



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 526 OF 2016

ISAAC GAKUA MWANGI.....CLAIMANT

VERSUS

CHIEF EXECUTIVE/DIRECTOR

WOMEN ENTERPRISE FUND.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 1st April 2016 and amended on 12th March 2019, the Claimant pursues a claim against the Respondent for unlawful termination of employment and failure to pay terminal dues.
2. The Respondent filed a Statement of Defence dated 9th May 2016 and amended on 15th October 2019. The Claimant filed a Reply to the Respondent’s amended Statement of Defence on 6th November 2019.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Deputy Human Resource Manager, Sammy Maiyo. The parties further filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Volunteer for Mathioya Constituency until 16th February 2016, when his employment was terminated. He adds that he was paid a monthly salary of Kshs. 20,500.
5. The Claimant claims to have been employed on a two year fixed term contract and accuses the Respondent of terminating his employment without justifiable cause and in violation of due procedure.
6. The Claimant sets out his claim as follows:

- a) Service pay for years worked.....Kshs. 41,000
- b) Unpaid salary for the month of February 2016.....20,500
- c) Salary for the balance of term of contract (20 months).....410,000
- d) Accrued leave due since 2011.....82,000
- e) House allowance for 53 months.....530,000
- f) Damages for unlawful termination (12 months’ salary).....246,000
- g) Certificate of Service

h) Costs plus interest

The Respondent's Case

7. In its Statement of Defence as amended on 15th October 2019, the Respondent states that it recruited the Claimant as a Volunteer on a monthly stipend. The Respondent adds that this is not a position of gainful employment and the Claimant was therefore not entitled to any salary or allowances.

8. The Respondent pleads that the Volunteerism Programme was meant to empower young people within the locality of their branches, and the Claimant was recruited as one such Volunteer based in Mathioya Constituency.

9. Without prejudice to the foregoing, the Respondent further pleads that the Claimant's contract was terminated on the following grounds:

- a) Poor performance;
- b) Absconding duty;
- c) Unethical work behaviour and professional negligence;
- d) Refusal to carry out a lawful and reasonable instruction that was within the scope of his duty;
- e) Gross misconduct.

Findings and Determination

10. The first issue for determination in this case is whether there was an employment relationship between the Claimant and the Respondent, as defined in law.

11. The Claimant's engagement with the Respondent was formalised by letter dated 28th October 2011, stating as follows:

"Dear Isaac,

RE: OFFER OF APPOINTMENT AS A VOLUNTEER

*I am pleased to inform you that you been appointed to serve as a Volunteer for **Mathioya Constituency** with effect from 31st October, 2011. This is a two year renewable contract depending on the financial ability of the Fund and your satisfactory performance that will be determined by regular performance appraisals.*

Under the supervision of the District Gender and Social Development Officer and the Fund's Regional Credit Co-ordinator, your duties will include but not limited to:-

- 1. Create awareness of the Fund in the constituency.*
- 2. Sensitize potential women borrowers in Self Help Groups (SHGs) or individuals to apply for the loans.*
- 3. Assist SHGs access and fill loan application forms.*
- 4. Provide the feedback linkage between SHGs and the Fund's Secretariat in Nairobi.*
- 5. Capacity building of women borrowers.*
- 6. Monitor utilization of loans and repayment.*
- 7. Any other roles assigned by the Chief Executive/Director of Women Enterprise Fund.*

BENEFITS

*Note that in the discharge of volunteer service, you will **NOT** be entitled to any salary, house and medical allowances. However, the Women Enterprise Fund Board has authorized a stipend allowance of Kshs. 5,000 (read five thousand) per month and Kshs. 2,500 (read, two thousand five hundred) for training facilitation within the constituency.*

You will also benefit from the training offered by the Fund and hence strengthen your resume and employer ability in the job market.

In the event of your acceptance of this offer of appointment as a volunteer, please signify your acceptance by signing the duplicate

copy herewith attached and return to this office on or before Monday, 14th day of November, 2011.

(signed)

S.T WAINAINA

CHIEF EXECUTIVE/DIRECTOR”

12. The question before me is whether the foregoing letter created an employment relationship between the Claimant and the Respondent.

13. Section 2 of the Employment Act defines an employee as:

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

14. The letter dated 28th October 2011, which I have reproduced above refers to the Claimant as a volunteer and expressly states that he was not entitled to a salary but was to be paid a stipend.

15. In the persuasive decision in *Universal Church of the Kingdom of God v Myeni, Mxolisi Justice & 2 others (ZALAC/2015/31)* the Labour Appeal Court of South Africa declared that a Volunteer Pastor, earning a stipend allowance, could not claim an employment relationship with the Church. The South African Court went further to hold that an employment relationship must be evidenced by either an implied or express contract of employment.

16. Closer home, **Ongaya J** in *Richard Stanley Gathuku Kinuthia v Kenya Red Cross Society [2015] eKLR* held that a volunteerism arrangement could not be converted into an employment relationship.

17. In the case before me, the parties were clear that the Claimant’s engagement with the Respondent was that of a Volunteer, earning a stipend allowance and not a salary. By definition therefore, the Claimant was not an employee of the Respondent and his claim cannot be sustained before this Court.

18. As a result, the Claimant’s entire claim fails and is disallowed.

19. Each party will bear their own costs.

20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022

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JUDGE

APPEARANCE:

MR. AWINO FOR THE CLAIMANT

MISS KIPRUTO FOR THE RESPONDENT