Mungai v Avion Limited (Cause 972 of 2016)
[2023] KEELRC 399 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 399 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 972 OF 2016

BOM MANANI, J

FEBRUARY 16, 2023

BETWEEN

ROBERT MUGURO MUNGAI ..... CLAIMANT

AND

AVION LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant has sued the Respondent for alleged wrongful termination of his contract of employment. He alleges that the Respondent employed him sometime in April 2015 only to terminate his services without cause in January 2016. The Claimant therefore seeks compensation for unlawful termination.

2. The Respondent has disputed the claim. The Respondent denies that it ever engaged the Claimant's services as an employee. According to the Respondent, the parties were engaged on an independent contractor-client basis. Thus, the Claimant's suit is misconceived and ought to it be dismissed with costs.

Claimant's Case

3. The Claimant avers that around April 8, 2015 the Respondent offered him employment as a security guard. That he accepted the offer and begun working immediately. The Claimant asserts that his monthly salary was Ksh 10,000/- albeit paid in two equal installments: the first installment in the middle of the month and the other at the close of the month.

4. It is the Claimant's case that during the currency of his contract, he used to report to work from 6 pm until 6 am every night. The Claimant alleges that he used to work throughout the week including public holidays. It is his case that he was not compensated for working on public holidays. He further avers that he was not paid house allowance.

5. The Claimant alleges that termination of his employment was unlawful. To support this assertion, the Claimant states that he was not given notice before his contract was terminated. He further alleges that he was not given the reason why he was relieved of employment. The Claimant appears to suggest that the contract was terminated in January 2016.

Respondent's Case

6. The Respondent does not deny having entered into an oral arrangement with the Claimant for provision of security services. However, unlike the Claimant, the Respondent's case is that the arrangement between the parties was that of an independent contractor.

7. It is the Respondent's case that it allowed the Claimant to step into a security service provision gap at its premises on a temporary basis as the Respondent sourced for a security firm to offer the service. The Respondent denies that it thereby employed the Claimant.

8. According to the Respondent, the short-term nature of the relationship between the parties corroborates the fact that it was one of an independent contract rather than employment. According to the Respondent, the fact that the Claimant used to receive remuneration after every two weeks fortifies the contention that he was an independent contractor.

9. The Respondent denies having conducted an interview for the Claimant as would be the case when hiring an individual under a contract of service. Further, it is the Respondent's case that the Claimant was not enrolled for National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) contributions for the duration of his service because he was not the Respondent's employee.

10. The Respondent avers that the Claimant would sometimes fail to report to work for unexplained reasons a matter that greatly disrupted provision of security services at the Respondent's yard. That the Claimant failed to report to work for at least six (6) days between April 2015 when he begun working and July 2015 when he was discharged. That following these unexplained absenteeism, the Respondent terminated the Claimant's contract.

Issues for Determination

11. After evaluating the pleadings, evidence and submissions by the parties, the following appear to be the issues for resolution in the cause:-

    a. Whether the parties were engaged under a contract of service or a contract for services.

    b. Whether, if engaged under a contract of service, the said contract was unfairly terminated.

    c. Whether the parties are entitled to the reliefs sought in their pleadings.

12. Whether parties to a labour relation are engaged in an employer-employee or independent contractor-client arrangement does not, for the most part, depend on their individual perception of the relation. In determining the nature of the relation, it is often immaterial what the parties declared or thought it to be. To discern the type of labour relation that the parties have, the court must analyze the totality of the facts surrounding the relation against the applicable law.

13. Over time, the law has developed a number of tests that assist in distinguishing contracts of service from contracts for services. The distinction between the two contracts is critical because whilst the former enjoy protection and benefits that accrue from employment law, the latter do not. Contracts for services are regulated by the general law of contract.

14. Some of the tests that have often been deployed to distinguish between the two contracts are: the control test; the degree of integration test; the mixed test; the mutual obligations test; and the economic benefit or business reality test. As has been observed often times, not a single one of these tests can provide a conclusive answer to the paradox that is the distinction between the two contracts. As a result, the obtaining set of facts will, in large part, determine which test is most suitable in resolving the puzzle. More often than not, more than one test has to be deployed in the process. Indeed, this accounts for the evolution of the so called mixed test, a fusion of the control and degree of integration tests. (See *Omusamia v Upperhill Springs Restaurant* (Cause 852 of 2017) [2021] KEELRC 3 (KLR) for a discussion of this subject).

15. I will not go into analyzing the various tests in this judgment. I will move straight to interrogating which of the tests is suitable in determining the relation between the parties to this action.

16. Under the control test, the degree of control that the consumer of the service exerts over the service provider determines whether the contract is one of service or for services. The more the control that is exerted by the consumer of the service, the more likely it is that the relation between the parties is one of a contract of service. The converse is true for a contract for services.

17. The level of control is usually measured through parameters such as whether the client determines: the hours, time and place of work; the manner of executing the task at hand; and provides the tools for executing the task. In contracts of employment, the employer has a greater say in deciding where and when the employee works and the manner in which the work will be executed. In addition, the employer would more often be in charge of provision of work implements. The converse applies to contracts for services (*Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [2010] BTC 49).

18. What emerges from the foregoing is that in determining whether parties are working under a contract of service or a contract for services, the duration of their engagement may be of little relevance. Further the method of recruitment of the service provider may not be very material. As George Ogembo mentions in his book, ''*Employment Law Guide for Employers, Revised Edition*'', it does not really matter whether the service provider was appointed, head-hunted, or elected to the position he occupies. What is material is whether the ingredients in the degree of control test mentioned above can be discerned from the arrangement.

19. From the facts before me, it is apparent that the Respondent hired the Claimant to work as a security guard. It is not very material for purposes of determining whether the parties had an employer-employee relationship that in hiring the Claimant, the Respondent did not subject him to an interview.

20. It is clear that the Respondent controlled the hours and time that the Claimant was to provide this service. The Respondent directed the Claimant to work on the night shift between 6.00 pm and 6.00 am. It was not open to the Claimant to elect to guard the Respondent's premises during the day for instance.

21. The Respondent also determined the place the Claimant had to render the service. Although the Respondent had several quarries, it directed the Claimant to guard the one at Gachororo. It was not open to the Claimant, on his volition, to decide to guard any other of the several quarries.

22. Further, the Claimant was remunerated at the agreed intervals of every two weeks in return for the security services. This position agrees with the definition of the term ''employee'' in the *Employment Act* which is understood to mean ''a person employed for wages or a salary and includes an apprentice and indentured learner''. It is noteworthy that under section 18 (2) (c) of the *Employment Act*, an

employee engaged for a period that is in excess of one month may be paid periodically at the close of every month or part thereof.

23. The parties may have entered into the arrangement on a loose oral agreement. Further, they may have perhaps intended that the arrangement be for a fixed or temporary duration. However, this does not so to speak, render the relation as a contract for services. If the parties intended that the contract be for services, this should have been made clear, beyond peradventure, from inception of the arrangement.

24. Importantly, it is the Respondent who asserts that the Contract between the parties was one for services. It is correct to observe that it is the duty of the Claimant to prove that the parties had an employer-employee relation. However, once the Claimant provides evidence, on a balance of probabilities, tending to establish that the contract was one of employment, the evidential burden of proof shifts onto the Respondent in terms of section 109 of the *Evidence Act* to prove that the relation was one of independent contract.

25. From the record, the Claimant has been able to provide prima facie evidence that the contract between the parties was one of service. He has stated that the Respondent: directed the hours, time and place of work; and paid him a periodic wage.

26. With this evidence, the evidential burden shifted to the Respondent to controvert the Claimant's case by providing evidence pointing to existence of an independent contract. With respect, I have not seen this evidence. In the premises, it is my finding that the parties were operating under a contract of employment as opposed to one of an independent contractor.

27. The second issue for determination relates to whether, if engaged under a contract of service, the Claimant's contract was unfairly terminated. The answer to this question depends on the extent to which the Respondent observed the directions under sections 41, 43, 45 and 47 of the *Employment Act* in releasing the Claimant.

28. Under section 41 of the Act, an employer is entitled to terminate an employee on grounds of misconduct, poor performance or physical incapacity. However, before taking such decision, the employer must notify the employee of the charge against him in the presence of a co-employee or shop floor union representative and allow the employee a chance to respond to the charge. After hearing the employee and his witnesses, the employer must promptly communicate to the employee the decision that he has reached on the matter.

29. Under section 43 of the Act, the employer retains the burden of justifying the validity of the decision to terminate the services of an employee. This is despite the fact that section 47 of the *Employment Act* requires the employee to prove the unfairness of the termination. It has been observed that the effect of section 47 of the Act is to require the employee to only establish a prima facie case that the termination was unfair (*Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR). Once this is done, the evidential burden shifts onto the employer to justify the validity of the termination by: proving the ground or reason for the decision; and showing that the employment was terminated in accordance with fair procedure. Where the employer is unable to prove these facts, the decision to terminate is, by virtue of section 45 of the Act, deemed unlawful (*National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR).

30. The Respondent has asserted that the Claimant was guilty of absenteeism prompting the decision to terminate his services. However, no cogent evidence in support of this assertion was tendered. No evidence of the days on which the Claimant was absent from duty was tendered. No warning letters were presented in evidence to show that the Claimant had been cautioned against reporting to work late or not reporting at all.

31. There was no evidence to show that the Claimant was either served with a notice to show cause to explain why disciplinary action should not be taken against him for reporting to work late or that he was subjected to a disciplinary process as contemplated under section 41 of the *Employment Act*. It is therefore clear to me that in dismissing the Claimant from employment, the Respondent did not meet the minimum statutory requirements under section 43 of the *Employment Act*. Consequently, the decision to dismiss the Claimant was, in terms of section 45 of the *Employment Act*, unlawful. It is so declared.

32. The third issue for determination relates to whether the parties are entitled to the reliefs sought in their pleadings. This question shall be examined in the context of section 49 and other applicable provisions of the *Employment Act*.

33. The Claimant has prayed for service pay. Under section 35 (5) of the *Employment Act*, this entitlement presupposes that the employee has been in continuous service of the employer for at least one year. The rationale for this position is that computation of this entitlement is pegged on every year worked. The parties agree that at the time he was relieved of his contract, the Claimant had not served the Respondent for a year. Therefore, this claim fails.

34. In the witness statement that he adopted, the Claimant states that he was not paid house allowance. This statement is repeated in the demand letter that the Claimant produced as evidence. The fact that the salary paid to the Claimant was exclusive of house allowance is also pleaded in the Statement of Claim.

35. In response to the claim for house allowance, the Respondent's witness stated that the Claimant, who was living in the Respondent's neighborhood, was engaged on temporary basis as an independent contractor. The Respondent did not controvert the Claimant's evidence that he was not paid house allowance. Rather, the Respondent's case was built on the premise that since the Claimant was not an employee, he was not entitled to the benefits due to an employee including house allowance.

36. As has been demonstrated earlier on in this decision, the contract between the parties was one of service. Therefore, the Claimant was entitled to draw house allowance at the rate of 15% of his basic salary (see regulation 5 of the *Regulation of Wages (Protective Security Services) Order, 1998* as read with section 31 of the *Employment Act*).

37. Although the Claimant asserts that his services were terminated in January 2016, there was no cogent evidence to establish the exact date of his termination. In the premises, I will go by the Respondent's admission that the termination occurred in July 2015 three months after the parties had entered the relationship. I will therefore award the Claimant house allowance for the three months which works out to Ksh 4,500/.

38. The Claimant has claimed for payment for seven public holidays that he allegedly worked. However, he gave no particulars of these dates either in his pleadings or evidence. In the absence of this evidence, the claim is deemed as unproved. It is rejected (see *Ngunda v Ready Consultancy Limited* (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR)).

39. The Claimant also prayed for overtime pay. From his evidence, he used to report to work from 6 am to 6 pm daily. This evidence was not cogently countered by the defense.

40. The fact that the Claimant was working 12 hours in a day means that he was doing 84 hours a week. Under regulation 6 of the *Regulation of Wages (Protective Security Services) Order, 1998*, those involved in the provision of security services are required to clock a maximum for 52 hours per week. This means that the Claimant worked 32 hours over and above the maximum prescribed time every week and 128

hours more every month. In the three months he was with the Respondent, the Claimant was engaged for 384 hours overtime.

41. Regulation 7 of the *Regulation of Wages (Protective Security Services) Order, 1998* deals with overtime pay. It requires an employer who engages an employee for overtime to pay such employee overtime pay equivalent to the employee's one and half hourly rate for every hour the employee is engaged on overtime.

42. The Claimant's monthly salary was Ksh. 11,500/. Therefore his daily rate was Ksh. 383/. The hourly rate was Ksh 16. Thus, one and a half his hourly wage is Ksh 24. The overtime due to the Claimant for the overtime hours of 384 is thus Ksh 9,216/. This amount is awarded.

43. The Claimant was also entitled to notice of one month or salary for one month in lieu of notice in terms of sections 35 and 36 of the *Employment Act*. There is no evidence that he was granted this entitlement at the point of his termination. Consequently, I award him Ksh 11,500/ being gross salary in lieu of one month notice.

44. As noted above, the Respondent did not prove the validity of the grounds to terminate the Claimant's contract. Accordingly, the Claimant is entitled to compensation for wrongful termination under section 49 of the *Employment Act*. I have considered that the parties had not worked together for long. Consequently, and considering the indicators under section 49 of the *Employment Act*, I award the Claimant gross salary for six months as compensation for wrongful termination. This works out to Ksh. 69,000/.

45. I award the Claimant interest on the above amounts at court rates to run from the date of institution of the suit till payment in full.

46. I award the Claimant costs of the case.

47. I order that the award is subject to the applicable statutory deductions in terms of section 49 of the *Employment Act*.

48. I direct the Respondent to issue the Claimant with a Certificate of Service under section 51 of the *Employment Act*.

Summary of Award

a. The contract between the Claimant and Respondent was one of employment and not independent contractor.

b. The Respondent unlawfully terminated the Claimant's contract of employment.

c. The Claimant's prayer for service pay is declined.

d. The Claimant's prayer for pay for holidays worked is declined.

e. The Claimant is awarded unpaid house allowance of Ksh 4,500/.

f. The Claimant is awarded overtime pay of Ksh 9,216/.

g. The Claimant is awarded salary for one month in lieu of notice to terminate, that is to say Ksh 11,500/.

h. The Claimant is awarded compensation for wrongful termination equivalent to his gross salary for six months, that is to say, Ksh 69,000/-

i. The Claimant is awarded interest on the aforesaid sums at court rates from the date of institution of the suit till payment in full.

j. The amounts awarded are subject to the applicable statutory deductions in terms of section 49 of the *Employment Act*.

k. The Claimant is awarded costs of the case.

l. The Respondent is ordered to issue the Claimant with a Certificate of Service under section 51 of the *Employment Act*.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF FEBRUARY, 2023

B O M MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI