



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAROB**

**CAUSE NO.451 OF 2016**

**JONES N. AUNGA.....CLAIMANT**

**VERSUS**

**MASTER QUICK COL SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant is a male adult. The respondent is a limited liability company.

The claim is that in the year 2006 the claimant was employed by the respondent as a recovery officer on verbal terms and where the parties agreed on payment of a wage of ksh.20, 000 per month plus a 35% commission of the fees paid by clients for recovery of debts undertaken by the respondent. The respondent paid the percentage for a while and then reduced it to 30%.

The claimant continued to earn a wage of kshs.20, 000 per month which eventually stopped and he would be paid in hand outs. The respondent did not pay statutory dues.

On 5<sup>th</sup> January, 2016 the respondent through its director orally dismissed the claimant from his employment without a hearing or payment of terminal dues.

The claimant is seeking the following;

- a) A declaration that employment terminated unfairly;
- b) Notice pay at ksh.20,000;
- c) Service gratuity for each year worked Ksh.100,000;
- d) Commission earned but not paid Ksh.8,730;
- e) Damages for unfair termination Ksh.240,000;
- f) Leave allowances for 10 years at 30% Ksh.60,000;
- g) Salary arrears from March, 2013 to January, 2016 34 months Kshs.680,000;
- h) Costs of the suit.

The claimant testified in support of his claims that he was employed by Peter Nyaoga the director of the respondent as a debt collector at a wage of Ksh.20, 000 and 35% commission for the amounts collected. There was no agreement or terms of employment save he was required to report at work from 8am to 6pm. His clients included Kenya Power and Lighting Company and was issued with the respondent's card for introduction. The respondent issued him with business cards for introduction.

The claimant also testified that the defence that he was a contractor is not true as he was reporting on duty daily and when absent the respondent would demand to know his whereabouts. He would be out looking for potential business for the respondent. His wages would be paid through a voucher.

The payments stopped and on 5<sup>th</sup> January, 2016 the respondent's director Mr Nyaoga dismissed him without payment of any terminal dues. His statutory dues were not paid and he is owed unpaid commissions.

The defence is that the respondent engaged the claimant as an independent contractor to recover debts, instructed on needs basis and would be paid a fee for the services in form of commissions. There was no employment relationship as alleged. There was no obligation to pay a salary or remit statutory deductions which relates to an employee.

The claims made with regard to alleged unfair termination of employment or breach of contract are not justified and are without evidence of employment and the claim should be dismissed with costs.

In evidence, Peter Nyaoga testified that he is the director of the respondent. He had various jobs from different companies and would call debt collectors to follow up on the payments and pay them a commission. These were not employees because the kind of work done was to collect debts and in some accounts there was nothing to collect. The claimant was a debt collector and was paid a commission. There was no contract issued as the work done was based on a needs basis and a payment of 30% commissions based on the collections. There was no withholding tax or statutory deductions.

At the close of the hearing parties filed written submissions.

#### Determination

The claimant defined himself as a debt collector. He was employed by the respondent as a debt collector and would be assigned accounts for different companies where he would collect and paid a wage of ksh.20, 000 but which stopped after some time and was retained on commission, initially at 35% and later 30%. This evidence is confirmed by the respondent's witness Mr Nyaoga who testified that he engaged the claimant as a debt collector on a needs basis and would pay him a commission of 30% based on the collections made.

As much as parties are encouraged to undertake all financial relations in writing, in employment and labour relations, an employer has the duty to issue a written contract of service to the employee pursuant to section 10 of the Employment Act, 2007. In other relations which are commercial, civil and others, different rules and regulations apply.

The court has distinguished what comprise an employment relationship as against a contract for a service where one is an independent contractor. In the case of **Kenya Hotels & Allied Workers Union versus Alfajiri Villas (Magufa) Ltd [2014] eKLR** the distinction of an employee and an independent contractor worker is 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, 13<sup>th</sup> Cheque and so on.*

Unlike an employee, a worker for a service is left free. Upon allocation of work a set percentage, allowance or a commission payment is made. Such a worker has no statutory deductions such as NSSF or NHIF or PAYE as these has to be paid for by the worker directly since there is no employer. In the case of **Joab Ate Okada v Bayer East Africa Limited [2019] eKLR** the court held that;

*[In a contract for a service] There was no payment of a salary. There were no statutory deductions or payments. The claimant was engaged as an independent contractor from the start until his employment by HR Strategic Partners who terminated employment and not the respondent who had an engagement for service delivery and payment upon completion of set targets.*

The claimant testified that he was employed in the year 2006 and paid a wage of ksh.20, 000 per month and which was not paid after some time. he amended his claim for wage arrears for the period of March, 2013 to January, 2016. Nothing stopped the claimant to urge his claims for unpaid wages, if at all due. to remain without a wage from March, 2013 only confirms there was no employment as otherwise a report to the Labour Officer should have addressed such lapse.

The claimant was entitled to address the non-payment of wages due with the Labour Officer and where statutory dues were owing and not remitted, the Labour Officer, pursuant to section 16(5) of the Employment Act,2007 was upon receipt of a complaint was bound to address and ensure a payment and sanction.

The claimant admitted that he was paid a commission based on debts collected. This then removed him from the definition of an employee. He was an independent contractor not eligible for work benefits similar to an employee.

Accordingly, the claimant not being an employee, his relationship being purely commercial, this court is denied jurisdiction. The claim is hereby struck out. Each party shall bear own costs.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF MARCH, 2021.**

**M. MBARU**

**JUDGE**

In the presence of: Court Assistant: Okodoi

..... and .....