



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before CAUSE NO. 1355 OF 2016

Hon. Lady Justice Maureen Onyango)

BENARD B' KONES NDIEMA.....CLAIMANT

VERSUS

TWIN OAKS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant instituted the matter herein vide a claim dated **1st July 2016**. In the said claim avers that he was unlawfully and unfairly terminated from employment. That the Respondent failed to give to the Claimant proper factual and genuine reasons for terminating his employment. He therefore seeks compensation for unlawful termination, terminal dues and certificate of service.

2. The Respondent filed its Memorandum of Defence dated **14th September 2016** in which it denies the allegations by the Claimant in toto. The Respondent avers that it never employed the Claimant but only engaged him through his business known as Wakobe Services as a professional independent contractor. It faults the authenticity of the staff identity card produced by the Claimant and contends that the same is a forgery and was never issued by the Respondent.

3. The suit was heard on 6th February, 2021 and 25th May 2021 when the Claimant testified on his behalf while the Respondent called one witness and closed its case.

Claimant's case

4. The Claimant testified that he stated working with Twin Oaks Hotel, the Respondent herein, in 2013. His employment was terminated on 26th January 2016. He as never told the reason for termination. He testified that he was on duty along Garissa Lodge with the Finance Manager in the company car which he was driving. The Finance Manager received a call calling them to the office. They reached the office after 5 pm when other staff had left. The General Manager asked them to see her the following day.

5. They reported for work the following day and worked until 5.30 pm when the Managing Director called him, the Finance Manager and Accountant and told him and the Finance Manager to hand over to the Accountant.

6. The Claimant testified that he was engaged as a Credit Manager, Debt Collection. His job entailed ensuring company claims from clients countrywide. He met clients in the process of debt collection, and was issued with an identification card.

7. The Claimant testified that he was not issued with a letter of termination, was not given notice, was not paid salary for January and was not paid in lieu of notice.

8. He testified that his salary was Kshs.42,000/- out of which Kshs.30,000/- was basic salary and Kshs.12,000/- was allowances. The salary was paid until July 2015 when the Respondent stopped paying the allowances.

9. The Claimant denied that he was paid as an independent contractor and insisted he was an employee. That at the time of employment he was reporting directly to the Managing Director as there was no Finance Manager. He testified that he was issued with the identity card to identify himself to customers when collecting debts.

10. Under cross examination the Claimant stated he was not issued with an employment letter. That his job title was credit manager, that the identity card issued to him refers to him as Wakobe Services.

Respondent 's case

11. The Respondent called one witness, Joseph Mwangi Gichung'wa who adopted his witness statement dated 14th January 2021 as his evidence in chief. He testified that he knew the Claimant as the owner of a company known as Wakobe Services which provides security services and debt collection services. The Respondent engaged the said company to provide the two services. He denied that the Claimant was ever an employee of the Respondent.

12. Mr. Mwangi further testified that all employees of the Respondent were issued with employment contracts. That the Respondent does not issue staff cards to its employees as it only has twelve employees who are well known to one another. It was his testimony that the job card produced by the Claimant was fake and was not issued by the Respondent. He produced copies of cheques issued to Wakobe Services and received by the Claimant.

13. On cross exam, Mr Mwangi stated that the services of the Claimant's company commenced in the year 2013. He was not aware that Wakobe Services was incorporated in the year 2015. He admitted that all the cheques produced in Court are dated 2015 and that he had not produced any cheque issued to Wakobe Services in the year 2013. That the Respondent did not request registration documents from Wakobe Services as all they needed was the services rendered by the said company.

14. On how the staff from Wakobe identified themselves to the Respondent's clients, Mr. Mwangi stated that the Respondent issued a letter indicating that Wakobe Services was collecting debts on behalf of the Respondent.

Submissions

15. The Claimant through his counsel on record submits that he had proved that the Claimant was the Respondent 's employee earning Kshs.47,000/- per month, that he had been issued with a Staff ID as he had to deal with clients on a one on one basis. That if indeed the Claimant was working as an independent contractor, he would be using something else as an identifier. On the allegation that the job card was fake, counsel submits that there was no complaint to any police station since 2016 when this matter was instituted and that these unfounded claims are meant to deflect the focus of the matter. Counsel relies on the definition of an employee as provided for under Section 2 of the Employment Act which defines an employee as follows;

“...means a person employed for wages or a salary and includes an apprentice and indentured learn...”

16. Counsel submits that the Claimant has proved that he did not work his own hours, he did not work for anyone else but was at the beck and call of the Respondent, received a monthly salary and though he was entitled to leave, his employer never granted the same and did not pay him in lieu. That the Respondent has no known contract with Wokabe Services and cannot prove relations with the said company. Counsel relies on the case of **Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa) Ltd [2014] eKLR** where the Court held as follows;

“...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 he 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...”

17. Based on the above, counsel submits that the Claimant has proved his case and is entitled to the prayers as prayed.

18. At the time of delivering this judgment, the Respondent had not filed its submissions.

19. Based on the above, counsel submits that the Claimant has proved his case and is entitled to the prayers as prayed.

20. At the time of delivering this judgment, the Respondent had not filed its submissions.

Analysis and determination

21. Upon consideration of the issues arising from the pleadings, the testimonies before Court and the submissions on record, the following issues arise for determination:

- a. Whether the Claimant was employed by the Respondent under a contract of service or as independent contractor;
- b. Whether the Claimant entitled to the reliefs sought.

Whether the Claimant was employed by the Respondent under a contract of service or as independent contractor

22. In support of his case, the Claimant produced a staff ID as proof that he was indeed an employee of the Respondent. The Respondent on the other hands aver that the Job card is not authentic and was not issued by the Respondent. That they had engaged a business owned by the Claimant, Wakobe Services, to offer security and debt recovery services. In support of its case, the Respondent produced cheques issued in favour of Wakobe Services and an invoice from Wakobe Services for day guard June 2015 and night guards June 2015 for a total of

Kshs.30,000/-. The cheques produced are for different amounts but all addressed Wakobe Services which the Claimant admitted during cross examination to be his company.

23. It is trite that it is the responsibility of the employer to provide employment documents like employment contracts and pays lips. This however does not mean that the Claimant has no onus of proving on a balance of probability that there was an employment relationship with the Respondent. In **Casmir Nyakuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR** the Court stated as follows:

“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term if employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obliged to serve a production notice.”

24. The Claimant did not deny the authenticity of the cheques or invoice. Further, the Claimant failed to offer any explanation why his company drew the invoice or received the cheques. In my view, this omission was fatal. The averments that the cheques were issued for payment of services rendered to the company by Wakobe Services remained uncontroverted.

25. The upshot is that the Respondent on a balance of probabilities has proved that the relationship existing between it and the Claimant was that of an independent contractor, with the Respondent on the one hand and the Claimant’s Wakobe Services enterprise on the other.

26. Having established that there was no employee employer relationship between the Claimant and the Respondent, it naturally follows that there was no unfair termination and the Claimant is not entitled to the reliefs sought. Accordingly, the claim is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF FEBRUARY, 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE