Ulalo v Nation Media Group (Cause 292 of 2018)
[2024] KEELRC 574 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 574 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 292 OF 2018

B ONGAYA, J

MARCH 15, 2024

BETWEEN

IBRAHIM ULALO ..... CLAIMANT

AND

NATION MEDIA GROUP ..... RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of Claim dated March 12, 2018 through Njonge & Co. Advocates. The claimant prayed for judgment against the respondent for:
   i. A declaration that the claimant's termination was wrongful and unlawful.
   ii. Damages for unfair, illegal, unlawful and wrongful termination of employment.
   iii. An order directing the respondent to issue the certificate of service in favour of the claimant.
   iv. The respondent to pay the cost of the suit.
   Interest on (i), (ii) and (iii) above at Court rate.
   v) Any other relief Court may deem fit.
2. The Respondent filed a reply to Memorandum of claim dated March 27, 2018 through Iseme, Kamau & Maema Advocates. The respondent prayed that the claim be dismissed with costs.
3. The claimant's case was that he was employed by the Respondent as a freelance sales executive between the year 2010 and 27th July 2017.
4. That on 27th July 2017 the claimant was unlawfully summarily dismissed from his employment.
5. That despite the dismissal, the respondent did not pay the claimant his terminal dues as per the employment contact.

6. The claimant particularised malice and unfairness by the respondent as follows;

   a. Terminating the claimant's services without notice.

   b. Terminating the claimant's services without giving him an opportunity of being heard.

   c. Terminating the claimant's services without issuing warning letters.

7. The claimant pleaded and particularized his terminal dues as follows;

   a. One Month's salary in lieu of Notice.....Kshs. 150,000/=

   b. Leave days for 8 years .....(Kshs. 150,000/30 x 26 leave days x 8 years) = Kshs. 1,040,000/=.

   c. 30% monthly deduction on the salary 12 x 8 years' x 30/100 x Kshs. 150,000 = Kshs. 4,320,000/=

   d. Service gratuity at the rate of 15 days for each completed 8 years = Kshs. 150,000 x 15/30 x 8 years = 600,000/=

   e. Twelve months' gross salary for compensation for loss of employment..... (Kshs. 150,000 x 12 months) = Kshs. 1,800,000/=

   f. Certificate of service.

8. The respondent in the statement of response stated that through a letter dated 24.03.10 it contracted the claimant as a freelance sales executive and exhibited the letter and payslips as evidence.

9. That in the terms if engagement, either party was allowed to terminate the arrangement by giving 24 hours written notice.

10. The respondent pleaded that the termination of the claimant's employment was not unlawful, illegal, and malicious and put the claimant to strict proof.

11. That it is due to unsatisfactory performance and failure to meet his targets that led to the termination after issuance of notice of more than 24 hours.

12. The Respondent further pleaded that the claimant is not entitled to any terminal dues because he was paid all his commissions.

13. The respondent concluded to urge that the claimant is not entitled to any of the reliefs sought and that it should be struck out with costs.

14. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.

15. The 1st issue is whether the parties were in a contract of service with the consequence that the *Employment Act*, 2007 applied, or that there was no such contract but only consultancy. The respondent submitted that the contract expressly submitted that the contract provided that the claimant was an independent contractor and is bound accordingly. For claimant it is submitted that he did not work for himself but was under the respondent's control and was also on the payroll with a staff number and on the respondent's intranet. The Court agrees with the claimant that existence of employment contract or even consultancy is a matter of fact based on relevant evidence and not merely what is stated in the contract of service. The Court follows the decision by the Court in *Edward*

Ngarega Gacheru v Nation Media Group Limited [2019] eKLR where in exactly similar circumstances it was held,

> " In the present case, the Court sees no difficulty in finding that the parties were in a contract of service. First the letter by KRA to the respondent dated November 20, 2008 confirmed that permanent sales executives and freelance sales executives were subject to tax deduction because they were both falling under "contract of service". The respondent then acted upon that letter, deducted, and remitted the PAYE with respect to its freelance sales executives like the claimant. The respondent has pleaded and confirmed that if the claimant had been a consultant, then under section 35(3) as read with the 3rd schedule of the *Income Tax Act*, the legitimate action would be to recover 5% withholding tax. The evidence was that PAYE and not 5% withholding tax was deducted from the claimant's pay. Second, the evidence is that the claimant was provided the facilities to work such as official email, work station at the respondent's office, was subject to the respondent's workplace regulation and was subjected to internal appraisals. Obviously he did not work for himself but for the respondent – he was not a consultant. Third, the claimant was subjected to procedures and practices consistent to a contract of service – he had a staff number, he was on the payroll, he was appraised, he was on respondent's payroll, his working hours were regulated and terminologies such as staff, employee and certificate of service as well as a notice of termination were invoked. It was clearly employer-employee relationship. The claimant was subject to the respondent's control, he was integrated in the respondent's service, and he did not work for himself but clearly for the respondent."

16. Further in that case the Court held,

> "The Court holds that by the contract stating that parties were in consultancy or independent contracting and expressly stating that it was not a contract of service or employment relationship, the employer – employee relationship was not thereby extinguished or waived. The existence of a contract of employment is a matter of fact as it is a matter of law and once the salient features of the relationship are established, it is irrelevant that parties expressly or impliedly agree to the contrary. Parties are at liberty to agree upon such terms and conditions of their relationship and not meaning the law puts to the nature of the accruing relationship unless the law allowed them to vary the prescriptions or such meaning given in the law – so that parties cannot agree and contract beyond matters within their freedom to contract such as the meanings prescribed by law. The Court will therefore look at all the circumstances of the contract, its implementation, and the conduct of parties to give the lawful meaning to the intentions and nature of the emerging relationships between parties to the contract. While making that finding the Court reckons that it is for the employer under the *Employment Act*, 2007 to draft or draw the contract and the employees will not be faulted in signing contracts which are carefully designed by employers to defeat the employees' minimum protections and safeguards under the Act. Contracts of service which are expressly camouflaged as not being such contracts (like in the instant case) will be smoked out as inconsequential to the extent that they are rectified and the minimum terms of service in the *Employment Act*, 2007 are applied as appropriate."

17 The Court finds that as submitted for the respondent parties are bound by their contracts and are further bound by statutory provisions so that their intention and conduct must measure to the statutory provisions. The *Employment Act* bound the parties.

18. The 2nd issue is on remedies. The Court finds that the termination was abrupt without due notice and hearing. The termination was without due process as envisaged in sections 41 and 45 of the *Act*. It was procedurally unfair. It was equally unfair on merits as without due process validity and fairness of the reason is evasive. In the circumstances, the claimant is entitled to relief of compensation. His retainer was fixed at Kshs. 45,000.00 per respondent's submissions. The claimant has not offered justification for the base of the amounts claimed. There was no evidence on his last payment. No submissions were made in that regard. The Court awards him 6 months salaries making Kshs.270,000.00 less PAYE. While making the award the Court has considered factors in section 49 of the *Employment Act*. The respondent honored the contract as signed and the claimant raised no grievance. He therefore contributed to his predicament. Leave claim will be declined just because the base of the claim is not specifically pleaded, particularized and then strictly proved as it is required as of trite law in special damages. Similarly, the service pay will not be awarded because the claimant has not offered the base of the figures claimed. The Court finds that no submissions were made to justify the other claims and which are deemed abandoned. The respondent will pay the costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a. Payment of Kshs.270, 000.00 by May 1, 2024 failing interest to be payable thereon at court rates from date of judgment till full payment,

b. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15TH MARCH 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE