



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 212 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

LEONARD MUSITSA ENDOLI.....CLAIMANT

VERSUS

ODDS AND ENDS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant commenced this action by a memorandum of claim dated 6th February 2017 and filed on 7th February 2017 alleging that he had been wrongfully and or unlawfully terminated by the Respondent on account of redundancy and refusal to pay terminal dues.

2. The Claimant's case is pleaded or follows:

3. That on or about August 2007, the Respondent employed the Claimant as a carpenter with his monthly salary raising up to Kshs.130,000/- per month. That he was unlawfully terminated in January 2016 without notice or payment in lieu and severance pay. The Claimant demands Kshs.3,562,000/- being the aggregate sum for:

- a) 12 months' salary compensation Kshs.1,560,000
- b) One month's salary in lieu of notice Kshs.130,000
- c) Unpaid house allowance at 15% of the monthly salary Kshs.1,872,000
- d) Leave days earned but not paid (30) Kshs.140,000
- e) Unremitted NSSF and NHIF for 8 years TBA

4. The Claimant prays for –

- (a) Accrued terminal dues of Kshs.3,562,000
- (b) General damages for breach of contract and loss of employment
- (c) Certificate of service
- (d) Costs of this suit and interest.

5. The Respondent filed its statement of response on 6th June 2017 stating that it engaged the Claimant as an independent contractor as opposed to a permanent employee and denies that the Claimant had a monthly salary of Kshs.130,000/-. That the Claimant had been given a task to complete a furniture item but performed poorly and when requested to make rectifications, the Claimant refused to do so and deserted work on his own volition.

6. The Respondent avers that the Claimant was remunerated based on the output and was terminated because he failed to deliver to the satisfaction of the Respondent. That the parties had agreed that the Claimant would be paid on the basis of each furniture item made to the

satisfaction of the Respondent.

7. It is averred that the claim is fictitious/untrue/false and fabricated. That sometime in 2015, the Claimant had shared his dissatisfaction with his performance as an independent contractor. That the Claimant was not terminated but abandoned employment after failing/refusing to make some rectification to a piece of furniture he had made and did not report to work again.

8. That the memorandum of claim does not disclose an unfair termination of employment or wrongful dismissal and prays for its dismissal with costs.

Evidence

9. The Claimant Mr. Leonard Musitsa Endoli adopted the written statement and testified that he was employed in August 2007 at Kshs.130,000/- per month. His work involved making household items such as tables, that were very expensive. He further testified that for the entire duration of employment he had neither a payslip nor a formal contract of employment. That he was paid twice every month around 15th and at the end of the month. He testified that he was terminated in January 2016 on the ground that he had damaged the Respondent's business by destroying a table which he was unaware of.

10. He further testified that on the material day, the Supervisor came to the workshop with the owner of the business and pointed at the Claimant who was directed to change and go home with no reason for termination or termination letter or notice to show cause. The witness speculated that he was terminated to give room for some young men he had trained who had now matured in the making of furniture.

11. That he was compensated by the Respondent's insurer for injuries sustained at work in 2010.

12. That he was terminated by one Niresh. That the amount specified in the document was his monthly salary.

13. The Respondent tendered no evidence and did not object to the closing of the Respondent's case on 16th December 2021 during the mention to confirm the filing of submissions and filed its submissions.

Submissions

14. The Claimant isolated four (4) issues for determination namely, whether the Claimant was a permanent employee of the Respondent and performed tasks assigned by the Respondent according to the requisite standards, nature of termination of employment and entitlement to the reliefs sought.

15. As to whether the Claimant was employed on permanent terms, it is contended that the Claimant testified that he was employed as a carpenter in August 2007 at Kshs.130,000 per month.

16. That the evidence was not challenged. That the Respondent adduced no evidence to the contrary. That the DOSH forms identify the Claimant as an employee and does not indicate the Claimant's wages. That the Respondent availed no documentary evidence in its possession to contradict the evidence on record.

17. It is submitted that the Claimant had discharged the burden of proof that he was an employee of the Respondent.

18. As regards tasks performed by the Claimant, it is submitted that the Claimant was wrongfully terminated by the Respondent in January 2016 when he was directed to leave the workstation without any reason and was not taken through disciplinary process and any process undertaken did not comply with the provisions of Section 40 and 41 of the Employment Act, 2007. In a similar vein, the Respondent did not issue a notice of termination.

19. As regards, termination, it submitted that the Claimant's termination was irregular and in contravention of the law specifically Section 45(1), (2) and (3) of the Employment Act. That the Claimant was not paid his dues and is thus entitled to the same in full.

20. On reliefs, it submitted that since the Claimant was not being paid house allowance the same is payable as is the one (1) month's notice pay.

21. On unremitted NSSF and NHIF, it is submitted that since the Claimant was not being paid that non-payment entitles the Claimant to severance pay or an order that the Respondent pays the deductions in full.

22. On the 12 months' salary for wrongful termination, it is submitted that the maximum award be made. Section 2 of the Employment Act is relied upon for the definition of redundancy.

23. The decision in **Tom Ndadema & another v Club click** is relied upon to urge that the provisions of Sections 41 and 45 of the Employment Act were not complied with.

24. The Respondent on the other hand submitted that the Claimant had not proved that he was a permanent employee of the Respondent since he led no documentary evidence to that effect.

25. The Respondent identifies three issues for determination as follows; whether the Claimant was a permanent employee who earned

Kshs.130,000/- per month, reason(s) for termination and entitlement to reliefs.

26. As regards employment and salary, it is submitted that the Claimant was not an employee but an independent contractor. That the Claimant has provided no evidence of the contract of employment or payslip. That the DOSH documents filed by the Claimant show that he was earning a cash wages of Kshs.46,000/-. That the Claimant is not candid and honest with the Court and has not shown equity. The decision in **John Njue Nyaga v Nicholas Njiru Nyaga & another [2013] eKLR** is relied upon to urge that he who comes to equity must do so with clean hands.

27. It is also submitted that the Claimant has not provided any evidence to show that he was in permanent employment and has tendered evidence showing that he was paid on a piecemeal basis. It is submitted that he was therefore not an employee as envisaged by Section 2 of the Employment Act, 2007. The decision in **Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance, [1968] 2 GB 497** is relied upon for the distinction between a contract of service and contract for services.

28. On the reason for termination, it is submitted that at common law, an employee is required to comply with the instructions of the employer on when, where and how to work. That the Claimant was requested to effect some rectification to some piece of furniture but refused to do so and deserted the work place.

29. Reliance is made on the writings of **G.H.L Fridman ‘The Modern Law of Employment, London: Steven and Sons [1963] at page 446** on the master servant relationship specifically with regard to performance of the task at hand, that he must act faithfully and in accordance with the interests of the employer.

30. It is the Respondent’s case that as the Claimant’s Supervisor, the Claimant had been given a task to perform but did so in a shoddy manner and refused or failed to make the necessary rectifications and deserted work.

31. As to whether the Claimant is entitled to the prayers sought, it submitted that the Respondent paid in full all monies due to the Claimant. That he was paid for work done as an independent contractor.

Analysis and Determination

32. The issues for determination whether: -

- a) The Claimant was employed by the Respondent under a contract of service or as an independent contractor;
- b) The Claimant’s contract of employment was unfairly terminated;
- c) The Claimant is entitled to the reliefs sought.

33. As to whether the Claimant was an employee or an independent contractor, it was the duty of the Claimant to demonstrate that he was employed under a contract of service. Section 2 of the Employment Act defines an employee as “**person employed for wages or a salary and includes an apprentice and indentured learner;**”

34. A contract of service is defined as “**an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;**”

35. In **Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR**, the Court expressed itself as follows: -

*“A distinction between an employee and an independent contractor depends on statute, and tests which have been set out case law. These tests include organisation/integration test conceived in context of the professional worker? See **Cassidy v Min. of Health [1951] 2 KB 343** and multiple or mixed factor test which was initially formulated in **Ready Mixed Concrete v Min. of Pensions [1968] 2 QB 497**.*

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 be 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.

36. In **Christine Adot Lopeyio v Wycliff Mwathi Pere [2013] eKLR**, Mbaru J. stated as follows: -

“The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also noting that most contracts for service are not written, the facts of each case are paramount and worth consideration as to the intentions of the parties to such a contract. This is more so due to the fact that in law a contract of service is well outlined with fundamental protections as this is clearly defined under the Employment Act, 2007 unlike the other contract for service. This is more so in view of the definitions of employee, employer and contract of service under the Employment Act, 2007 and the Industrial Court Act, 2011.

This differentiation relates to very fundamental issues noting that under a contract of service it customarily relates to an employee who is subordinate or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner...”

37. The Court is in agreement with these sentiments.

38. In the instant case, whereas the Claimant alleges that he was a permanent employee of the Respondent, the Respondent avers that the Claimant was an independent contract. Regrettably, none of the parties led evidence to establish the real character of the engagement they had.

39. On his part, the Claimant testified that he was employed by the Respondent in August 2007 at a monthly salary of Kshs.130,000/- and was given neither a letter of appointment nor payslip. That he was paid around 15th and end month. He testified that he was employed as a carpenter and used to make household items. That he was terminated in January 2016 by one Mr. Niresh by word of mouth. He was directed to change and go home.

40. It is noteworthy that the Claimant led no evidence to establish that this monthly pay was Kshs.130,000/- or whether he paid taxes or was a member of NSSF and NHIF. Relatedly, he was reticent on any payment made after termination if any.

41. As evidence of an employer/employee relationship, the Claimant provided copies of the Directorate of Occupational Safety and Health Services: Notice by Employer on an Occupational Accident/Disease of an employee (DOSH 1) form completed on 6th February 2010.

42. The employer indicated that the Claimant then aged 43 was its employee as a carpenter. The accident in question occurred on 31st January 2010 at 12.00 non at the workshop and by then the Claimant had served for two years. The Claimant was injured on the palm by the planner machine and was admitted at the Nairobi West Hospital on 31st January 2010 and discharged on 1st February 2010 at the Respondent's expense. He also testified that he was compensated by the Respondent's insurer.

43. The form indicates that the Claimant's cash wage (exclusive of overtime, house etc was Kshs.46,000/-). The Respondent did not contest the contents or authenticity of the DOSH 1 form. Significantly, this was documentary evidence on record.

44. The Respondent on the other hand maintains that the Claimant was not an employee but an independent contractor. Sadly, the Respondent led no documentary or oral evidence to establish the allegation that the Claimant was an independent contract or when he was engaged and under what terms. The Respondent however acknowledged the cash wage of Kshs.46,000/- indicated in the DOSH 1 form.

45. The Respondent submitted that Claimant completed a furniture item in a shoddy manner and when requested to make rectifications, he refused to do so and absconded duty. No evidence was led on. What the Respondent did not close the issue, such as attempts to contact the Claimant or notice of termination.

46. The quotation from **G.H.L. Fridman 'The Modern Law of Employment, London: Steven and Sons [1963] at page 446** relied upon by the Respondent typifies a master servant relationship which underscores an employer/employee relationship.

47. The assertion that the Respondent was the Claimant's supervisor and was not satisfied with his workmanship and requested amends represent the Claimant as an employer as opposed to an independent contractor.

48. Finally, in the absence of how the Respondent paid the Claimant over the years, the Claimant's testimony remain uncontroverted.

49. For the above reason, it is the finding of the Court that the Claimant has on a balance of probabilities established that he was an employee of the Respondent effective 2008 as the DOSH 1 form attests at Kshs.46,000/- per month. The Claimant led no scintilla of evidence that his monthly pay was Kshs.130,000/- and did not contest the sum of Kshs.46,000/- indicated on the DOSH 1 form.

50. As regards termination of the contract of employment, the Claimant testified that on the material day in January 2016, while at the workshop working at around 3.00 pm, the Supervisor came in with the owner of the company and pointed to him as the one who had damaged a table. That he was unaware of this and thereafter he was directed to change and leave with no notice to show cause or termination letter or reason for termination.

51. Sections 35, 41, 43, 44, 45 and 47(50) of the Employment Act provide the statutory framework on termination of contracts of employment including dismissal.

52. Section 45 of the Act is the bedrock of fair termination. It provides that –

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove —

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

53. Sections 45 and 41 of the Employment Act provide the substratum for fair termination of contracts of employment: These provisions are couched in mandatory terms and employers have the proverbial Hobson's choice.

54. In *In Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR*, the Court of Appeal stated as follows:

"... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

55. The Respondent submitted that although it was unsatisfied, with the Claimant's performance in this once instance, it did not terminate him, he deserted work after failing to make the rectifications necessary. That he absconded duty after being involved in instances of gross misconduct.

56. The Respondent took no reasonable steps to contact the Claimant if he actually had deserted work as is required and did not issue a notice to show cause or termination letter to close the issue. More importantly, the Respondent led no evidence to demonstrate that the Claimant deserted work or the alleged gross misconduct or how the relationship between the two ended.

57. Finally, only employees are liable to commit gross misconduct or abscond duty.

58. From the Claimant's evidence before the Court which is uncontroverted it appears that the Claimant was unlawfully terminated sometime in January 2016 without compliance with the substantive and procedural safeguards prescribed by the Employment Act.

59. It is the finding of the Court that the Claimant's termination was unfair.

60. As to whether the Claimant is entitled to the reliefs sought, the Court finds as follows:

(a) Unpaid house allowance 15% monthly salary for 8 years Kshs.1,872,000

61. Neither the Claimant's written statement nor oral evidence led in Court advert to or demonstrate his entitlement to house allowance as per the contract of employment. He tendered no evidence that the sum of Kshs.130,000/- was exclusive of house allowance or that house and other allowances were payable separately in view of the Kshs.46,000 monthly pay in the DOSH 1 form. The claim is **declined**.

(b) One month's salary in lieu of notice

62. Having found that the Claimant was terminated without notice as provided by the Employment Act, the Court awards **Kshs.46,000/-** as payment in lieu of notice.

(c) Unremitted NSSF & NHIF for 8 years TBA

63. No amount is claimed under this head and none is awarded. Relatedly, the sums due are payable to the relevant statutory bodies that have the necessary framework to enforce compliance. The claim is **declined**.

(d) 12 months' salary compensation for unlawful termination of employment

64. Section 49(1)(c) of the Employment Act provides the discretionary remedy of compensation in cases of unfair termination or dismissal of an employee subject to observance of the parameters set out in Sections 49(4) of the Act.

65. In this case the Court has considered that the Claimant served the Respondent for about 8 years and was dismissed without compliance with the law. That the employee wished to continue working since he had children in college and other bills to pay as he testified.

66. Second having worked for the Respondent for 8 years and trained other employees of the Respondent, the Claimant was an accomplished carpenter and could easily land another offer. In the premise, the equivalent of six months' salary is fair, **Kshs.276,000/-**

(e) General damages for breach of contract and loss of employment

67. The remedy of general damages for breach of contract or loss of employment does not exist under the provisions of the Employment Act or other statutes. Section 49 of the Employment Act provides the framework for compensation for unlawful termination or dismissal. The claim is **declined**.

(f) Certificate of Service

68. Certificate of Service to issue to the Claimant.

69. **The upshot of the foregoing is that judgment is entered for the Claimant against the Respondent for the sum of Kshs.322,000/- with costs.**

70. Interest at Court rates from the date of judgment till payment in full.

71. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE