REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2322 OF 2016

STEVEN OTIENO MUNYORE.....CLAIMANT

VERSUS

KUEHNE & NEGEL LIMITED.....1ST RESPONDENT

JACES SERVICES LIMITED.....2ND RESPONDENT

JUDGMENT

Introduction

1. The claimant filed this suit on 17th November, 2016, alleging that he was employed by the 1st Respondent on the 1.5.2014 as a Truck Driver for a monthly salary of Kshs. 28,850 which was later increased to Kshs. 32,782.

2. After serving the 1st Respondent for one year, the company contracted the services of the 2nd Respondent to manage and process the salaries for all the truck drivers for the company while the company retained the general supervision of the claimant, providing proper working environment and payment of traveling allowances plus other expenditures incurred by the claimant while on duty.

3. Subsequently, the claimant entered into an employment contract with the 2nd Respondent vide letter of appointment dated 1.5.2015 for a contract period of one year but he continued working for the 1st respondent.

4. On 24.3.2016, while the claimant was driving to Naivasha in the course of his duty, he was involved in road traffic accident and he was treated at the Avenue Hospital. Thereafter he was given some days off by the 2nd Respondent's supervisor, one Mr. Stanley. On 29.3.2016 the claimant reported back to work and he was never given work for about one week until 5.4.2016 when he was informed by the contractor, Joe Adiedo that his salary will not be paid till the traffic court case was determined.

5. On 14th April, 2016 the claimant was served with a Show cause letter by the 2nd Respondent, which he responded to vide his letter dated 18.4.2016. Thereafter he was invited to a disciplinary hearing scheduled for 3.5.2016 by vide the letter dated 26.4.2016. The disciplinary hearing was attended by Joe Adiado, Wellington Ondiambo and Sarah Aseso all of the 2nd Respondent who concluded that the accident was not caused by the claimant and they then instructed him to wait for communication from the 1st respondent.

6. The 1st Respondent did not contact him forcing him to visit their offices severally and also to make calls until Mid-June, 2016, when he was informed by Joe Adiado that the 1st Respondent was no longer in need of his services and that the claimant employment had been terminated. He was then promised payment of his terminal dues but which were never paid.

7. As a consequence of the foregoing matters, the claimant prays for the following reliefs against the Respondent; -

i. That the Respondent be ordered to pay the claimant his terminal dues and contractual dues amounting to Kshs. 1,497,399.60

ii. A declaration that the termination of the claimant's employment was unfair and unjust

iii. Any other relief that this Court may deem just and fit to grant.

8. The 1st Respondent entered appearance on the 5th December, 2016 while the 2nd Respondent entered appearance on the 19th January, 2017.

9. The 2nd Respondent then filed its response to claim on the 2.6.2017 denying terminating the services of the claimant and instead stated that the claimant's employment ended automatically upon expiry of his contract period. It is the 2nd Respondent's case that, it employed the claimant on the 1.5.2015 as a truck driver earning a consolidated salary of Kshs. 32,782 and deployed to work for the 1st Respondent. The contract of employment was for one year with an option of renewal upon an application for renewal by the claimant one month before expiry of the contract as per clause 1 of the contract of employment. The claimant did not apply for renewal of contract and therefore the employment relationship between him and the 2nd Respondent lapsed on 30th April, 2016. Also that the claimant was paid his salary when they fell due each month.

10. It is averred that the claimant utilized all his leave days and therefore he is not entitled to pay in respect of leave. It averred that the claimant never worked during public holidays. It further averred that there was no provision for gratuity in the claimant's contract but he was a member of NSSF whose deductions were duly remitted when they fell due. With regard to the certificate of service the 2nd Respondent avers that the same was prepared and ready for collection.

11. It also stated that the claimant had several disciplinary issue but that did not form the basis for the separation, which was due to the expiry of the contract period.

12. On 11.6.2018 the 1st Respondent filed a response to the claim denying direct employment relationship with the claimant and averred that the claimant was outsourced and the last company to deploy the claimant to them was the 2nd Respondent with effect from 1.5.2015.

13. The 1st Respondent averred that there is no employer-employee relationship between it and the claimant herein as the 2nd respondent was charged with paying the claimant's monthly salary and the 1st Respondent could only facilitate the claimant's traveling itinerary by providing culinary allowance and accommodation allowance whenever the claimant was working overnight.

14. The 1st Respondent maintained that it has never employed the claimant directly as alleged and that all its employee are issued with employment contracts and given pay slips which the claimant has failed to produce in support of his case.

15. The cause proceeded for hearing where each party gave evidence and thereafter filed submissions.

Evidence

16. The claimant testified as CW-1 and adopted his witness statement of 30.8.2016 and list of documents as exhibits 1-8 and the further list of documents filed on 6.5.2021 as the Claimants Exhibit 9-10. The testimony merely reiterates the facts set out in the Statement of the Claim.

17. Upon cross examination by **Kilonzo Advocate**, the claimant maintained that he was employed by the 1st Respondent but admitted that he was never issued with an appointment letter or a payslips and testified that he was paid through M-pesa. He also stated that he was paid after every trip and could not tell whether the money he received from the 1st Respondent was an allowance.

18. On cross examination by **Enonda Advocate**, CW-1 admitted that his contract of employment was with the 2nd Respondent and it was for one year period. He also admitted that he was supposed to give one month notice of intention to renew the contract but he did not contending that he was dismissed before the expiry of the contract.

19. On further cross examination, he stated that that the 2nd Respondent advised him to stay away until the 1st Respondent got judgment with regard to the accident case this was on 3.5.2016. The claimant maintained that his contract was to lapse on 2.7.2016 since he signed his contract of employment on 2.7.2016. He contended that the said letter was never explained to him and therefore he did not know that the contract was to start with effect from 1.5.2016.

20. He admitted that he was employed by the 2nd Respondent by the letter dated 1.5.2015 signed by Mr Joe who was initially a fellow driver at the 1st respondent company, but now its agent. He admitted that he had a case of fuel siphoning which was handled by the 2nd Respondent and then the accident case that led to his dismissal. He testified that he was trying to avoid an accident by swerving but that caused him to veer off the road. He stated that at the time of the accident, he was driving at a speed of 50-70 Km/h.

21. The 1st Respondent called one witness, **Catherine Kibera**, the 1st Respondent's Human Resource manager who adopted her witness statement and list of document marked as D-1. She testified that the claimant was never employed by the 1st Respondent neither was he paid salary by the 1st respondent. She reiterated the facts set out in the defence that the claimant was only paid allowances for the days he worked overnight.

22. Upon cross examination by **Mathairo Advocate** RW-1 testified that from the year 2014 the 1st Respondent paid the claimant an allowance for days such as public holidays worked. She stated that the tabulation table produced shows the number of holidays worked in the year 2014 as one not four. She also testified that as per the M-pesa statement produced by the claimant, the transaction indicated therein is the allowance paid to the claimant and not salary. He also stated that the claimant's Airport pass indicated him as the 2nd Respondent's employee.

23. The 2nd Respondent also called one witness, **Joshua Odienda**, the chief operating officer and the director of the of the 2nd Respondent as

RW-2. He testified on behalf of Wellington Odhiambo Otieno, the 2nd Respondent employee who had earlier written a witness statement dated 12.6.2018 for the reason that the said witness had suffered stroke and was unable to speak. He then adopted the said witness statement and produced its documents which were marked as 2nd Respondent's Exhibit 1-6.

24. Upon cross examination by **Mathairo Advocate**, the witness testified that the 2nd Respondent was the one paying the claimant his monthly salary from 1.5.2015 as its employee. He maintained that the contract was running for one year from the said date. He also admitted that the claimant worked on public holidays.

25. He stated that the claimant was involved in a road accident in March 2016 and they continue to pay the claimant till the end of his contract. However he admitted that there were no records produced to prove the same. Finally, he testified that the claimant received a final discharge and the certificate of service but refused to sign the same.

Submissions

26. It was submitted for the claimant that the M-pesa statement are admissible without the need to accompany them with a certificate as provided for under Section 78(4) of the Evidence Act. The claimant then buttressed it arguments by citing the case of **United Airlines Limited V KCB [2019] e KLR**. where the court held that;-

> ***"Under Article 35(1) (b) of the Constitution, the appellant had a right to the said information to enable him prosecute his case fairly…… In conclusion, we would like to state that the bank is an agent of its customers and is obligated to disclose to the customer any information that may have any bearing on the customer's account. It cannot be justified to deliberately withhold from the customer relevant information pertaining to the customer's account. Doing so would amount to dereliction of duty on the part of the bank."***

27. On whether the claimant was employed by the 1st Respondent, it was submitted that the claimant was initially employed by the 1st Respondent in the year 2014 and even though the 1st Respondent denied ever employing the claimant the tabulation produced before Court was to the contrary as the same indicated days the claimant worked which was in 2014. It was then argued that the 1st Respondent ought to have filed records of the employee to dispute the facts pleaded. For emphasis reliance was placed on the case of **Esther Nduati Vs Ofyze Limited T/A Harris Tavern [2019] eKLR.**

28. It was then argued that the 2nd Respondent on their part admitted having employed the claimant on a one-year contract which allegedly lapsed on 30.4.2016 but it produced minutes of a disciplinary meeting held on 3.5.2016 affirming that indeed the claimant was still the Respondent's employee and his contract was still active.

29. On whether the termination of the claimant's employment was fair, it was submitted that the Respondent, firstly, refused to pay the claimant his March and April salary as he awaited the decision of the Court with regard to the accident case. This withholding of salary was in breach of the employment contract as was held in the case of **Leah Shighadi Sinoya v Avtech Systems Limited [2017] eKLR.**

30. It was then argued that the disciplinary hearing was conducted on 3.5.2016 by the complainant and the same persons who issued the Notice to show cause, and questioned the fairness in the disciplinary hearing. Additionally, it was argued that the 2nd Respondent did not issue him with any termination letter or the reasons for termination therefore hindering his right of appeal since the reason for termination was never disclosed to him.

31. The claimant then submitted that he has proved his case on a balance of probability and urged this Court to allow the claim as prayed.

32. The 1st Respondent on the other hand submitted from the onset that M-pesa statements are electronic evidence that need to be accompanied by a certificate prepared under section 106B(4) of the Evidence Act by a person who is competent in the management of the electronic devise outlining the manner in which the information was extracted. In support of its argument the 1st Respondent cited the case of **Lawrence Ngeki Muiruri Vs Republic [2020] eKLR** and **Mohamed Loge Hussein & another V Republic [2016] eKLR.** where the Court held that;-

> ***"The Mpesa transaction is electronic evidence, whose admissibility was incorporated in our laws, not so long ago. Counsel for the 1st appellant has cited the decision in the Mombasa High Court case of Republic –vs- Barisa Wayu Matoguda (2011)eKLR, which we fully agree with, that there are special provisions of the law governing the admission of electronic evidence in court. The admission of such evidence is governed by section 106B of the Evidence Act (cap 80), which provides as follows:-***
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> ***106B(1) "Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electromagnetic media produced by computer (herein referred to as computer output) shall be deemed to be a document, if the conditions mentioned in this section are satisfied in relation to the computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or any fact stated therein where direct evidence would be admissible".***

33. Accordingly, the 1st Respondent submitted that there was no any employment relationship and any monies paid to the claim were mainly for the travelling allowances and expenditure incurred by the claimant which does not necessarily indicate any employment relationship between the claimant and the 1st Respondent.

34. It was then submitted that the claimant has failed to prove any employment relationship between them and therefore the claimant is not

entitled to the reliefs sought as against it.

Issues for analysis and determination.

35. I have carefully considered the pleadings, evidence and the submission presented by both parties. The issues that commend themselves for determination in this matter are as follows: -

a) Whether the claimant was employed by the 1st or the 2nd Respondent.

b) Whether the claimant was unfairly dismissed or the contract expired.

c) What reliefs should issue.

Who was the claimant's employer?

36. It was argued by the 1st Respondent that they outsourced services from the 2nd Respondent who provided them with man power and as such there was no employment relationship between the claimant and itself. The 2nd respondent supported that view and stated that it was the one that employed the claimant. However, the claimant insists that he was employed in January, 2014 by the 1st Respondent and worked for it till 2.7. 2015 when he signed a contract with the 2nd Respondent as his employer but still continued to drive the 1st respondent's vehicles.

37. Having considered the evidence before Court, there is proof that the claimant worked for the 1st respondent from 2014 to April 2015. The document marked as D-1 produced by the 1st Respondent witness, shows a tabulation of allowances for the months worked by the claimant in the year 2014 from July, 2014 to December, 2014. It is therefore apparent that the claimant worked for the Respondent before being employed by the 2nd Respondent with effect from 1.5.2015.

38. In view of the foregoing conclusion, I proceed to hold that the employment of the claimant by the 2nd Respondent ended any employment relationship between him and the 1st Respondent. Henceforth he became employee of the 2nd Respondent alone and not an employee of both Respondents.

39. Having found that the employment relationship between all the three parties has been established by other forms of evidence, I see no need of referring to the disputed Mpesa statement.

Whether the contract of employment was unfair terminated or it expired.

40. The claimant maintains that he was unfairly dismissed by the Respondents. He argued that he was involved in an accident on 24th March, 2016 which led to him being issued with a notice to show cause why disciplinary hearing should not be taken against him for causing accident through careless driving. He stated that he responded and even attended a disciplinary hearing on the 3.5.2016. However, no verdict was given until June 2016 when he was verbally told about the termination.

41. The Respondents on the other hand maintain that the claimant was employed by the 2nd Respondent on the 1.5.2015 and the contract terminated by expiry of the contract period on 30.4.2016. The Respondent further argued that the claimant did not give one month prior notice of intention to renew the said contract, therefore the contract expired automatically on the 30.4.2016.

42. However, the claimant on the other hand maintain that he signed the contract of employment on the 2.7.2015 therefore his contract took effect from the 2nd July, 2015 and not as indicated by the respondent and his expectation was for the contract would to terminate in July, 2016 not April 2016.

43. I have carefully considered the above rival contentions. Paragraph one of the contract of employment provided that;

"The company is pleased to offer you employment with effect from 1st May, 2015 on the terms set out on this letter"

44. Clause 1 of the said employment contract further gives conditions for renewal of the contract to wit, the employee is required to give not less than one month written notice of the intention to negotiate another contract before the expiry of the contract.

45. It is trite law that the court's mandate is only to enforce the contract between the parties and not to rewrite it. In this case, it is clear that the claimant's employment contract with the 2nd Respondent commenced on the 1.5.2015 as per the letter of appointment and not on the date when the claimant signed the said contract. It is common for parties to sign a contract with a backdated effective date.

46. The claimant admitted that he did not serve any notice of intention to renew the said contract before the expiry date as required under the terms of the contract. As much as the claimant attended the disciplinary hearing on the 3.5.2016, my opinion is that the proceedings were neither here nor there because he was no longer an employee of the 2nd Respondent. Therefore I reject the claimant's case that he was unfairly dismissed and accept the 2nd respondent's case that the employment contract dated 1.5.2015 expired automatically on 30.4.20216.

Remedies

47. The Claimant is seeking salary in lieu of notice and compensation on ground of alleged unfair termination of his employment. However, in view of the foregoing finding that the claimant's employment contract expired automatically, the said damages cannot be granted.

48. The other prayer is for payment of his March to June 2016 Salary. From the facts of the case, the claimant was involved in an accident in March, 2016 and was given off duty for a week but thereafter he was suspended awaiting the determination of the Traffic case. In the meanwhile, the contract then expired on 30th April, 2016. The claimant is therefore entitled to his salary for the month of March and April 2016 before the expiry of the contract of Kshs. 65,564.

49. The claimant also prayed for leave pay. The claimant argued that he never utilized his leave days, a fact which was objected by the 2nd Respondent but did not back up the denial with any evidence of leave records. Clause 7 of the letter of appointment give the claimant 25 days leave. Therefore I find that the claimant is entitled to the 25 leave days for the one year worked with the 2nd Respondent equaling to Kshs. 31,521.

50. The prayer for house allowance is declined for the reason that the employment contract under clause 6, titled "Remuneration" indicated that the salary payable is a consolidated sum.

51. Service pay is also prayed for. The Respondents have produced NSSF statement to show that the claimant's contributions was updated. In addition the claim for gratuity is declined for lack of contractual basis. It is now trite law that gratuity is not a statutorily implied as a term of contract of service in Kenya and as such, it must find basis in the contract between the employer and the employee.

52. The prayer for overtime is also decline for lack proper particulars and evidence of the clocking in and clocking out time by the claimant.

53. The claimant also prayed for payment of public holidays worked for the 2 years while at the Respondents employ. The 2nd Respondent witness admitted in his testimony that the claimant worked on public Holidays and there was no evidence to show that he was paid for the same. I therefore award the claimant public holidays worked from 1st may, 2015 to 30th April, 2016 totalling to 9 holidays. As per the claimant salary's his daily wage is Kshs. 1260.85 and taking into account that an employee is entitled to double the daily rate of pay for work performed on a public holiday, the total claim for the 9 holidays Amounts to Kshs. 22,695.30.

54. The claim for a certificate of service is granted as provided for under section 51 of the Employment Act. The 2nd respondent is therefore directed to issue the claimant with certificate as admitted by the Rw2 for the period served from 1.5.2015 to 30.4.2016. However, the 1st respondent will issue the claimant with a certificate of service in respect of the period ending on 30.4.2015.

55. In conclusion I enter judgment for claimant as against the 2nd respondent in the sum of Kshs. 119,780.30 being claimant's salary for March and April, 2016, leave days earned and not utilized and the 9 public holidays worked during the said contract period. The award is subject to statutory deduction but in addition to interest at court's rate from the date of filing the suit. The claimant will also have costs from the 2nd respondent. Although in my opinion the 1st respondent was a necessary party to this suit, I will not condemn it to pay costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH, 2022.

ONESMUS N MAKAU

JUDGE

<u>Order</u>

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE