



REPUBLIC OF KENYA

IN THE LABOUR AND EMPLOYMENT COURT

AT BUNGOMA

ELR CAUSE NO. 4 OF 2019

MICHAEL OTIENO OUMA.....CLAIMANT

VERSUS

BONITO HOTELS LTD T/A TOURIST HOTEL BUNGOMA.....RESPONDENT

JUDGMENT

1. The Claim filed on 3rd April, 2019 seeks for payment of unpaid salary arrears and other benefits amounting to kshs. 1,341,330/- plus costs and interest. The jurisdiction of the court is challenged by the Respondent on the basis that the Claimant was not its employee but a consultant.

The Claimant's Case

2. The Claimant told the court that he was hired as a consultancy Chef by the Respondent vide undated agreement signed by the managing director of the Respondent with effect from 17th October 2014 for 2 months at a consideration of sksh.260,00/- (Claimant's Exhibit NO. 1). The contract ended and he was paid the agreed consultancy fees. That the Respondent offered him a fresh undated consultancy agreement under which the claim for unpaid salary falls (exhibit 2).

The terms of the said agreement (exhibit 2)are as follows:-

“(1) That your primary duty is to perform the duties of an Executive Chef for Tourist Hotel with effect from 1st December 2014. In addition you will provide consultancy services for Bonito Hotels Ltd who intend to expand into other hotel business in the Western Region in the area of Kitchen design.

(2) That you will assist Bonito Hotel Ltd to complete the development of the Kitchen at Tourist Hotel Bungoma.

(3) That it has been agreed that you will initially be paid a consultancy fee of Ksh.130,000/- per month until the business stabilizes. In addition, you will be provided with fully furnished company house including the provision of electricity and water. The company will arrange for the cleaning of the house and laundry.

(4) That the company will pay you transport allowance of kshs. 950 per week which will be increased to kshs.1,500/- with effect from 1st August 2015.

(5) That your will also be provided with meals and a reasonable beverage allowance in the near future.

(6) That as Executive Chief you will be entitled to a normal day off every week and a leave of 30 days in every year.

(7) That should there be need for the termination of this consultancy, ether party is entitled to give 3 months' notice for the termination or payment in lieu of such notice'.

Both contracts are signed by Ken Musebe Managing Director.

3. The Claimant adopted his witness statement dated 12th March, 2018 as his evidence in examination in chief. Among others the Claimant states that upon completion of 2 months he was offered another undated contract by the Managing Director which he performed for 3 years. That on the 2nd September 2017 the General Manager and Operations Manager called him to his office to inform him that he had to proceed

on three (3) months unpaid leave due to lack of business and report back to duty after the 3 months. That on 2nd October 2017 while still on unpaid leave he decided to terminate the consultancy after it became apparent that the company could not financially maintain him on employment. That at that time he had 16 days Public holidays and off days not taken, plus 28 days being annual leave for the year 2016/2017 upto 2nd October 2018 making a total of 44 days earned and had accrued outstanding consultancy fee of kshs.1,341,333/- which he claims as salary.

4. That on 22nd April, 2018 he send email to the General Manager of Tourist Hotel Bungoma Mr. Peter Adarus Ludaava and even called him on several occasions for payment and a further email dated 24th June, 2019 to acting chairman Mr. Dubaiji copied to other directors and General Manager requesting to be paid outstanding consultancy fee of kshs.1,341,333/- but no response. The Claimant further through his advocates made a formal claim. The Claimant relied on list of documents dated 12th March 2019 filed in court.

Respondent's Case

5. The Respondent Bonito Hotels Bungoma entered appearance and filed response and witness statements of Alfred Agengo(DW) dated 29th July, 2019. DW stated he was the General Manager of the Respondent and adopted his statement as evidence in chief. In summary the Respondent states the Claimant was not its employee but engaged for consultancy services which is purely commercial in nature and not employment. That the Respondent in strict compliance with the contract and terms of engagement invoked their right under the contract and issued termination notice to the Claimant.

6. The parties' witnesses were cross examined by counsel for both parties during the oral hearing of the case on the 18th October 2021.

7. The court gave directions on filing of written submissions. The Claimant's written submissions are dated 24th December 2021. The Respondent's written submissions are dated 25th October, 2021.

DETERMINATION

Issues for determination.

8. The Claimant identified the following as the issues for determination.

- a. Whether the Honourable court has jurisdiction to entertain the suit.
- b. Whether the Claimant is entitled to the remedies sought.

The Respondent in their submissions identified the following as the issues for determination

- a. Whether the Claimant was an employee or a consultant of the Respondent depending on the outcome in (a) above.
- b. Whether the Claimant is entitled to reliefs sought.

9. The court finds the parties have filed almost similar issues and frames the issues as follows: -

- a. Whether the Claimant was an employee or consultant of the Respondent
- c. Whether the Claimant is entitled to the reliefs sought

a. Whether the Claimant was an employee or consultant of the Respondent.

10. The Respondent contends that the court has no jurisdiction in the instant case as the Claimant was a consultant and not employee. The law on jurisdiction of the court is found in Section 12 (i) of the Employment And Labour Relations Court Act. This provision states as follows: -

“(i) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the constitution and one provision of this Act or any other written law which extends jurisdiction to the court relating to Employment and Labour Relations including—

- a. Disputes relating to and arising out of employment between employee and employer.

11. The Respondent contends that the relationship between the Claimant and Respondent was of consultancy and not contract of service hence no employer employee relations. Flowing from that position the Respondent argues the court lacks jurisdiction to entertain the claim.

12. The Respondent stated the Claimant was paid a fee not salary which is a feature of employment contract. That further the undated contracts do not provide specific duties of employee including benefits like insurance.

13. The Employment Act defines contract of service to mean agreement, whether oral or in writing and whether expressed or implied to

employee or to serve as an employee for a period of time and includes a contract of apprenticeship and intentioned learnership but does not include a foreign contract of service in which part x1 of this Act applies.

14. The Employment Act defines the term employee to mean a person employed for wages or salary and including an apprentice and indentured learner”.

15. The term Employer is defined under the Act to mean “ any person Public body, firm, corporation or accompany who or which has entered int a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company’

16. The Act does not define a consultant. The Concise Oxford English Dictionary defines the term consultant to mean a person who provides expert advice professionally, eg hospital doctor of a senior rank.

17. The test on whether Claimant is a Consultant or employee was set out in decision of *Kimondo Judge in Eldoret Aviation Limited -vs Kenya Revenue Authority* (through the Commissioner of Domestic Taxes) (2013) eKLR adopted with approval by Lady Justice Maureen Onyango in *Kollengode Venkatachala Lakshminarayan -vs- Intex Construction Limited (2020) Eklr* where Justice Kimondo held as follows:-

“ There are also various tests to be employed when there is doubt whether a person is an employee one of those tests is whether the person’s duties are an integral part of the employer’s business . See *Beloff -vs Predram Ltd (1973) ALL ER 241*. The greater the direct control of the employee by the employer, the stronger the ground of holding it to be a contract of service. See *Simmons - vs Health Laundry company (19190) I KB 543,0 Kelly -vs- Trust house . Forte (1983) 3 eKLR 456*. That test is however not conclusive. The passage cited by the Appellant in Halsbury’s Law of England vol 1,26 4th Edition paragraph 3 is instructive.

“ There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the Employment of highly showed individuals, and is ow only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but it otherwise only one of the relevant factors for the modern approach is to balance all of the factors in deciding on the overall classification of the individual. The factors relevant in a particular case my include, in addition to control and integration , the method of payment, any obligation to work only for the employer, stipulation as to hours, overtime, holidays etc., arrangements for payment of income tax and insurance contribution, how the contract was terminated, whether the individual may delegate work, who provided tools and equipment and who ultimately bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be important consideration”.

18. Applying the above test in the instant case, the Claimant was first engaged as a consultant on undated consultancy agreement effective 17th October 2014 as a Chef Consultant for the development of Bungoma Tourist hotel for a period of 2 months at consultancy fee rate of kshs. 260,000/-. This consultancy is not in dispute. The dispute is under the subsequent untitled contract titled consultancy agreement effective 1st December 2014 signed by the same person, Ken Musebe, Managing Director. The 2nd Consultancy Agreement (Claimant’s Exhibit 2) whose terms are stated as follows:-

‘the Claimant was engaged as Consultant Chef Specialist Bonito Hotels Ltd to perform duties of Executive Chef for Tourist Hotel Bungoma and in addition to provide consultancy services for Bonito Hotels Ltd who it is indicated intended to expand into other hotel business in Western region in the area of Kitchen Design. To assist Bonito Hotels Ltd to complete the development of the Kitchen at Tourist Hotel Bungoma.

That it has been agreed that he will initially be paid a consultancy fee of kshs. 130,000/- per month until the business stabilizes, in addition, he will be provided with a fully furnished company house including provision of electricity and water. The company will arrange for cleaning services of the house and laundry. That the Company will pay transport allowance of Kshs950/- per week which will be increased to kshs.1,500 with effect for 1st August 2015. That you will also be provided with meals and a reasonable beverage allowance in the near future. That as Executive Chief you will be entitled to a normal day off every week and a leave of 30 days in every year. That should there be need of termination of this consultancy, either party is entitled to 3 months’ notice for the termination or payment in lieu.’

19. Applying the test above, the court finds that the fact that the undated agreement is titled Consultant Agreement does not make the Claimant an independent contractor for period effective 1st December 2014 nor does the fact of payment of consultancy fee as opposed to salary.

20. The Respondent relies on the decision of *NIDRI Therese Assie Lumumba -vs Forum for Africa Women Educationists (2020) eKLR* where the court held that the Claimant was a consultant and not employee of the Respondent thus claim of travel insurance failed. The court looked into the said decision and found that unlike the instant case, the Claimant in that decision was not entitled to housing or leave under her contract. In the instant case the Claimant under the 2nd undated contract of consultancy is entitled to housing, off day, leave days all benefits which are usually awarded to employees.

21. The Claimant was engaged as Executive Chef of the Tourist Hotels Bungoma. The Respondent’s witness was the General Manager of Bonito Hotels Ltd (DW). DW adopted his witness statement. DW testified that he was aware the Claimant left the Hotel in 2017 and that it was true Bonito Hotels runs Tourist Hotel Bungoma. DW relied on documents on record. He could not inform the court when the Consultancy began but said it was for two months. DW confirmed Tourist Hotel Bungoma employs Chefs and would not do Hotel business without a chef. DW told the court that after the Claimant left, they engaged the services of the Chef the Claimant had trained. DW said he could not confirm the documents produced by Claimant emanated from them. DW confirmed that the Claimant left in 2017 as per records. In

reexamination DW stated the Claimant was a consultant.

22. Section 9 (1) of the Employment Act provides ingredients of a contract of service being :-

- a. For a period or a number of working days which amount in the aggregate to the equivalent of 3 months
- b. Which provides for the performance of any specified work which would not reasonably be expected to be completed within a period of a number of working days amounting in aggregate to the equivalent of three months shall be in writing.”

23. The Claimant told the court he worked for 3 years as an Executive Chef. DW told the court they employed the Chef the Claimant had trained on leaving in 2017. The court considering the foregoing and fact that the consultancy agreement provided for housing, leave days, day off every week finds that the relationship between the Claimant and the Respondent was that of employer- employee. The court finds that effective 1st December 2014 the Claimant was an employee of the Respondent and that “exhibit 2” amounts to an employment contract. The court further finds that it has jurisdiction over the instant claim.

Whether the Claimant is entitled to relief sought

24. The Claimant seeks salary arrears and other benefits amounting to Kshs.1,341,330/-. And has attached and produced the tabulation of the arrears. The Respondent as employer having admitted the Claimant left in 2017 had obligation to produce payment records for the services of the Claimant. The Respondent did not rebut the amount of Kshs.1,341,330.00 specifically and with records. The Claimant’s claim is proved and the Claimant is awarded Kshs.1,341,330/- as unpaid wages.

CONCLUSION AND DISPOSITION

25. The court enters Judgement for the Claimant as follows:-

- a. Salary arrears of Kshs. 1,341,330/-.

The above amount(a) is subject to statutory deductions .

- b. The Claimant is awarded costs and interest at court rates from date of Judgement.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF FEBRUARY, 2022

J. W. KELI,

JUDGE.

In the Presence of

Court Assistant:- Brenda

For Claimant: Absent

For Respondent:- Absent