



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 555 OF 2017

JUNE DEZINA VEL.....CLAIMANT

=VERSUS=

THE NATION MEDIA GROUP LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant herein a renowned Radio presenter sued the Respondent vide a statement of claim dated 21st March 2017, claiming that on or about July 2015, the latter offered her employment as a radio presenter at a monthly salary of Kshs. 100,000. She claimed that a few months into the employee-employer relationship, the Respondent's General Director abruptly directed her to stop hosting the show that she was until further notice. The Claimant gives a picture of the relationship as one that was anchored on a contract of service.
2. The Respondent's position is diametrically opposed to that of the Claimant. It asserts that which was between it and the Claimant was a relationship that was founded on a contract for service as opposed to a contract of service.
3. The success or failure of the Claimant's case herein shall turn on the Court's determination as to whether the relationship between the protagonists herein was one created on a contract of service or a contract for service.

The Claimant's case.

4. The Claimant impleaded the Respondent herein through the statement of claim herein above mentioned, seeking for the following orders and reliefs against it, namely:
 - a) A declaration that the termination of the Claimant by the Respondent was unfair.
 - b) Leave pay amounting to Kshs. 75,000.
 - c) Salary for 9 months worked, Kshs. 900,000.
 - d) Damages for unlawful dismissal equivalent to 12 months, Kshs. 1,200,000.
 - e) An order that the Respondent do issue the Claimant with a certificate of service.
 - f) Costs of this suit.
5. Contemporaneously with the filing of the statement of claim, the Claimant filed a witness statement, and a list of documents under which the documents that she was to place reliance on in her case were filed too. At the hearing, the Claimant opted to adopt the witness statement as her evidence in chief. She however gave a brief oral testimony in addition to clarify on areas that she considered required a clarification. The documents were admitted as her documentary evidence.
6. The Claimant stated that on or about the month of July 2015 she met a friend of hers, Harrison Mwaura to whom she disclosed that she was looking for a job. This friend referred her to Timothy Oriedo, the General manager QFM, a radio station owned by the Respondent. She further stated that Timothy Oriedo was well known to her as they had worked together for many years at Royal Media Services, though in different capacities.
7. Consequently, she met Timothy (hereinafter referred to as the General manager). She presented her resume for employment as a Radio

presenter, and had a discussion on the different programmes that she was able to host. At the end of it all, the General manager promised to call her back.

8. True to his word, the General manager later called her to his office, she obliged. The following day she went to the office whereat she met him with three men from the Sales department. He informed her that CMC was coming in to sponsor Taarab show.

9. The Claimant avers that she was tasked by these gentlemen to come up with the show's name and she suggested *Mazagazaga Ya Taraab*, and the name was settled on.

10. She alleged that later on she was given a first assignment, the promotion of Ford Ranger double cabin pick-ups for CMC. She contended that after the promotion she went back to the General manager asking about her employment contract, making it clear that she was not going to start airing the show without one. At this point the General manager sought to know from her what her salary expectations were. Her indication was Kshs. 100,000 (One hundred thousand).

11. Consequent to the deliberations, the General manager urged her to sign a temporary contract that he termed a holding contract; promising that one that captured the intentions of the parties was to be signed later in the month of August, 2015, when budgets for the Respondent company were prepared.

12. She asserted that in the 1st week of September 2015, she went back to the General manager on the issue of contract, only to be told that the same was not yet ready. She was however urged to continue with the show. She acceded and continued presenting using her own music.

13. The Claimant contended that no salary or allowances were paid to her during the whole period she was awaiting the signing of the contract. That at one time the said General manager assured her that the contract was going to be backdated.

14. She further stated that in December 2015, the General manager handed to her a contract document wherein it was indicated that she was offering services to the Respondent for Radio commercial production, event organising and management, concept development and presentation, among other services, and that she was to be paid on commission basis.

15. That this did not settle down well with him. She got prompted to approach the General manager, complaining that what the contract document contained was not a true reflection of the intention that was between them. That she had offered her services through that period as a Radio presenter for a salary that had been verbally agreed on.

16. As at this time, she had worked without receiving any pay. She hoped that the General manager would intervene in her favour but the contrary happened. The General manager called her and informed her that she should stop hosting the show until further notice.

17. She asserted that her employment got terminated abruptly. The termination was without reasons as she was not given any.

18. She states that she never went to QFM to work as an attachee, a trainee or an intern or a commercial consultant or marketer, but as a well known senior and experienced Kiswahili Radio presenter with an established following among Kiswahili Radio listeners across the country and beyond.

19. In her oral brief testimony in Court, when the matter came up for hearing, the Claimant testified that she executed the written agreement because she trusted the General manager and his word that the Respondent was to employ her.

20. She further stated that the Respondent never at any time informed her that her work was not profitable.

21. She alleged that she stopped pushing for the letter of employment on the General manager's word, that the same was to be issued after the Radio budget was available.

22. The Claimant tendered the following documents as her documentary evidence, two payslips for the month of May 2013 and 2014 by her former employer, an email dated 8th May 2015 to one Susan, an email to the General manager dated 28th August 2017, a certificate of service dated 3rd February 2015 by its former employer, a newspaper advertisement for Sunday August 23, 2015 and a demand letter dated 13th February 2017 by her counsel.

23. She summed up her evidence by stating that the termination of her employment was unfair therefore entitling her to the reliefs she has sought in the pleadings.

24. The Claimant was cross-examined by counsel Ms. Athiman for the Respondent. She stated that she started working with the Respondent in August 2015. That before then she had worked for citizen (Royal Media Services) up to early 2015.

25. She further stated that Mr. Timothy Oriedo was not the Human Resource manager of the Respondent company and that the deliberations between her and him, did not at all involve its Human Resource management department.

26. She reiterated that her former colleague introduced her to the General manager towards the end of July 2015.

27. She stated that she signed the agreement in December 2015, and that before signing the same, she read it and understood the contents thereof. The agreement was to take effect on 1st August 2015. Clause 2 of the agreement stipulated the terms upon which she was coming on

board. She executed the agreement.

28. She acceded to the suggestion by counsel that clause 3 of the agreement provided for the terms of payment.

29. The Claimant stated that during the period she was with the Respondent, she did not make any sales. She further stated that according to clause 13 of the agreement, the agreement superseded any other prior oral or written.

30. That she would go to the studio every Sunday from 1.00 p.m. to 5.00 p.m. She did not do any other show. The rest of the work she would do her own things.

31. Under re-examination by her counsel Mr. Maina, the Claimant asserted that the agreement was signed as a result of the pressure that she had exerted on the General manager.

32. That she did not go to the Respondent looking for a job of a marketer. She signed the agreement because the General manager requested her to trust him. The employment contract was to follow.

The Respondent's case.

33. The Respondent, in response to the Claimant's claim filed a reply to the statement of claim dated 27th day of November 2018. It denied the claim and the Claimant's entitlement to the reliefs sought.

34. The Respondent presented one Sekou Owino as its witness. The witness opted to have the contents of the statement as part of his evidence in chief, testifying briefly in Court to make a few clarifications on the same and explanations on the document that was filed under the list of documents dated 27th November, 2018.

35. The witness stated that the Claimant approached the Respondent seeking an internship position where she would create and present Taarab music on a Radio special program and in exchange the Respondent would shoulder the cost of airing the program. The witness further stated that the Claimant proposed that if the envisioned program was to attract sponsorship and gain public attraction, then the profits flowing therefrom would be shared between the parties. The Claimant maintained that she required a written contract in order to authenticate her affiliation with the Respondent and attract sponsorship.

36. The witness stated further that the Respondent considered the Claimant's proposal. However, it had challenges to proceed with an arrangement between it and the Claimant as proposed by the latter. It instead decided to engage her in the terms that were put forth in an agreement dated 1st August 2015, inter alia:

a) The Claimant was engaged as a consultant having a background in Radio Commercial Production, Events Organization and Management, Proposal, Concept Development and Presentation Strategic Management, Design and Graphic, Copywriting and /Creative Radio related services, and provided services to the Respondent on this basis – *Clause 2*.

b) The Claimant was to be paid a fee equivalent to twelve and one half percent of the order value net of agency commissions and taxes, for each satisfactorily completed concept that is conceptualized and sold by her – *clause 3*.

c) A concept fee of two and one half (2.5) of the order value net of the agency commissions and taxes would be paid in the event the Respondent's sales team sold and actualized the consultant's idea.

d) There would be no payment for concepts that did not actualize hereunder.

e) The agreement was for a specified period of one year unless or until terminated by either party giving to the other less than 30 days prior written notice – *clause 7*.

f) It was understood between the parties the Claimant was an independent contractor and not an employee of the Respondent – *clause 8*.

g) The agreement superseded any prior written or oral agreements between the parties – *clause 13*.

37. The witness contended that the agreement was the only offer made to the Claimant. The agreement was express, the Claimant was engaged as a consultant, and not a Radio presenter, and her pay was contingent on the number of satisfactorily completed concepts conceptualized and sold by the Respondent's sales team, and not a fixed salary of Kshs. 100,000 alleged by her.

38. The witness stated that there were no concepts conceptualized by the Claimant and sold by the Respondent's sales team warranting any payment to the Claimant.

39. The witness asserted that the Claimant was not terminated, however, the agreement commencing 1st August 2015 was for a specific period of one year which lapsed on the 31st July 2016 and the Claimant made no effort towards having it renewed or extended.

The Claimant's submission.

40. Counsel for the Claimant in his written submissions stated that the Claimant is not a rookie in the industry. She worked with the Respondent's General manager for many years previously at Royal Media services. This the Respondent did not rebut. That she would easily distinguish between working as a consultant and a worker as an employee.

41. He further submitted that the Claimant was not given a written contract from the word go. She worked for five months before the consultancy agreement was presented to her. That the Respondent was referring to budgets, fortifies the Claimant's position that the contract was a holding contract.

42. He argues that the allegation that the Claimant was an intern is spurious and ridiculous. The Claimant is a seasoned Radio presenter as evidenced by her documents. It is unconceivable that the Respondent would take her as an intern. If she was an intern, how would she be offered a show to run at a media station?

43. The oral contract entered into between the Claimant and the Respondent through their General manager binds the Respondent. At minimum, the Claimant should be awarded 5 months' salary being the salary due to her for the said months, for which she worked before the execution of the so called "Commission Agreement."

44. He further argued that the Respondent has not sufficiently rebutted the evidence as regards the oral agreement. It did not call Mr. Oredo with whom the engagement was with the Claimant, to testify.

The Respondent's submissions.

45. Counsel for the Respondent identifies two issues as the issues that present themselves for determination by this Court thus:

- a) The nature of the relationship between the Claimant and the Respondent; and
- b) Whether the Claimant is entitled to the remedies sought.

46. On the 1st issue, Counsel submitted that the Claimant misconstrued the nature of the relationship between herself and the Respondent to be that of employer and employee when in fact they were not.

47. It was submitted that the test for determining whether the relationship between the parties is a contract for service between two independent parties or a contract of service giving rise to an employer/employee relationship was set out in the case of **Maurice Oduor Oketch –vs- Chequered Flag Limited [2013] eKLR** where the Court held:

"In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employment by the parties in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 actually exists."

48. He further placed reliance on the holding in **Everest Aviation Limited –vs- Kehnya Revenue Authority [2013] eKLR** where Justice Kimondo held:

"In determining whether a relationship between parties is a contract for service between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of contract of work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical."

49. He cited further, **Halsbury's Laws of England Vol. 1 26, 4th edition** paragraph 3.

"..... the factors relevant in a particular case may include, in addition to control and integration; the method of payment; any obligation to work only for that employer, stipulation as to hours, overtime, holiday etc; arrangements for payment of income tax and national insurance contributions, how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who alternately bears the risk of loss and the chance of profit. In some cases, the nature of work itself may be an important consideration."

50. It was argued that clause 8 of the agreement was in provision clear and unambiguous. The Claimant was an independent contractor with respect to the Respondent not an employee. The Respondent expressly provided that it will not provide fringe benefits, paid vacation, or any other employee benefit for the benefit of the Claimant.

51. He submitted further that clause 3 of the agreement provided for the mode of payment to the Claimant. The Claimant would be paid commission for any revenue made and the Claimant was not entitled to a salary.

52. He asserted that the Claimant under cross examination admitted that she would only work with the Respondent once a week, that is on Sundays when airing the show called *Mazaagazaga*. She was at liberty to partake in other form of employment during the course of the week.

53. The Claimant was aware of the nature of the relationship between her and the Respondent. She willingly executed the agreement thus

confirming the relationship. She even continued working without protest after the execution of the agreement. She was all through agreeable to the terms of the agreement governing their relationship.

54. Parties are bound by an agreement they have executed and a court cannot redraw the same for them. Counsel cites the holding in the case of **James Heather Hayes –vs- African Medical Research Foundation (AMREF) (2014) eKLR** thus:

“..... It is not the duty of this Court to redraw agreements by parties. The Court can only come in to facilitate an interpretation and implementation of those contracts and no more.”

The Claimant has not demonstrated any justification for departing from the terms of the agreement. The Claimant is estopped from denying the terms and applicability of the agreement.

55. The Claimant’s case that there was an oral employment contract between the parties does not stand on firm ground. The agreement in clause 13 clearly excluded any other contracts that may have existed between the parties.

56. Counsel urged the Court to be guided by parole evidence rule, which posits that a written contract cannot be vitiated by an oral agreement.

57. On the last issue, counsel argued that the Claimant as an independent contract was not on a salary in any event, clause 13 of the agreement was express on this.

Analysis and Determination.

58. From the material placed before this Court, the following issues emerge for determination:

(i) What is the nature of the Claimant’s case as set out in the statement of claim?

(ii) Can a written agreement be executed between parties on a contractual relationship which was otherwise commenced orally?

(iii) What was the nature of the relationship between the Claimant and the Respondent?

(iv) Who should be condemned to pay costs of this suit?

Of the nature of the Claimant’s case.

59. In order to justly determine this matter, I am constrained to first consider what the nature of the Claimant’s case is as presented by her pleadings and eventually discern whether she made any effort to prove the same as to presented, bearing in mind the importance of pleadings and the implication of a party’s failure to stick to her/his pleadings.

60. In the case of **Aristide Marege Nyangau –vs- Lavington Security Limited [2021] eKLR**

On pleadings this Court stated:

“From the onset, it is important to state that the whole purpose of a pleading, be it a statement of claim, defence or reply is to define the issues between the parties, to confine the evidence of the trial to matters relevant to those issues, and to ensure that the trial proceeds to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from pleadings. Put in another way, a party should know in advance, in broad outline the case he will have to meet at the trial.”

No doubt, numerously judicial attention has been given on the importance of pleading and the implication on a party’s dwelling on matters not pleaded or that cannot be ascertained from its pleadings. In Adetoun Oladegi (NIG) Limited –vs- Nigeria Breweries PLC S.C 91/2002, Judge Pius Aderem, J.S.C. expressed himself:

“..... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in pleadings, or put in another way, which is at variance with the averments of pleadings goes to no issue and must be disregarded.”

61. This Court still stands by this position.

62. In the statement of claim, the Claimant sets out the principle issue for determination:

“Issue – wrongful / unfair termination of JUNE DEZINE VEL.”

63. The Claimant pleaded that her employment was terminated unfairly or unlawfully in breach of section 45 of the Employment Act as no valid reason was given by the Respondent for the termination. Too that the termination was a violation of Article 41 (1) and 47 of the Constitution in that it violated the Claimant’s right to fair labour practice and the right to reasonable administrative action.

64. Flowing from this, the Claimant sought for *inter alia* a declaration that the termination of her employment was unfair.

65. I have carefully considered the Claimant's evidence presented by her to this Court, I am prepared to conclude as I hereby do that the Claimant did not make any effort to direct her evidence towards establishing her claim as pleaded.

Of whether a written agreement can be executed between parties on a contractual relationship which was otherwise commenced orally in the first instance.

66. From the Claimant's contentions, I garner her thinking. That this Court should consider her relationship with the Respondent in two phases, 1st the one for the period July 2015 to December 2016 that allegedly thrived on an oral agreement, second that of the period between January 2016 to the time of termination guided by a written agreement. The written agreement would not have a retrospective effect therefore.

67. Though the Claimant in her pleadings was silent on the agreement that was executed as between them on the 7th December 2015, and that it had an effective date, 31st August 2015, she under cross examination admitted its existence, and the being of the effective date.

68. In her evidence, one sees nothing that can be basis for creation of an impression that she was impaired in any manner from understanding the contents of agreement before executing the same. She has to be bound by the terms of the contract wholly.

69. An agreement/contract executed by parties, is a formal expression of the intention of the parties thereto on a relationship created or to be created between them, and how the sails of the relationship shall be guided during the currency of the same. I see no problem in parties who had commenced a contractual relationship orally, to by consensus do and execute a written contract depicting that prior to the written contract they were operating on terms that are similar, to those that they shall as from the date of execution of the agreement.

70. Consequently, it is untenable for the Claimant to argue that the contract would not be said to have taken effect on the 31st August 2015.

Of the nature of the relationship between the Claimant and the Respondent.

71. The contract dated 7th December 2015, which the Claimant does not deny executing, expressly provided for the nature of the contract that was created thereunder between the parties. Clause 8 thereof provided:

“It is understood by the parties that the consultant is an independent contractor with respect to the company, and not an employee, THE COMPANY will not provide fringe benefits, including health insurance benefits, paid vacation, or any other employee benefit, for the benefit of the consultant.”

72. This Court cannot hold otherwise than is clearly expressed by the parties in their agreement. To do so would amount to rewriting an agreement for the parties, a thing that cannot sit well with the higher calling of this Court, dispensation of justice.

73. The parole rule will not allow the Claimant to urge this Court successfully to look at the term(s) of the agreement in any other manner, other than expressly provided for therein. Section 98 of the Evidence Act, Cap 80 Laws of Kenya provides:

“Where the terms of any contract or grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representative in interest, for purposes of contracting, varying, adding to or subtracting from its terms.”

A reinforcement that the Claimant cannot be successful in her bid.

74. The effect of the rule was appreciated in the case of **George Musindi & 2 others –vs- Small Enterprises Finance Co. Limited [2007] eKLR**, where the Court citing **Chitty on contract 29th Edition Vol. 12** stated:

“It is often said to be a rule of law that if there be a contract which has been reduced to writing, verbal evidence is not allowed to be given so as to add or subtract from, or in any manner vary or qualify the written contract the rule is usually known as “parole evidence.”

I am persuaded.

75. Having said this, I am not prepared to expend time to consider whether or not the traditional characteristics, and the others that Courts of law have identified of independent contracts, as submitted by counsel for the Respondent, were available in the relationship that were between the parties herein.

76. Even if I were, I would definitely find in the affirmative, considering the circumstances of the matter generally, the terms of payment, and the specific exclusion of benefits to the Claimant, as was expressly provided for in the agreement.

77. In the upshot, I find that, the Claimant was an independent contractor, who was on a contract for service.

Of the reliefs.

78. The reliefs sought by the Claimant are in the nature of those that can only be availed to an employee under a contract of service. Having found that the Claimant was not such an employee, she is not entitled to a single of those reliefs that she has sought.

79. In the upshot, the Claimant's case is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JANUARY, 2022.

OCHARO KEBIRA

JUDGE

In Presence of

Mr. Maina for the Claimant.

No appearance for the Respondent.