



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1771 OF 2016

GEORGE ONYANGO RACHUONYO.....CLAIMANT

VERSUS

AFRICAN DEVELOPMENT SOLUTION (ADESO).....RESPONDENT

JUDGMENT

1. The suit was filed by the claimant on 8th September, 2016. The claimant prays for the following reliefs:-

(a) A declaration that the termination of his employment was unlawful and unfair.

(b) Terminal benefits including:-

(i) Notice pay – Kshs 462,910.30

(ii) Salary for February 2016 – Kshs462, 910.30

(iii) Compensation for unlawful dismissal.

2. C.W.1 the claimant testified under oath and adopted a witness statement filed on 1/9/2016 as his evidence in chief. The claimant also produced a bundle of documents and marked exhibit '1' to 55 as part of his evidence.

3. C.W.1 testified that he was interviewed for the job of Audit and Compliance Manager and was given a consultancy contract on a probationary basis. That after two weeks, the respondent changed the role of the claimant to that of Head of Finance in which he continued until 20/12/2015.

4. That on 28/12/2015, a new employee was introduced as head of finance and the claimant was taken to the position of Finance Manager and Controller. That the claimant was not issued with a new contract in his new roles.

5. That in February, 2016, the claimant was given a new portfolio of Senior Finance Manager in an acting capacity.

6. That on 15/2/2016, the claimant was asked to proceed on leave pending investigations on suspicious financial transactions.

7. The claimant stated that he had resigned from a well-paying and stable job upon being lured to join the respondent.

8. The claimant earned a gross salary of Kshs 499,824.00.

9. The claimant stated that he had become a member of Senior Management Team representing Finance department of the entire organization and had sufficient authority to make decisions within the organization. That he was also a member of Head of Departments Committee which met weekly every Monday.

10. That he managed staff on a daily basis and chaired all weekly finance staff meetings. That he worked closely with office of the Executive Director reporting directly to her and attended at least one board meeting.

11. That he reported to work from 8 a.m. to 5 p.m. and all work equipment were provided to him by the respondent.

12. That on 9/10/2015 the claimant asked the Executive Director to issue him with a written Employment contract for the role of Head of

Finance since the consultancy contract he had earlier served had been overtaken by the subsequent deployments. The claimant produced emails requesting for his contract and the responses he got. The net salary of the claimant was increased to Kshs 462,910.30 but he never got a new contract for Head of Finance.

13. The claimant also got monthly telephone allowance of Kshs 10,000 and internet allowance of Kshs 4,000. That he was issued with a computer and a phone to facilitate his work. The claimant denied that he was a consultant and stated he had converted to a permanent employee by virtue of the deployment to the position of Head of Finance.

14. By a letter dated 28/12/2015, the claimant became the Financial Controller of the respondent. The appointment was by the Board of Directors. The claimant did not also get a contract for the position.

15. The claimant testified that he continued working in good faith for four months without a written contract.

16. The claimant applied to take up the position of Senior Finance Manager for **REGAL –IR** in January, 2016, a position that was vacant for a long time. REGAL – IR is a project owned by Adeso but funded by US Government. The senior management supported the move and the claimant was offered the job. At the time the claimant was terminated from employment, he had taken up the new position of Senior Finance Manager for **REGAL – IR** and had physically moved to occupy the new office as from 8/2/2016. The claimant had left the position of Head of Finance.

17. On 12/6/2016, the claimant testified that he was ambushed in a meeting with allegations of being involved in defrauding **ADESO USD 65,000**. That morning the claimant's computer was confiscated and his emails were blocked the night before. The claimant was told not to step in his office but remain in the board room.

18. The claimant got no explanation for the manner he was suddenly being treated. The claimant was then interviewed by a panel about signing a letter authorizing transfer of funds to a third party. The claimant stated that he could not remember the alleged transaction since he had not been notified of any charges or particulars. The claimant was verbally suspended and has never been allowed to go back to the office since, even to take personal belongings. On 12/2/2016, the claimant received a letter of suspension for 2 weeks up to 26/2/2016 pending investigations. The claimant was also asked to sign a leave form.

19. On 26/2/2016 the claimant received a letter of termination. The claimant's salary was also withheld on account of ongoing investigations into the purported fraud.

20. The claimant testified that he never got any hearing before termination and was also denied a right of appeal. The claimant was not privy to the purported investigations and got no report at all.

21. On 29/2/2016, the claimant sent a letter of appeal against the termination. The claimant demanded a fair hearing before dismissal. This did not materialize.

22. The claimant prays to be awarded as set out in the Statement of Claim.

Response

23. The respondent filed a response to the Statement of Claim on 21/10/2016 in which the respondent denies all particulars of claim and puts the claimant to strict proof thereof. R.W.1 Ms Degan Ali testified that the respondent was at all material times contracted by the respondent as a financial consultant to commence work on the 21st September, 2015 at an agreed invoiceable fee of Kshs 409,824 per month subject to 5% withholding tax remittable to Kenya Revenue Authority by the respondent. That on 25th November, 2015, the only change made to the agreement was to change invoiceable fee to Kshs 487,274 effective 1/10/2015

24. That in October, 2015, during the consultancy term the claimant was appointed to take up responsibility of Acting Head of Finance to oversee the functions held by the Chief Executive Officer. That as a Financial Consultant, this appointment was within the terms of reference of the original engagement.

25. That during the period of consultancy, the respondent shared with the claimant the interest to offer him a permanent position away from his consultancy contract to run the programme **REGAL- IR** as a Finance Manager. That this offer was subject to the availability of donor funding and their approval.

26. That in November, 2015, due to financial constraints the respondent faced, the respondent commenced a restructuring process which the claimant was fully aware of and a merger was done in Operation Department and the Finance Department and the claimant was appointed vide an email dated 28/12/2015 as Acting Head of Finance and Operations. Through the email, communication was made to the staff that the claimant would continue to support the Finance Department. That this was a title given under his consultancy services to ease flow and chain of work.

27. R.W.1 denied that the claimant was ever an employee of the Respondent. R.W.1 also denies that the employment of the claimant was unfairly terminated stating that at all material times, the claimant was a consultant and not an employee.

28. That the respondent paid all invoices raised by the claimant upto the last invoice in the month of February, 2016 when the contract between the two was terminated.

29. R.W.1 produced the contract of consultancy and the invoices raised by the claimant and paid by the respondent for work done.

30. R.W.1 also produced evidence of withholding tax paid to Kenya Revenue Authority.

31. The respondent prays that the suit be dismissed with costs.

Determination

32. The issues for determination are:-

(a) Whether the claimant was an employee as opposed to a Consultant for service.

(b) If the claimant was an employee, if there was a valid reason to terminate his employment and whether the respondent followed a fair procedure in terminating the employment.

(c) Whether the claimant is entitled to the reliefs sought.

33. Facts that are not in dispute are that the claimant was employed by the respondent on 21st September, 2015 and was given terms and conditions of service in an Agreement dated 8th September, 2015. The claimant was described in the agreement as a consultant and his Terms of service are set out in the agreement including, that the Consultancy service was for a maximum of 3 months commencing on 21st September, 2015 and ending on 20th December, 2015.

34. The claimant was in terms of the agreement to be paid Kshs 409,824 (Gross) salary per month for the duration of the contract.

35. The Consultant was to invoice the respondent after working for 30 days and the respondent was to pay the fees agreed. The consultancy fees was subject to withholding tax of 5%.

36. The contract provides at Clause 13.1.

“13.1 This Agreement will automatically terminate with immediate effect on the termination date.”

Terms of reference were attached to the Agreement.

37. It is not in dispute also that on 25th November, 2015, the claimant's fees was increased to Kshs 487,274 effective 1st October, 2015 and an amended contract was signed by the parties on 25th November, 2015. All other terms remained the same.

38. It is also not in dispute that in October, 2015, the claimant was appointed Acting Head of Finance to oversee the functions held by Chief Finance Officer. The claimant requested for a letter of appointment but was not granted one.

39. On 28th December, 2015, vide an email communication to staff, the claimant was appointed Acting Head of Finance and Operations and he was also to continue to support the Finance Department as the Financial Controller. Meanwhile, the internal Consultancy Agreement automatically terminated on 20th December, 2015 as per Clause 13.1 thereof.

40. Therefore as at the time the claimant assumed the duties of Acting Head of Finance and Operations as well as to serve Finance Department as the Financial Controller, the Consultancy Agreement had already expired.

41. From the testimony by the claimant which has not been credibly refuted by the respondent he worked on a full time basis from 8 a.m. to 5 p.m. He supervised staff and chaired staff meetings in his department. That he reported directly to the Chief Executive Officer and was treated in all respects as a permanent employee of the respondent.

42. The claimant was paid telephone allowance of Kshs10,000 and internet allowance of Kshs 4,000 in addition to the monthly salary of Kshs 462,910.30. It is the Court's considered decision that the remuneration given to the claimant was a wage and or monthly salary as opposed to a fees for consultancy which was paid to the claimant before expiry of the Consultancy Agreement on 20th December, 2015.

43. Indeed, the email by the Executive Director dated 28th December, 2015, had confirmed the claimant as an employee as opposed to a Consultant, for service and was to all intent and purpose an employee of the respondent. The time sheets submitted by the claimant show that as from December, 2015, the claimant reported to work at 8.00 am and clocked out at 5 p.m. The sheets also show that the claimant worked for (5) days a week. The payment of a Consultancy fees per month was a red herring geared to deny the Kenya Revenue Authority Pay As You Earn at 30% of the gross income earned by the claimant. Instead, the respondent deceitfully continued to pay 5% withholding tax to the Kenya Revenue Authority.

44. By a letter dated 22/2/2016, the respondent wrote a letter to the claimant sending him on Administrative leave for two weeks period pending investigations. The respondent promised to revert back to the claimant on 26th February, 2016.

45. By a letter dated 26th February, 2016, the respondent terminated the employment of the claimant. The respondent stated that the intended offer by the respondent of the position of Financial Manager, Regal-IR had been withdrawn. The claimant however, testified as at the time of termination he had already assumed this position.

46. The claimant was also advised payment of his salary upto 25th February, 2016 was subject to the outcome of investigations of fraudulent financial transactions which was going on.

47. It is clear that the respondent, wrongly assuming that the claimant was not an employee of the respondent terminated his employment without notice; notice to show cause; a disciplinary hearing and or any opportunity at all to be heard on the matter in violation of sections 36, 41, 43 and 45 of the Employment Act, 2007.

48. In **Kenya Hotels and Allied Workers Union –vs- Alfajiri Villas [2014] eKLR**, the Court differentiating between an employee under the Employment Act and an independent consultant stating that the terms of:-

.....a true independent contract are that the contractor will be a registered taxpayer, will work his own hours, run his own business; will be free to carry out work for more than one employer at the same time..” Per Radido, J.

49. In **Everret Aviation Limited –vs- The Kenya Revenue authority, 2013 eKLR**, Kimondo, J. stated:-

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

50. In the Court’s view, where the employer has chosen to mix elements of an independent contractor with elements normally applicable to an employee, the Court has a duty to critically look at the relationship and determine the dominant factors in the relationship so as to find the true status of the relationship between the parties. In the present case, upon a critical analysis of facts before me, the dominant elements in the relationship between the claimant and the respondent were as follows:-

(i) As at the time of termination, the claimant held a function in the organogram of the organization as head of department.

(ii) The claimant reported to work daily from 8 a.m. to 5 p.m.

(iii) The claimant supervised staff and chaired staff meetings.

(iv) The claimant reported directly to the Chief Executive Officer.

(v) The claimant received allowances to ease his work in addition to the monthly payment he received.

(vi) The claimant had no written contract of employment as at the time of termination but had been offered his present job by the Chief Executive Officer vide an email which job he accepted and continued doing.

51. These elements clearly demonstrate that the claimant was an employee of the respondent and not an Independent Consultant. The claimant did not work for any other person during the tenure of his employment. As said earlier, raising of an invoice to be paid a monthly fees was just deception to disguise the true status of the claimant and for the respondent to avoid responsibility of an employer in terms of the Employment Act.

52. Accordingly, the claimant has opined that he was entitled to one month salary in lieu of notice upon termination in the sum of Kshs 462,910.30 and the Court awards him the same.

53. Furthermore, the Court finds that the claimant was entitled to one month salary for the month of February, 2016 upto to the last day of work being 25th February, 2016 in the sum of Kshs 385,750 and the Court awards him accordingly.

Compensation

54. The claimant had served the respondent diligently and continuously for a period of six (6) months. The claimant did not contribute to the termination. The termination was without notice and without payment of terminal benefits and or any compensation. The claimant was not paid for days worked. The claimant suffered loss and damage by reason of the unlawful and unfair termination. The claimant lost prospects of career progression and had even lost job retention with his previous employer having been lured to take up a lucrative job with the respondent.

55. The Court relies on a similar case of **Kenya Hotels and Allied Workers Union –vs- Alfajiri Villas (Magufa) Limited Cause No. 229 of [2014] eKLR** in which Radido J. awarded the claimants 6 months compensation for unfair dismissal. The Court considering the circumstances of this case in terms of Section 49(1) (c) and (4) aforesaid awards the claimant three (3) months’ salary in compensation for the unlawful and unfair dismissal in the sum of Kshs.1,388,730.

56. Judgment is entered in favour of the claimant against the respondent as follows:-

(a) Notice pay Kshs 462,910.30

(b) Salary for February, 2016 Kshs 385,750

(c) Compensation 1,388.730.

Total award: 2,237,390.30

(d) Interest at Court rates from date of judgment till payment in full.

(e) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 3RD DAY OF FEBRUARY, 2022.

Mathews N.Nduma

Judge

Appearances

Mr. Michuki for the claimant

Mr. Basi for Respondent

Ekale – Court clerk