REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1930 of 2011

JOSEPHAT MUGALO MUHATI……..……CLAIMANT

VERSUS

CHANDHA INVESTMENT LTD……..……...…1ST RESPONDENT

KULWART SINGH CHADHA…….……..2ND RESPONDENT

AWARD

Claimant in person

Ndolo Advocate for the Respondents

On 17th November 2012 Josephat Mugalo Muhati a male adult then resident at Kawangware Nairobi brought a claim for unlawful and unfair termination of employment against his former employer Chadha Investment Limited named in the suit as the 1st Respondent and Mr. Kulwart Singh Chadha the Chairman of the 1st Respondent as the 2nd Respondent.

The particulars of the suit outlined in the memorandum of claim may be briefly summarised as follows:-

That the claimant was employed by the Respondent on 5th June 2006 as a driver earning a basic salary of Kshs.7,000/-. That he worked continuously for the Respondents until the 7th July 2011 when his services were unlawfully terminated on allegations that he had on 6th July, 2011 stolen roofing slabs from a basement where he parked the Chairman's car. The matter was reported to the Police and the Claimant was taken to Parklands Police Station for questioning.

The Claimant was aggrieved by the accusations made by the Respondents and he wrote a letter of resignation dated 7th July 2011 annexed to the Memorandum of Claim as appendix "JMM1". He alleges that he continued to report to work until the 16th September, 2011 but was not allocated any work by the Respondent for 2½ months. He claims payment of salary arrears for 2½ months, one month's salary in

Lieu of Notice, Service Pay for 3 years, Unpaid Leave days for 3 years, overtime worked over weekends, salary under payments and 12 months compensation for unlawful dismissal. He in addition claims Damages for loss of employment, illegal confinement by Police and defamation, interest on the claimed amounts and costs of the suit.

In their statement of defence the Respondents deny that the Claimant was employed on 5th June 2006 and aver that he was employed as a driver on Monthly Salary of Kshs.7,156/50 plus a house allowance of Kshs.1,073/50 on 1st August 2007.

That he worked continuously for the Respondent until the 7th July 2011 when he voluntarily resigned from the employ of the Respondent by a letter of the same date annexed to the statement of defence and marked "CK1" .

That the Claimant was a suspect in a matter involving loss of roofing slabs from a basement parking. They further aver that upon resignation, the claimant was paid all the terminal benefits due to him and the Respondent therefore is not whatsoever indebted to the Claimant. They pray that the Claimant's suit be dismissed with the costs.

The Claimant testified under oath in support of his case as CW1. He told the court that he was employed on 5th June, 2006 as a driver for the 2nd Respondent. That he was in continuous employment until the 7th July 2011 when his employment was unlawfully terminated by the Respondent. He initially told the Court that at the time of the termination, he earned a monthly salary of Kshs.10,000 but this was later clarified by both parties and it was not in dispute that he earned Kshs.10,239 plus a house allowance of 15% of the said amount.

Regarding the matters leading to termination of his employment, CW1 told the court that on the morning of 7th July 2011, as per the usual routine of his work, he fetched the 2nd respondent from his home to his office. He parked the Mercedes car as was customary at the basement and took the newspapers to the 2nd Respondent. He then returned to the parking with a view to pick another Director of the 1st Respondent who he used to pick regularly also. He found two security guards at the basement parking and he drove off to pick the said Director.

Upon arrival at the Director's home a Guard approached the car and demanded to search the boot. Nothing was recovered from the boot. The Guard then made a telephone call saying that he did not find anything in the car boot. CW1 proceeded to take the Director to the office. Thereafter he was summoned to the 2nd Respondent's office together with a foreman and two Security Guards he had left at the basement. He was then informed that nine (9) roofing slabs had gone missing from the basement where he had parked and that he was a suspect. He denied stealing the slabs stating that the slabs were long and could not fit in the boot of the car he drove. The slabs were stored at the basement and were many of them at the time.

Later on in the day, the 2nd Respondent summoned him again to his office together with the foreman and the two Security Guards. As he entered the office the 2nd Respondent sharply requested him to hand over the car keys to him. He pleaded to be allowed to remove his properties from the car but was refused. The 2nd Respondent directed the Guards to strip him of his shirt but he resisted. The Guards then tied his hands and were directed to take him to Parklands Police Station. At the station, the two Guards and the foreman recorded statements. He was then booked and freed on Police bond.

On the same day, the 7th July 2011, he wrote the letter of resignation. He claimed in the letter that he had resigned due to harassment meted on him the day before. He requested the Respondent to prepare his benefits.

The Claimant further told the court that on 8th July 2011 he reported to work as usual but was asked to go to the Head Office at Westlands, where the 2nd Respondent asked him to go home and await

conclusion of investigations. The Claimant told the court that he continued to report to work daily until the 16th September 2011. That, it was not until the 19th September, 2011 when the Respondent wrote a letter accepting his resignation. The letter is attached to the memorandum of claim and marked "JMM2" and reads as follows:-

"Reference is made to your resignation letter dated 7th July, 2011. We would like to inform you that your resignation is accepted and we wish you well in your future endeavours."

The Claimant states that he is entitled to 2½ months salary arrears for the period 7th July 2011 when he wrote the letter of resignation and 16th September, 2011,when he stopped reporting to work. He asserts that he had religiously reported to work during that period.

The Claimant told the Court that the Police had by a letter dated 30th August, 2012 attached to the Memorandum of Claim as part of annex "JMM1" exonerated him from the alleged loss of roofing slabs. This to him was confirmation of the malice by the Respondents against him.

The Claimant confirmed that he was paid gratuity in the sum of Kshs.20,000/- by CFC Life Assurance Ltd and also received his dues from National Social Security Fund (NSSF).

He told the Court further that the payment of the gratuity did not exempt the Respondent from paying him severance allowance for every 15 days worked for four years. He added that for the entire period he worked for the Respondent, he had worked on all Saturdays, but was not paid overtime. He further claimed that he took the 2nd Respondent and his family to the Sikh Temple on Sundays but was denied overtime . He finally claimed that the basic salary of Kshs.10,239/- which he received in 2011 was below the entitlement of a driver in terms of the General Wages Order 2011. He alleged the minimum wage at the time was Kshs.13,780/- and therefore claimed payment of the difference for twelve (12) months.

He added that his termination was unlawful, malicious and unfair and claimed damages and compensation as articulated in his memorandum of claim. He also claimed Damages for illegal confinement and defamation of character.

During cross-examination by Mr. Ndolo for the Respondents, the Claimant denied that he worked as a daily paid casual between 5th June 2006 and 1st August 2007. He therefore denied the allegations by the Respondents that he was employed on permanent terms on 1st August 2007. He also denied that he never reported to work from the date of his resignation on 7th July 2011 as alleged by the Respondent.

He further denied that himself and the two Security Guards were suspects in the matter of the loss of the roofing slabs and that they had voluntarily gone to the Parklands Police Station to record statements. He insisted that he did not sign the duty roster between the 7thJuly 2011 and the 19th September, 2011 because the Respondent refused to assign him any work though he had reported to work every day. He added that the letter of acceptance of the resignation by the Respondent dated 19th September, 2011 is testimony that he was still employed till that day.

He added that he had only gone on leave twice in the five years he had worked for the Respondent and he was therefore, entitled to three years payment in lieu of Leave for 21 in days each completed year. He conceded and withdrew prayers 11(e), 11(f), 18(ii) and18(iii) during cross examination stating that prayers 11(e) &11(f) were repetitions and that 18(ii) and 18(iii) were brought due to a misunderstanding of the jurisdiction of the Industrial Court. He however insisted that the Court should award him all other prayers including costs of the suit and interest on the amounts claimed.

The Respondents called one witness (RW1) Japhetha Muongolo Kisaka in support of the case. He told the Court that he was a chief accountant of the Respondent and that the claimant was employed as a daily paid casual on 5th June 2006 and was converted to permanent employment as a driver for the

Respondent on 1st August, 2007. The duties of the Claimant were to chauffer the 2nd Respondent mainly and another Director of the Respondent from time to time. He added that the Claimant did not receive any written employment letter or contract. He produced a duty roster for the Respondent which was inspected by the court and photocopies were retained in a bundle marked 'R2'.

He showed the court the records of the Claimant indicating that he had taken most of his leave days from 2008 until 2011 except 10 days which were in arrears. He however added that the Claimant had only applied for leave in two years but in the other years he was asked to take leave whenever the 2nd Respondent and the other Director had travelled abroad and had therefore not applied for leave in those occasions. Only the application form for the year 2010-2011 was submitted.

The record also showed that employees were marked present daily when they reported to work and in the case of the Claimant, the record showed he was absent from work from 7th July 2011 when he tendered his letter of resignation. He told the court that the Claimant did not report to work from that day, except when he brought the Police Report dated 30th August 2011, that exonerated him from the alleged theft of roofing slabs. Thereafter the Respondent on 19th September 2011 accepted his resignation because he had refused to return to work, though he had personally persuaded him to do so.

He added that he personally assisted the Claimant to be paid his gratuity by CFC Life Assurance Ltd via a letter dated 15th September, 2011. He explained that the Respondent's Severance pay due to all employees was invested monthly with CFC Life Ltd who inturn paid the employees upon termination of their employment. The Claimant was therefore, not entitled to any other severance pay since he acknowledged receipt of Kshs.20,000/- Gratuity.

He told the Court also that he had assisted the Claimant to process his NSSF dues by providing him with the letter accepting his resignation dated 19th September 2011 and a certificate of service dated 15th September 2011. These letters were submitted as part of the Bundle '1', by the Respondent. He denied that the Claimant was owed any notice pay since he had voluntarily resigned and refused to return to work when he advised him to do so.

He further denied that the Claimant was entitled to any overtime and told the Court that he worked from 8.00 a.m. to 5.00 p.m. on weekdays and 8.00 a.m. to 1.00 p.m. on Saturdays. He denied that the Claimants ever worked on Sundays. He was however, at pains to explain during cross-examination by the claimant whether he was at work himself on Sundays, when the Claimant took the 2nd Respondent and his family to the Sikh Temple. He produced the General Wages Order for the year 2011 which clearly showed that the Minimum wage for a light Vehicle driver at the time was Kshs.10,239/- plus 15% House Allowance. He therefore, said that the Claimant was not entitled to any underpayment as claimed in prayer 11(i).

He emphasized that the Claimant's employment was not terminated, but he had voluntarily resigned and he is therefore, not entitled to compensation for unlawful or unprocedural termination.

Upon closure of the Respondent's case, both the Claimant (in person) and the Respondent through its Advocate Mr. Ndolo made final submissions.

Upon a careful analysis of the pleadings by both parties, the evidence by CW1 (Claimant) and RW1 (for the Respondent) and their respective submissions, the following issues fall for determination:-

(i) Was the Claimant employed on 5th June, 2006 or on 1st August, 2007.

(ii) Was the employment of the Claimant unlawfully and unfairly terminated or did he voluntarily resign from his employment.

(iii) Did the Claimant report to work from 7th July, 2011 to 19th September, 2011 and thus entitled to

2½ Months salary arrears as claimed.

(iv) Did the Claimant work on all Saturdays from 8.00 a.m. to 5.00 p.m. and on Sundays without overtime payment.

(v) Did the Claimant take his leave in two (2) years out of five and therefore entitled to payment of the balance.

(i) Was the Claimant employed on 5th June, 2006 or on 1st August, 2007.

It is common cause that the Claimant was employed by the Respondent on 5th June, 2006.

The only issue in dispute is the terms of that employment between 5th June 2006 and 1st August 2007. The Claimant avers that he was on permanent terms and therefore the period should count for purposes of computation of leave pay, severance allowance and overtime claimed. However the Respondent claims that between the 5th June 2006 and 1stAugust 2008 the Claimant was a daily paid casual and therefore the period should not count with respect to the claims made by him.

It is not in dispute that the Respondent did not give the Claimant any written contract of service.

Section 9(1)(a) and (b) of the Employment Act No. 11 of 2007 provides that a contract of service for a period or a number of working days which amount in aggregate to the equivalent of three (3) months or more or which provides for the performance of any specified work which could not reasonably be expected to be completed within three (3) months shall be in writing.

Section 9(2) imposes the responsibility to draw the contract stating particulars of employment on the Employers. Section 10(7) buttresses this point by providing that if in any legal proceedings an employer fails to produce such a written contract or the written particulars prescribed in the Act, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

This is the scenario in this particular case. The Claimant states that he was employed as a driver on permanent terms as from 5th June 2006 whereas, the Respondent avers that he was a daily paid casual until the 1st August 2008. In the absence of any documentary evidence and granted that the burden of proving the particulars of the relationship during that period is on the Respondent the court finds the point in favour of the Claimant, the Respondent having fallen short of the statutory threshold on a balance of probabilities.

(ii) Was the employment of the Claimant unlawfully and unfairly terminated or did he voluntarily resign from his employment.

With respect to the issue, whether the employment of the Claimant was unfairly terminated by the Respondent or whether he had voluntarily resigned from his employment, the court has carefully analyzed the facts by both parties and has come to the following conclusions of fact.

On 7th July, 2011 the Claimant wrote the letter annexed to the memorandum of Claim addressed to the 2nd Respondent. In the letter he states:-

"Sir, l here forward to you a letter of resignation due to harassment you did to me yesterday. I am awaiting for you to prepare my benefits. Thank you in advance".

The Claimant explained that he was humiliated by the Respondent by causing the Security Guards to tie his hands and taking him to Parklands Police Station on allegations that he had stolen roofing slabs from the premises of the Respondent. He added that the Chairman had instructed the Guards to remove his shirt prior to tying him up but he had resisted. He felt that the Respondent had lost confidence in him hence the resignation.

The Respondent on the other hand denied that the Claimant was forcefully taken to the Police Station. RW1 told the court that the Claimant and the two Security Guards were asked to report to the Police Station to record statements on the loss of roofing slabs since the three had access to the basement where they were stored. He told the court that he had pleaded with the Claimant to continue working but he had declined. He denied categorically that the Claimant reported to work between the 7th July, 2011 and 16th September, 2011 pending investigations. He relied on the duty Roster to show that the Claimant was not marked present during that period. The Claimant on the other hand insisted that though he had religiously reported to work daily he was not allocated any work, hence he did not sign the duty Roster. He further relied on the letter dated 19th September, 2011 wherein the Respondent wrote as follows:-

"Reference is made to your resignation letter dated 7th July, 2011. We would like to inform you that your resignation is accepted and we wish you well in your future endeavours."

Thewitness stated that the Respondent was initially reluctant to accept the resignation by the Claimant and had counseled him to recede it in vain. He added that he wrote this letter to assist the Claimant get his gratuity and NSSF dues. He however clarified that the Claimant had stopped working on the 7th July 2011.

From the evidence aforesaid it is clear that the Claimant had resigned from the employment of the Respondent by a written letter to the Respondent. It is not possible that he continued to offer himself for work after tendering the resignation letter. He had in fact continued to process his terminal dues as evidenced by a note dated 16th September, 2011 written by one G.K. Gitau from NSSF requesting the witness to provide the Claimant with a letter to facilitate processing of his NSSF dues. The letter is in bundle 'R1'. RW1, Mr. Kisaka told the court that he wrote the letter dated 19th September 2011, accepting the Claimant's resignation upon this request. He also had on 15th September 2011, written a letter to CFC Life Assurance Ltd informing them that the Claimant had ceased being an employee of the Respondent from 7th July 2011. This letter is also part of bundle 'R1'. He requested CFC Life Assurance Ltd to pay the Claimant his gratuity in the sum of Kshs.19,070/-. The Claimant confirmed that he was indeed paid Kshs.20,000/- in full settlement thereof. Mr. Kisaka confirmed that Gratuity was paid in lieu of severance allowance which the Respondent invested with CFC Life Assurance Ltd for all employees on a monthly basis.

The court finds the evidence of the Respondent more plausible in all the circumstances of the case and finds that the Claimant was upset by the incident aforesaid and had resigned from the employment of the Respondent. The duty Roster produced confirms that the Claimant did not perform any duties for the Respondent from the time of his resignation.

He has not pleaded that he was constructively dismissed but even if he had, the evidence adduced would not in the circumstances sustain a case of constructive dismissal. The evidence of Mr. Kisaka, RW1 clearly shows that the Claimant and the two (2) Guards were merely asked to record statements when it was discovered that items were missing from their duty station. The conduct by the Respondent was reasonable in the circumstances of the case. The Police on 30th August 2011 exonerated the Claimant from the case. The Security Guards who had recorded statements on the matter at the Police Station did not resign and they continued to serve that Respondent. The conduct by the Claimant is not expected of a reasonable employee in all the circumstances of the case.

The court finds that the Claimant voluntarily resigned from his employment on 7th July 2011 and therefore his employment was not unlawfully terminated by the Respondent.

(iii) Did the Claimant report to work from 7th July, 2011 to 19th September, 2011 and thus entitled to 2½ Months salary arrears as claimed.

With regards to whether the Claimant reported to work between the 7th July, 2011 and the 19th September, 2011. The court relies on the evidence of Mr. Kisaka RW1 together with the duty Roster

referred to earlier. The Register clearly shows that the Claimant was not marked present at work during that period. The Claimant's allegation that he reported to work daily but was not allocated work was inconsistent with the contents of his letter of resignation and his pursuit for terminal benefits immediately thereafter. The court finds therefore, that the Claimant is not entitled to a salary arrears of 2½ months for the period 7th July 2011 to 16th September 2011 as claimed in prayer 11(a) of the Memorandum of Claim.

(iv) Did the Claimant work on all Saturdays from 8.00 a.m. to 5.00 p.m. and on Sundays without overtime payment.

With regard to the Question whether the Claimant was entitled to overtime for Saturdays and Sundays worked in terms of prayers 11(g) and (h) of the memorandum of claim. The Claimant told the court that he worked on four Saturdays a month from 8.00 a.m. to 5.00 p.m. and he reported at the 2nd Respondent's home on Sunday at 8.00 a.m. to take the 2nd Respondent and his family to the Sikh Temple and back home.

He would then be at work until 4.00 p.m. on Sundays. He told the Court that he had on several occasions asked the 2nd Respondent to pay him overtime for the extra hours worked on Saturdays and Sundays but he was consistently told that Chauffers were not entitled to over time. Mr. Kisaka RW1 did not report to work on Sundays and therefore, was not able to explicitly deny that the Claimant worked on Sundays and was not paid over time. The Respondent is obliged by Law as earlier said to provide the employees with a contract of service including the specific terms of the employment, the Respondent had not done so. In the circumstances. RW1 was unable to refute the claims by the claimant that he had to wait for the 2nd Respondent and other Director to take them home even on Saturdays when other employees knocked off at 1.00 p.m. He was left behind to take them home hence he left work at 5.00 p.m., but was denied overtime. He had in terms of Section 10(7) of the Employment Act, the evidential burden to rebut the claim of overtime which he failed to do for lack of documentary evidence.

Accordingly the Court finds that the Claimant has proved on a balance of probabilities that he is entitled to payment for overtime in terms of prayers 11(9) and 11(h) for:-

(a) extra hours worked on four (4) Saturdays in a month between 8.00 a.m. and 5.00 p.m. from 5th June, 2006 to 7th July, 2011.

(b) Extra hours worked on (4) Sundays in a month between 8.00 a.m. and 4.00 p.m. from 5th June, 2006 to 7th July, 2011.

However, claims that go beyond 3 years from the date of filing of the suit on 17th November, 2011 are barred by Section 90(1) of the Employment Act. Therefore, only overtime for the period 16th November, 2009 to 17th November, 2011 is due and payable by the Respondent.

(v) Did the Claimant take his leave in two (2) years out of five and therefore entitled to payment of the balance.

The Respondent through Mr. Kisaka, RW1 produced records of Leave taken by the Claimant for four (4) years. The Court perused the original records and photocopies were submitted and are contained in the bundle marked 'R2'. RW1 took the court through the Leave record of the Claimant and was able to demonstrate to the Court that the Claimant had taken all the leave days he was entitled to for the period he served the Respondent apart from ten (10) days. He therefore, conceded that the Claimant was entitled to payment of ten (10) days salary in lieu of leave not taken. The Claimant's basis for payment in lieu of leave was that he had not applied for leave on most occasions, but was merely asked to take leave whenever the Chairman and the Director travelled abroad. Indeed RW1 was only able to produce the leave application form for 21 working days for the period 14th December 2010 to 10th January 2011. RW1 confirmed to the court that it was indeed true that the Claimant took most of his Leave entitlement whenever the Chairman and the Director were out of the Country. During those periods the

Claimant being the Chauffer for the two had no work and therefore was the best suited for him to take leave.

Section 28(1) of the Employment Act, provides that; "an employee shall be entitled.

(a)After every twelve consecutive months of service with his employer to not less than twenty one (21) days of leave with full pay".

Section 28(2) states that the Employer may with the consent of the employee divide the 21 days minimum Leave entitlement according to S.28(3) into different parts provided that one part of these parts consists of at least two uninterrupted working weeks.

Considering the evidence by the Claimant, that of RW1 and the law applicable, the Court is satisfied that the Respondent did not violate the provisions of S.28 of the Employment Act No. 11 of 2007 in the manner it granted Leave to the Claimant. Accordingly the Respondent shall pay the Claimant ten (10) days salary in lieu of Leave.

In the final analysis, the Court finds that the Claim against the Respondent for unlawful and unfair termination of employment lacks merit and the same is dismissed. Similarly the claim for payment of 2½ months' salary from 7th July 2011 to 16th September 2011, compensation and payment of damages, one month salary in Lieu of Notice, Severance Pay and Underpayment of the basic salary are also dismissed.

The Claims for Damages for illegal confinement and defamation of character were abandoned by the Claimant and are accordingly dismissed.

The Court however has found merit in the claims for overtime for extra hours worked on Saturdays and on Sundays that are not time barred by statute. Overtime for Sundays is calculated at double the salary rate prevailing at the time. Furthermore the Court finds that the Respondent owes the Claimant ten (10) days Salary in Lieu of leave days not taken.

Accordingly, the Respondents' will pay the Claimant the following:-

(a)Overtime worked on Saturdays between 8.00 a.m. and 5.00 p.m. for the period from 16th November, 2009 to 17th November, 2011 in the sum of Kshs.57, 024/-.

(b)Overtime worked on Sundays between 8.00 a.m. and 4.00 p.m. for the period from 16th November, 2009 to 17th November, 2011 at double the rate in the sum of Kshs. 99,792/-.

(c)Ten (10) days salary in Lieu of Leave days in the sum of Kshs.13,780/-.

Total Amount = Kshs.171,596/-.

In view of the outcome of the suite being partly in favour of the Claimant and partly in favour of the Respondents, each party will bear their costs of the suit.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 14th day of November, 2012.

Mathews N. Nduma

PRINCIPAL JUDGE