

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 133 OF 2016

MICHAEL NG'ANG'A RUIRII.....CLAIMANT

VERSUS

KARANI MUTITU.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent and averred that he was employed as a driver in February 2014 and was earning a gross salary of Kshs. 15,000/- a month. The Claimant averred that on 28th April 2016 the Respondent failed to allocate him any duties or admit him at his place of work and stopped payment of his salary. The Claimant averred that the actions of the Respondent amounted to unlawful dismissal and unfair termination of employment. He thus sought a declaration that the termination was unfair and unlawful, one month's salary in lieu of notice, off days, holidays, house allowance, annual leave days and damages for the unlawful dismissal. He also sought costs and interest of the suit.

2. The Respondent filed a defence in which it was denied that the Claimant was employed on the date and under the terms averred in the statement of claim. The Respondent averred that the Claimant was only allowed to drive the Respondent's vehicle on a need basis and the Respondent would agree with the Claimant on the wages to be paid for the specific work done. The Respondent averred that he stopped engaging the Claimant after the Claimant became unreliable and denied that there was any notice supposed to be issued to the Claimant and/or there was a place of work where the Claimant would be admitted. The Respondent averred that the Claimant was never an employee as contemplated under the Employment Act and cannot therefore have been unlawfully terminated.

3. The Claimant and the Respondent both testified. In his testimony, the Claimant stated that he was employed by the Respondent as a driver and worked both day and night. He testified that he was dismissed and his salary stopped. He stated that he would drive the lorry to far places such as Lodwar, Mombasa and Uganda as he used to transport goods. He testified that public holidays would find him on the road and that he never went on leave. He stated that he was not paid for the overtime, the holidays or weekends worked and was not paid house allowance. He stated that after dismissal he was not paid service pay as no money was paid after termination. He testified that no NSSF dues were paid.

4. In cross examination he stated that he only had produced the demand letter and that there was nothing else attached to his claim. He testified that he had not seen that the Respondent had denied employing him. He stated that in his claim he did not aver that he used to drive to Mombasa, Uganda and Tanzania. He was shown the statement filed before court along with the claim and denied that it was his statement. He was asked whether he was a 'squad driver' and he stated that he was paid at the shop in cash and did not sign any acknowledgement. He stated that he would go to the farm and collect farm produce and deliver. He testified that he used to park the vehicle at the hardware shop in Karatina. In re-examination he stated that he was required at work daily and would go to work daily.

5. The Respondent was called and he testified that he was a businessman and that he would call the Claimant and give him work to transport goods from place to place. He stated he did not have a transport company but has a lorry which transports goods. He said that he would pay the Claimant per job and it was after completion. He testified that it was not frequent and that he would only give the Claimant work when the Claimant was available and there was work to be done. He denied paying a monthly salary and stated it was per job. He testified that he did not dismiss the Claimant as he had not employed the Claimant. He stated that the Claimant would go and return the vehicle after delivery. He testified that the Claimant took the vehicle to deliver and the Claimant did not return the vehicle but another driver and he stopped giving the Claimant any work. He stated there was no monthly employment and there were times they would stay for long without seeing each other. In cross examination he testified that he used to give the Claimant work as a driver. He stated that he did not have any document showing the work done or any proof of payment. He stated that he used to pay per trip and that his vehicle never went out of the country. He testified that he would call the Claimant when needed and assigned work. He stated that the vehicle was brought by another driver and that the vehicle was intact. He said that from that day he never gave the Claimant any tasks to date. He testified that he never explained to the Claimant as the Claimant never came to his place but came to court. He stated that from 2014 he would call and give the Claimant tasks and there were many times he would call the Claimant and he would not be available. He said that he would pay Kshs. 1,000/- for Nairobi and Kshs. 3,000/- for Mombasa as it was per trip and if the vehicle had a breakdown they would communicate by phone. He testified that he would pay for food and accommodation for the days when there was breakdown and the pay was per trip. In re-examination he testified that the vehicle was brought by someone else. He stated the payment was per trip and it was negotiated as the trips were not to the same place.

6. The parties were to file submissions and the Claimant did not file submissions. The Respondent submitted that the Claimant had filed a claim without any particulars and that in cross-examination he denied authoring the statement in support of the claim. The Respondent submitted that the Claimant did not prove his claim. The Respondent relied on the case of **Jennifer Nyambura Kamau v Humprey Mbaka [2013] eKLR** and submitted that the Claimant did not demonstrate that he was indeed an employee of the Respondent in any way and that the claim was absurd, imaginary and untrue. The Respondent submitted that the Claimant was engaged on need basis and was paid upon performing the tasks assigned. The Respondent submitted that the Claimant ceased to be given tasks when the vehicle was brought back by a stranger. The Respondent submitted that the Claimant was not his employee.

7. In any dispute where there is an unlawful dismissal alleged, it is the duty of the Claimant to prove there was unlawful dismissal and the Respondent's burden is to show there was reason for the dismissal. In this claim it was asserted that the Claimant was dismissed while the Respondent asserted there was no dismissal as the Claimant was not an employee. The Claimant did not avail any proof of employment and it was difficult to believe he was ever an employee of the Respondent. He even denied the statement filed alongside his claim. As his testimony did not line up with his averments he failed to prove his case on a balance of probabilities and having failed to do so there is only one outcome – dismissal. Suit is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 16th day of December 2019

Nzioki wa Makau

JUDGE