



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 683 of 2011

CHARO KAHASO THOYA APPLICANT

VS

ALBERT KIMANTHI MUTUA..... 1ST RESPONDENT

K-REP BANK LTD 2ND RESPONDENT

JUDGMENT

The Claimant herein Charles Kahaso Thoya has filed this claim against the Respondents herein Albert Kimanthi Mutua and K-Rep Bank Ltd. The claimant filed his memorandum of claim dated 18th April, 2011 on the 4th May contending against wrongful termination and refusal to pay his terminal benefits by the Respondents.

The claimant in his memorandum of claim stated that the 1st Respondent is the Chief Executive Officer of the 2nd Respondent herein who had engaged him on 1st July, 2005 as a Cook and other related duties which the 1st Respondent could allocate to him from time to time. Such related duties included cleaning, gardener, fishpond maintenance, green house maintenance, and domestic animal caretaker. His starting salary was Ksh.8000/= per month without house allowance or statutory deductions e.g. NSSF and NHIF. The claimant states that he used to report to his place of work as early as 6.45 a.m. and could leave as late as 9.30 p.m. and sometimes 10 p.m. The claimant avers that despite working long hours there was no payment of overtime at all.

The claimant further states that his services were terminated by the 1st Respondent without due regard to the Employment Law. The Claimant thereafter reported a dispute to the Ministry of Labour at Industrial Area. The Respondent was summoned there several times but he never turned up.

The claimant opted not to give evidence but to rely on his memorandum of claim filed and reply to defence and annexures. He was cross-examined by Mr. Kairaria for the Respondents and he stated that he was employed by the Respondent Albert Mutua and worked at his house and at other times at K-Rep branches when cleaning services were required. He says he used to work at Mr. Mutua's home alone but further cross examined he states that one Ngina Masha was also an employee of the 1st Respondent. He claims he knew Antony Njora and Erastus Mensa. He says he didn't cook for Mensa. He says Mensa was employed when Ngare left. Ngare's job was to assist the claimant. He says he left in January, 2011 after Mr. Mutua dismissed him. He said he now runs a kiosk but it is not his. The owner is in Hardy. He says he is now unemployed. He says he used to live in Mr. Mutua's premises but he could not stay with his family. He says for the six (6) years he worked, he could not go on leave, he says he does not know when

Ngare left. He says he used to go on offs on Sundays.

The Respondents on the other hand filed their defence and a counterclaim dated 27th July, 2011, on 28th July, 2011 through the firm of Gitonga Kamiti, Kairaria and Company Advocates. In the statement they deny that the 1st Respondent is the Chief Executive Officer of the 2nd Respondent having retired as Chief Executive Office of the 2nd Respondent in May, 2010. The 2nd Respondent says the claimant was not their employee and they have been wrongfully enjoined in the proceedings. The 2nd Respondent states that its joiner in these proceedings is vexatious, frivolous and gross abuse of the court process and ask the court to dismiss claimant's claim against it with costs.

1st Respondent further stated that he personally engaged the claimant as a domestic servant on 1st July, 2006 until February, 2011, when the claimant deserted duty. The first Respondent states that he provided the claimant with housing at the servant's quarters, meals, water and electricity free of charge during the course of employment. He says he also paid the claimant's salary promptly and allowed him to go on annual leave and public holidays throughout the period of employment. He says he also gave claimant afternoon offs on alternate days and other offs whenever the claimant wanted to go away from Nairobi.

The Respondent further states that in 2010, the claimant opened and started running a kiosk business at the Royale Club in Karen. The performance of claimant deteriorated and he started working for 2 (two) hours a day instead of the agreed 8. When Respondent inquired of this, the claimant got annoyed and decided to leave employment.

The Respondent further states that he had more than one employee at his residence in Karen and did not overwork the claimant as alleged. He says he treated the claimant with respect. The Respondent further denies that he even deducted NSSF and NHIF payments from the claimant's salary. The Respondent states that the claimant's claim must fail. The Respondents have instead made a counter claim against the claimant for a refund of one month's salary in lieu of notice and compensation for 480 hours not worked in the 4 months before the claimant left employment all totaling to Ksh.24,000/=.

Having heard all the parties herein, the issues for determination are:

1. Whether claimant was wrongfully and unfairly terminated by the Respondents.
2. If so, what remedies are available for the claimant.

There is ample evidence that the claimant worked for Respondent as a house servant. Whether claimant deserted duty or was sacked by Respondent is a matter of evidence, and in this case, it is the word of the claimant against Respondent and vice versa. From Respondents' evidence, claimant absconded duty after he started running a kiosk business. The claimant states that he was verbally told to stop working and not to report to work the following day. There is evidence claimant had given indicating he was the only one working for Respondent and was therefore overworked. In cross examination however it comes out that there were other house servants and so claimant's contention is a lie.

There is also a claim claimant had given asking he be paid a house allowance. It turns out that he was staying at the servant's quarters of the Respondent. Given these two scenarios, it is apparent that claimant cannot be relied upon as he appears to be untruthful.

I will therefore take the Respondent's word that the claimant resigned from work after he started running a kiosk business which claimant admits he was running. I do not find any wrong doing on respondent's part. In fact 2nd Respondent is wrongfully enjoined in this suit as there is no proof that the 2nd Respondent even employed the claimant.

Having said so, what remedies if any is the claimant entitled to.

I find the claimant was entitled to the following remedies.

1. I month salary in lieu of notice - Ksh.8,000/=
2. Severance pay of 15 days for
years worked = 4000×6 - Ksh.24,000/=

There is no proof of overtime worked nor offs and public holidays. The same is not awarded.

Total Awarded Ksh.32,000/=.

3. The counter claim is dismissed.

Dated, signed and delivered this 1st day of November, 2012.

HELLEN WASILWA

JUDGE

Appearances:

Mr. Charo Kahaso Thoya - Claimant in person

Mr. Kairaria of

Gitonga Kamiti, Kairaria & Co. Advocateds - for Respondents