



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.11 OF 2020

(Before D.K.N.Marete)

LEON KABANGELA MTAMBWA.....CLAIMANT

VERSUS

ST.ORSOLA CATHOLIC HOSPITAL-MATIRI.....RESPONDENT

J U D G M E N T

This matter was originated by way of a Memorandum of Claim dated 7th August, 2020. It does not disclose an issue in dispute on its face.

The Respondent in a Replying Affidavit dated 10th November, 2020 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that at all material times to this cause, he was an employee of the Respondent and offered medical services to her clients. He earned Kshs.150,000.00 having joined the establishment on 18th August, 2018.

The Claimant's further case is that he worked for the Respondent for four months and twelve (12) days without pay and on a promise that this would be made. This made the continued stay and relationship untenable as he could not meet his daily needs.

The Claimant's other case is that due to the unbearable situation, he left the Respondent establishment for Reinha Rosary Mission Health Centre in Nairobi where he is stationed to date.

His further case is that despite demand, the Respondent has failed to pay the claimant's dues.

He prays as follows;

- a) *Salary arrears for 4 months and 12 days equivalent to Kshs.645,000/=*
- b) *A refund of any deductions that have not been remitted,*
- c) *Damages,*
- d) *Costs of this suit and interest thereon.*

The Respondent's case is a denial of the claim.

It is her case that the claimant was never an employee of the Respondent and never undertook an interview for the job of medical doctor, or at all.

His further case is as follows;

- That the allegation of a verbal agreement for a monthly salary of Kshs.150,000.00 does not arise.
- That Annexure LKN1 is a forgery and was not originated from the Respondent.

- The department of HR ordinarily should have interviewed the claimant and briefed the management/Respondent.
- There is no way the claimant would have been renewing his licence to work for the Respondent yet he was not so engaged.
- That the work permit is a forgery and fraud.
- That infact the Medical Practitioners and Dentist Board Temporary Licence for Limuru Nursing Home Ltd annexure 'EN1' above runs from 3rd September 2018 for a period 4 months (3.8.2018 – 3.12.2018) and there is no way the claimant would have been in two places at the same time.
- The Claimant is trying to dance with documents to forge a claim against the Respondent.
- That annexure 'LKB3' dated 5th November 2018 (two months later) is the letter I wrote to the Director of Immigration services requesting him to grant the Claimant a work permit for the Respondent intended to engage him.
- Two years to format this claim.
- That annexure 'LKN3' I wrote to assist the claimant get a work permit and to work for us.
- That apparently after the Claimant's sojourn with Limuru Nursing Home Ltd, he went for Reinha Rosary Mission Health Care and even after getting the permit pursuant to our recommendation, which he did on April 2019, he never came back to us.
- That for clarity and avoidance of doubt, the Respondent has an elaborate Human Resource Management policy manual which it strictly follows on its engagement with its workers. Annexed and marked "EN2" is a copy of the said manual.
- That part 3.4 (Recruitment Procedures) and 3.5 (contents of employment file) are particularly relevant to the present case.
- That in a nutshell the Respondent can never engage an employee without an interview being conducted and an appointment letter being given.
- That this entire claim is meant to unjustly enrich the claimant claim and is actually criminal.

The issues for determination therefore are;

1. Whether the Claimant was an employee of the Respondent?
2. Whether there was a termination of the employment of the Claimant by the Respondent?
3. Whether the termination of the employment of the claimant by the Respondent, if at all, was wrongful, unfair and unlawful?
4. Whether the claimant is entitled to the relief sought?
5. Who bears the costs of this cause?

The 1st issue for determination is whether the Claimant was an employee of the Respondent. The Claimant in his written submissions dated 30th November, 2021 brings out a case of unlawful termination of employment. In this he reiterates his case as pleaded.

The Claimant's list of documents enlists a demand letter, a temporary licence for foreign doctors, work permit dated 6th November, 2018, work permit No.745778, a letter from the Respondent dated 14th September, 2018 referring him to The General Resource Manager.

In a further list of documents dated 7th July, 2021 the claimant presents a duty roster of the respondent for the month of October, November and December, 2020 and snapshots of him in action at the Respondent's hospital.

The Respondent from the onset denies the work permits are forgeries intended to facilitate a fraudulent claim against the Respondent. It is her case and submission that the claimant was never her employee and never worked for her. He was in the first place also never recruited into Respondent's work force.

The Respondent's case overwhelms that of the claimant. Indeed the claimant has not at all established a case of employment by the Respondent. He has not controverted or rebutted the overriding case of no employment adduced by the Respondent. His case fails on a balance of probabilities and preponderance of evidence.

Overall, the claimant has failed to comply with Section 47 (5) of the Employment Act which provides as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

He has failed to establish a case of employment on a balance of probabilities or preponderance of evidence. I therefore find a case of no employment of the claimant by the Respondent and hold as such. And this answers the 1st issue for determination.

On a finding of no case of employment for the claimant, all the other issues fall by the wayside. They are not necessary material for determination.

I am therefore inclined to dismiss the claim with costs to the Respondent.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr.Ayora instructed by Ayora Magati & Company Advocates for the Claimant.
2. Mr.Kiauthi instructed by Kiauthi Arithi & Company Advocates for the Respondent.