



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.01 OF 2021**

***(Before D.K.N.Marete)***

**ANTHONY NJUGUNA.....CLAIMANT**

**VERSUS**

**AFRI-CINA INTERNATIONAL CO.LTD.....1ST RESPONDENT**

**ZHENG MIOGUO.....2ND RESPONDENT**

**J U D G M E N T**

This matter was originated by a Memorandum of Claim dated 28th March, 2018. It does not disclose any issue in dispute on its face.

The Respondent, in a Response to the Memorandum of Claim dated 7th May, 2018 faults the claim and prays that it be dismissed with costs.

The Claimant’s case was that he was employed by the Respondent as a Manager whose itinerary was to cover Embu, Meru, Murang’a and Nyeri from 2004. This was reduced to a contract of ten (10) years from January 2016 to January, 2026. His terms of contract were thus;

- a) Monthly salary Kshs.30,000/-*
- b) Vehicle fuel while on duty*
- c) Insurance cover for his vehicle*
- d) Seventy cent (70cts) for every kilogram of macadamia nuts the company buys.*

The Claimant’s further case is that the 2nd Respondent was to disclose all the account and macadamia bought to enable claimant calculate monies due and owing. Books of account were to be disclosed to the claimant. His term of contract while on duty referred to the period the macadamia season was active.

His other case is that without cause, the Respondent terminated his contract on 12th March, 2018.

His claim is as follows;

- a. 30,000/- (monthly salary) \*10 years = 3,600,000/-*
- b. Vehicle fuel while on duty approximately 60,000= \* 3 months in a year=*  
*180,000/-*  
*180,000 \* 10 years = 1,800,000/=*
- c. 70 cents for every kilogram of macadamia nuts the company buys*  
*70/4,000,000/= 2,800,000 per year*

2,800,000 \* 10 years = 28,000,000/=

Total = 33,400,000/=

He prays thus;

- a. Payment for damages for breach of contract as calculated in the claim.
- b. Costs of suit and interest.
- c. Any other relief this honourable court may deem fit to grant

The Respondent's case is a denial of the claim. It is his further case that the claim is a fraud and an abuse of the process of court.

The Respondents further case is that the claimant failed to perform his obligations under the contract and proceeded to venture into politics which consumed his time leading to absconding of duty. He vied as a ward representative rendering himself liable to breach of contract.

The issues for determination therefore are;

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

This matter variously came for hearing and on 5th May, 2021 the parties agreed on a determination by way of written submissions.

The Claimant in his written submissions dated 14th June, 2021 reiterates his case on unlawful termination of employment. This is also elaborated in his witness statement dated 27th March, 2018.

The Respondent in her written submissions dated 25th July, 2021 submits a case of lack of due diligence in the performance of the claimant duties. His contract of service was frustrated in that due to his absence from duty, he was unable to deliver macadamia nuts as was expected of the contract of employment.

It is her further case that indeed there was no employment relationship interpartes and what subsisted was an independent contractors contract where the claimant was to be paid for services delivered. This is illustrated by her reliance on the following authorities;

15. There was no employment relationship between the parties as defined under section 2 of the Employment Act, 2007 to justify the claims made. In the case of Ready-Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance, 1968 2 QB the court made a distinction between a contract of service and contract for service where the courts held as follows;

*“A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.”*

16. An employee and independent contractor are also distinguished in the case of **Kenya Hotels and Allied Workers Union v Alfajiri Villas (Magufa) Ltd (2014) eKLR** in which the courts held as follows;

*“An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual “employment” matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th cheque and so on.”*

Again,

17. In the authority of **Fredrick Byakika v Mutiso Menezes International Limited (2016) eKLR**, the court held as follows;

*“Such I find to be just some of the defending characteristics of a consultant/independent contractor. The Claimant was under such a contract. His hours of work were not fixed and were subject to the work to be undertaken; was required to invoice his dues to the Respondent so as to be paid each month which he did so in July and August 2014; he was subject to withholding tax at 15%; when he got sick he did not apply for sick leave/time off and does not claim for a refund of costs for treatment he underwent while he*

*suffered malaria and diabetes; and the contract between the parties recognise the Claimant as a Consultant.”*

This matter tilts in favour of the Respondent. This is because the Claimant has failed to evidentially sustain a case of employment, or even unlawful termination of employment. Even on the test of balance of probabilities, he flops *in toto*. The Respondent puts it thus;

*37. The Claimant has not proved that he was gainfully employed by the 1st Respondent herein. By their own admitted documents, he concedes that he was a Marketing Agent rather than an employee of the 1st Respondent herein.*

*38. By engaging in activities which directly denied him the ability to perform his contractual obligations as an agent/independent contractor, the contract between the parties herein was frustrated.*

*39. Hence the balance of convenience lies in dismissing the claim with costs as the Claimant has not proved that (i) he was an employee of the Claimant; (ii) that he was not absconding his obligations under contract, and (iii) that his contract for service was terminated in a manner contrary to the law.*

The Claimant has failed to establish his case and falls short of the provisions of Section 47 (5) of the Employment Act, 2007. This 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.”*

I therefore find a case of no termination of employment in the circumstances. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

**DATED AND DELIVERED AT NYERI THIS 9<sup>TH</sup> DAY OF MARCH, 2022.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

1. Mr. Kariuki holding brief for Mr.Kimwere instructed by Kimwere Josphat & Company Advocates for the Claimant.
2. Mr.Keunda holding brief for Osundwa instructed by Osundwa & Company Advocates for the Respondents.