should appear before me on 28 September 2012 for directions.
9. On 28 September 2012 none of the parties appeared and I directed that any of the parties were free to move the Court.
10. Again on 20 November 2012 the Deputy Registrar wrote to the parties to appear before Justice Nzioki wa Makau to take directions. It appears from the record none of the parties appeared.
11. On 13 May 2013, the Deputy Registrar, Mombasa, where I am currently stationed also wrote to the parties to appear before me for taking of further directions on 4 June 2013 or risk the Cause being dismissed.
12. On 4 June 2013 the file was placed before Makau J. as I was away and Mr. Kahiti held brief for

- Mr. Ogwe for the Claimant while the Respondent did not appear. Mr. Kahiti signaled the Claimant's agreement to my preparing a judgment based on the record.
13. Rule 21 of the Industrial Court (Procedure) Rules, 2010 envisage the Court, subject to the agreement of the parties determining a suit on the basis of pleadings, affidavits, documents filed and submissions.
14. Rule 22 on the other hand permits the court to proceed in the absence of any party. The Respondent was served but did not appear. In the circumstances, I will proceed to determine the cause on the basis of the material on record.

Claimant's case

15. The Claimant's case as gleaned from his pleadings is that he was employed by the Respondent in 1998 as a home attendant and that he served the Respondent until 2 July 2009 when he resigned. At the time of resignation he was earning Kshs 10,000/- per month.
16. In submissions the Claimant asserted that his termination was wrongful.
17. The Claimant exhibited in the Memorandum of Claim a reply to the demand letter by his Advocates. The letter made reference to the Claimant absconding from duty, payment of leave up to December 2008 and a letter of resignation.
18. The Claimant seeks terminal dues being unpaid salary for July 2009 of Kshs 10,000/-, 220 days severance pay of Kshs 73,333/-, unpaid leave days Kshs 32,967/-, one way travelling allowance of Kshs 3,000/-, unpaid house allowance of Kshs 171,600/- all totaling Kshs 290,900/-.

Respondent's case

19. According to the Respondent's pleading, the Claimant was employed in 2004 as a home attendant and he left employment on 26 June 2009 while earning a net salary of Kshs 10,000/- per month.
20. The Respondent further pleaded that the Claimant absconded duty without notice from 26 June 2009 and that therefore, the Claimant is not entitled to salary for July 2009 or severance pay. Further the Claimant was paid in lieu of annual leave and no house allowance is outstanding. Vouchers indicating payment in lieu of leave were exhibited to the Memorandum of Response.

Evaluation

Wrongful termination

21. In the submissions, the Claimant asserted that his termination was wrongful. But in paragraph 5 of the Memorandum of Claim, he pleaded that he resigned. In my view because the Claimant pleaded he resigned and considering the reply by the Respondent to the demand letter informing the Claimant's Advocate that the Claimant resigned, the issue of wrongful termination does not arise.
22. I find as a fact that the Claimant resigned and was not wrongfully terminated by the Respondent.

Unpaid salary for July 2009

23. The Claimant seeks Kshs 10,000/- being salary for July 2009. His pleading states that he worked until 2 July 2009.
24. The Claimant's Advocates made a demand of the Respondent through letter dated 7 July 2009. The letter was not exhibited. It is apparent that the Claimant did not serve the Respondent the whole of July 2009 if at all. I decline this head of claim.

Severance pay

25. Severance pay is paid in cases of termination through redundancy. The Claimant resigned. He was not declared redundant and is therefore not entitled to severance pay.

Unpaid leave of 9 days per year since employment

26. The documents exhibited in the Memorandum of Response show the Claimant was paid leave up to December 2008. He worked until around 2 July 2009. He is therefore entitled to pro rata leave equivalent to 9 days. Using the formula of salary divided by twenty six to get the daily rate which is then multiplied by the 9 days I assess the Claimant's accrued leave to be equivalent of Kshs 3,461/-.

One way travelling allowance

27. No contractual basis or statutory foundation for this claim was laid and I decline to award it.

Unpaid house allowance

28. The Claimant seeks Kshs 171,600/- being unpaid house allowance at the rate of Kshs 1,300 for 11 years he served the Respondent.

29. The Respondent's case was that the Claimant was earning a net salary of Kshs 10,000/- including all other dues. In other words it was a consolidated salary.

30. Section 31 of the Employment Act requires an employer to provide reasonable housing accommodation for employees or in lieu to pay housing allowance but with exceptions as set out in section 31(2).

31. No sufficient material has been placed before me to enable me grant this head of claim and I decline to grant it.

Conclusion and Orders

32. In conclusion, I reach the determination that the Claimant was not wrongfully terminated but resigned.

33. I further decline all the heads of claim sought by the Claimant save for 9 days pro rata leave for the period January to July 2009, which I assess in the sum of Kshs 3,461/-.

34. There will be no order as to costs.

35. The Deputy Registrar to transmit this file to the Deputy Registrar, Industrial Court Nairobi after delivery of this judgment.

Delivered, dated and signed in Mombasa on this 27th day of September 2013

Justice Radido Stephen

Judge