



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.524 OF 2016

ELIZABETH AWUOR OTIENOCLAIMANT

VERSUS

CORE CONSTRUCTION LIMITED.....RESPONDENT

JUDGEMENT

In July, 2015 the respondent employed the claimant under a two and a half (2 ½) years contract in their construction industry earning ksh.101,800 per month which was subject to 5% tax deduction with a net salary of ksh.95,000.

The claimant worked from July 2015 to 10th February, 2016 and completed her probation period and was confirmed.

On 10th February, 2016 the claimant was called by one of the engineers, Robert Nyamongo and directed to solve/calculate how many 40 kn newton are in a tonne and this was sent through a group whatsapp to which the claimant sent an answer but the engineer rejected these answers and directed her to proceed and hand over her duties to another employee and get out of site and premises and t consider her contract terminated.

The contract terms required notice of 3 months before termination or payment in lieu thereof which was not done in this case. There were no reasons to justify termination of employment or payment of terminal dues.

The claim is for the following dues;

- a) 3 months' notice pay Ksh.285, 000;
- b) Leave allowance Ksh.55, 416.60;
- c) Service pays Ksh.221, 666.60;
- d) Payment for unfair termination of employment Ksh.1, 140,000;
- e) Payment of full salary for the remainder term contract 23 months ksh. 2,185,000; and costs.

The claimant testified in support of the claims made that she was employed on contract as site manager

and did her duties as required but Engineer Robert Nyamongo engaged her with questions over a whatsapp group expecting her not to know the answers save she did and her response were not taken well. This led to termination of her employment in a very inhumane and embarrassing manner through a group site. There was no justification and her terminal dues were not paid. The claimant had been on a term contract and had hoped to work to its end and renew the same. She was denied a fair chance to finish her contract and the claims made should be confirmed.

The response is that the claimant was not an employee of the respondent as alleged save she was appointed as site manager-consultant contracted and not employed.

The letter of appointment recognises the claimant as a consultant and was to be paid a fee of ksh.101, 800 subject to 5% withholding tax.

The claimant's hours of work were not fixed and were subject to work undertaken and she agreed on the nature of relationship as that of a consultant and not employee. The termination of contract was due to the claimant's breach of safety regulations which put the building under construction at risk which would have occasioned great loss to the respondent.

The claims made are not due as the claimant was not an employee of the respondent. The claim should be dismissed with costs.

Despite being served, returns filed the respondent did not attend at the hearing and therefore no evidence was called.

Both parties filed written submissions.

The pleadings, evidence and written submissions put into account, the respondent raised the issue that the claimant was not an employee and that she was employed as a consultant.

The employment relationship is therefore challenged. This is a matter crucial to these proceedings and shall be addressed first before the court can consider the claims made.

Both parties have filed the *Letter of Appointment for the Position of Site Agent*.

The claimant was appointed by the respondent as Site Agent for a period of 2 ½ years with effect from 1st July, 2015. It was agreed that *a consultancy fee chargeable by you during the said period shall be Ksh.101, 800 subject to 5% withholding tax.*

The parties also agreed that the claimant as *a Consultant you may not, without the written consent of the company* not to engage in other work and to ensure that information of the company which came to her notice and attention was kept confidential.

Was the claimant an employee of the respondent or a consultant/agent employed for a service?

Distinguishing features of whether one is a consultant or an employee are addressed in case law.

Under section 2 of the Employment Act, 2007 an employee is defined as follows;

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

A consultant on the other hand is defined as one who is self-employed, independent person who has a special skill or expertise or filed and who is engaged for work at a fixed fee.

In the case of **Scantly Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** the court held that an employee is one who is under a contract of service while a consultant and independent agent

is under a contract for a service.

In the case of **Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR** the court held that;

An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th Cheque and so on.

The parties herein were deliberate and intentional with regard to the nature of relationship. A contract was drawn to leave no doubts.

The claimant was engaged as *site Agent* and it was agreed that *consultancy fee chargeable by you during the said period be Ksh.101, 800 subject to 5% withholding tax.*

There is no other benefit to the consultancy as would be the case in employment.

The special features of an employee are missing. A person secured for a service is unlike one sourced as an employee.

One feature of an employee as against a consultant is payment of statutory dues. Independent contractors are responsible for own NSSF and NHIF and Kenya Revenue Authority dues in taxation. See In the case of **Abyssinia Iron & Steel Limited versus Kenya Engineering Workers Union [2016] eKLR.**

In the case of **Vitalis Oliewo K'omudho versus AAR Health Services Ltd [2016] eKLR** the court held that;

Some of the defining characteristics of the claimant's case is that he was a consultant; he had no salary but a commission payable on an override commission at 1.35%; he was subject to withholding tax at 10% and did not pay statutory deductions; the benefits at work were not applicable as the Claimant was to pay for his own medical cover, had no leave days; and the parties had a written contract that recognise the Claimant as a Consultant.

The claimant filed *Further List of Documents* dated 17th November, 2021 and therein has attached NSSF statement for the period 1st November, 2008 to 31st October, 2021 and the employer is noted as *Samar Technical Services*. this is not the respondent herein. This is not a primary record of employment on the face of the Letter of Appointment issued to the claimant by the respondent.

The claimant also attached the NHIF Member Data Summary. For the period of January, 2016 going back to August, 2015 the claimant are listed as under *Core Constructions Limited*. This is not a primary record of employment. without an employment relationship, one is allowed to secure health cover with NHIF.

A challenge on the employment claim was made in the response way back on 7th June, 2016. This ought to have been addressed instantly.

Despite the respondent not attending at the hearing, an issue of jurisdiction is imperative for the court to address at whatever stage and before judgement can issue. This has arisen in this case and these are the findings. the court finds the terms of appointment relating to the claimant and the respondent were purely commercial and which deny this court jurisdiction.

Accordingly, on the reasons set out above, there is no employment relationship between the parties herein, court is without jurisdiction and must down its tools. Suit is hereby struck out. Each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: OKODOI

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