



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 697 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

ESTHER AUMA ONGOLA.....CLAIMANT

VERSUS

AND BEYOND (K) LIMITED.....RESPONDENT

JUDGMENT

Vide his memorandum of claim dated 11th May 2018 which was amended on 17th December 2018, the Claimant avers that she was unlawfully/unfairly terminated from employment by the Respondent and prays for orders against the Respondent as follows –

- (a) A declaration that the termination of the Claimants Employment was Unfair and Unlawful.
- (b) An order compelling the Respondent to pay the Claimant a total sum of Kshs.31,004,450.60
- (c) An order compelling the Respondent to issue the Claimant his certificate of service within 14 days from the date of delivery of the judgment
- (d) Costs and interest of this suit

The Respondent filed a statement of response dated 18th November 2019 in which it denies the contents and facts of the claim and avers that the same is dubious, vexatious, devoid of merit, tainted with forgeries, falsehoods and an abuse of the courts process.

Parties agreed to dispose of the claim by way of witness affidavits and written submissions

The Claimant filed a witness affidavit sworn by the Claimant on 4th September 2020 while the Respondent filed a witness affidavit sworn by Rufus Kirigwi Kimani the appointed accountant for Kichwa Tembo Tented Camp on 7th November 2020

Claimant's Case

The Claimant avers that she was employed by the Respondent as a masseuse on 1st December 2006 at a monthly salary of Kshs.14,000.00 which progressed to Kshs.103,505.30.

The Claimant avers that she worked diligently for a period of 8 years and 5 months until 12th May 2015 when the Respondent unlawfully and unfairly terminated her employment without notice.

The Claimant avers that she was never issued with any warning letters prior to her termination and neither was she paid her terminal dues. The Claimant further states that during her employment she never went for annual leave and was not paid leave allowance nor her house allowance.

The Claimant further states that she was never paid her salary for the months of May and June 2014.

The Claimant states that she was entitled to 10% commission on the basic salary per month.

The Claimant further states that the termination of her employment was malicious, vexatious, dictatorial and a violation of the Claimants constitutional right to fair labour practices as envisaged in Article 41 of the Constitution of Kenya and Sections 28, 31, 36, 41, 43, 45 and 51

of the Employment Act. The Claimant avers that the termination was unfair.

Respondent's Case

The Respondent disputes the duration of employment as stated by the Claimant and states that the Claimant was only employed by the Respondent from 1st January 2007 to June 2009 when the Respondent revised its operational policies and the Respondent began outsourcing massage therapist as a professional service. That the Claimant agreed to the change in the terms of the contract and agreed to offer massage services as an independent contractor. The employment contract between the Claimant and Respondent was thereafter terminated and the Claimant was paid all her dues including the accrued leave days.

The Respondent states that the Claimant entered into an independent contract as from 2nd July 2009 and the terms were explicit that the Claimant's tenure was as independent contractor and not an employee.

The Respondent further states that the Claimant had previously been issued with warning letter and when called to discuss a complaint that had been raised she left the Respondent camp on 12th May 2015 and did not return. That this is how she ceased offering professional services to the Respondent.

The Respondent further states that the Claimant being an independent massage therapist is not entitled to benefits under Employment Act. That she ought to have organised her leave and found a competent replacement. It also further states that the Claimant was not on salary but was entitled to a 40% commission on the massage revenue. As such she was not entitled to benefits that accrue to employees such as house allowance and a certificate of service.

The Respondent states that the Claimant is not entitled to any of the reliefs sought

Claimant's Submissions

The Claimant submits that she was an employee of the Respondent from 1st January 2007 to 12th May 2015 when the Respondent unlawfully and illegally terminated her services without proper notice.

The Claimant submits that all the documents she has availed contain the status of an employee and not an independent contractor. She further submits that the clearance certificate issued to her on 12th May 2015 described the Claimant as an employee and not a contractor. That she had an employment number being 00068. The Claimant further states that she was a member of the staff welfare which is strictly for the Respondent's employees. She submits that the allegations that she was an independent contractor are unfounded and should be disregarded.

The Claimant submits that her services were terminated and she was issued with a clearance certificate without indication of the reasons for termination, which is against Section 43 of the Employment Act.

The Claimant submits that the termination was unfair and against Section 45 of the Employment Act.

The Claimant relies on the case of **Nairobi ELRC Cause No. 312 of 2010 Fred A. Odhiambo v The Honourable Attorney General & Another eKLR (2018)**.

"It is the court's consideration that the employer has failed not only in substantive test but also in procedural one. The Respondent has failed to show on a balance of probability that the termination of the Claimant was for a valid and just reason and has failed to demonstrate that the termination was done in terms of a fair procedure."

The Claimant submits that the Respondent's action was unconstitutional and amounted to an unfair labour practice under Article 41 of the Constitution of Kenya 2010. The Claimant submits that she was terminated without notice, which is against Section 36 of the Employment Act.

The Claimant submits that she was never given accommodation nor paid a house allowance for the period she worked for the Respondent and having worked for the Respondent for 8 years and 5 months she is entitled to payment of service pay in the sum of Kshs.573,264.

The Claimant submits that she worked for the Respondent and never went for an annual leave nor was she paid leave allowance which is in violation of Section 28 of the Employment Act. As such she is entitled to leave allowance of Kshs.764,352.

The Claimant further submits that she was never paid a salary for the months of May and June in 2014 in breach of section 17 of Employment Act. As such submits she is entitled to Kshs.207,004.60 as unpaid salary.

The Claimant further submits that she was unfairly terminated which is in breach of section 49 of the Employment Act. She urges the court to order payment of the salary for the three years she has been out of employment. She further seeks payment of unpaid commission.

The Claimant also seeks payment of overtime being 8 hours a day and public holidays. The Claimant seeks the court to enter judgment in her favour for Kshs.31,004,450, a certificate of service be issued and costs of the suit.

Respondent's submissions

The Respondent submits that the Claimant was retained as an employee of the Respondent from 1st January 2007 to 1st July 2009 when the Respondent revised its operational policies and part of the changes was outsourcing massage therapist services which the Claimant agreed to and entered into an agreement on the 2nd July 2009. Following the agreement the Claimant was removed from the Respondent's payroll in July 2009 and subsequently started offering independent massage services on 2nd July 2009.

The Respondent submits that the test as to whether an employee is under a contract of service or under a contract for service, as was held in the case of **Christine Adot Lopeiyio v Wycliffe Mwathi Pere (2013) eKLR** are: -

a) **The control test** whereby servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.

b) **Integration test** in which the worker is subjected to the rules and the procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.

c) **The test of economic or business reality** which takes into account whether the worker is in his business or on her account as an entrepreneur, or works for another person, the employer who takes the ultimate risk of loss or chance or profit.

d) **Mutuality of obligation** in which the parties make commitments to maintain the employment relationship over a period of time. The contract of service entails service in return for wages and secondly mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as maybe the case for casual worker.

The Respondent further relied on the case of **Fredrick Byakika v Mutiso Menzens International unlimited (2016) eKLR** where the court held that reliance on the terms such as salary, employment terms and conditions, summary dismissal and such, though occasionally referenced to, do not confer an employment relationship.

The court defined the terms of engagement of an independent contractor in **Joseph Nyagah v United Millers Limited (2019) eKLR**.

“..an independent service provider is paid upon submitting an invoice, the dues payable were subject to withholding tax of 5%, no direct control in service though supervised to deliver quality service, hours of work are based on job demands, no salary or wage is paid but a commission based on sales, completion of service or lapse of task and there is no payment of statutory dues ...”

The Respondent submits that the Claimant herein was an independent contractor as she was entitled to 40% commission which was payable after submitting the invoice of the total amount earned in a month. The Respondent further states that all the dues paid to the Claimant were subject to 5% withholding tax.

The Respondent submits that it did not have direct control of the Claimant's hours of work as it depended on her job demand. As such the Claimant's demand for overtime and public holidays is disingenuous.

The Respondent further states that the Claimant's pay was not subject to **PAYE** or any statutory deductions.

The Respondent submit that the Claimant's nature of engagement is not applicable to Sections 35, 40, 43 and 45 of the Employment **Act**.

The Respondent further submits that it had issued the Claimant with warnings on her behaviour and on 12th May 2015, she left and was not seen again, which can only be construed as an activation of and confirmation of the terms on “*duration of contract*”.

The Respondent submits that the clearance certificate produced by the plaintiff is falsified as by policy clearance certificates are completed by the management of the Kichwa Tembo Camp and the employment number 68 reflected in the form last appeared in the Claimant's payment schedule in July 2009 which number does not appear in the cash payment vouchers.

The Respondent submits that the reliefs sought totalling to Kshs.31,004,450 is extortion. That the Claimant is not entitled to the same. That the Claimant's disengagement of services with the Respondent was on her own volition and any loss occasioned by her exit cannot be compensated by the Respondent.

The Respondent urges the court to find that the nature of engagement between the Claimant and the Respondent does not confer to the definition of an employment or a contract of service.

Analysis and determination

Upon careful analysis of the pleadings, witnesses' affidavits, the documentary evidence adduced and the written submissions by the parties, the issues for determination are;

- a) Whether the Claimant was engaged in a contract of service or on a contract for service.
- b) Whether the Claimant is entitled to the prayers sought.

It is submitted by the Claimant that she was employed by the Respondent on the 1st of January 2007 to 12th May, 2015 as a masseuse. In support of the same the Claimant has adduced a letter of contract of employment dated 1st January 2007 and a letter of confirmation of contract dated 8th January, 2008. The Claimant has also adduced to evidence payslips for the years 2007 and 2009. She has also attached a job Identity card issued on the 1st of January 2007, NHIF card and an insurance card whose policy number is HQS/012/011081/2007. The Claimant has also attached to her claim certificates of consultancy from the Kenya Revenue Authority for the year 2011, which contains the gross amount paid and the amount of tax deducted.

Further the Claimant has attached a recommendation letter from the Respondent company dated 6th June 2015 which letter indicate that the Claimant served the Respondent from 1st January, 2007 to 12th May 2015 as a masseuse on commission basis

The Respondent on the other hand has confirmed the Claimant was employed by the Respondent from 1st January 2007 to the 30th June 2009 when the terms of contract changed and the Claimant was contracted to offer the Respondent massage therapist services as an independent contractor. That the employment contract was terminated and the Claimant paid all her dues in June 2009. The same is supported by attached schedule of payment of the terminal dues dated 19th July 2009 which itemises the payment to the Claimant to include service charge, accrued off days and three months' notice. Further, the Respondent has adduced to evidence an agreement between the Claimant and the Respondent dated 2nd July, 2009 which provides that *"though you will be based at Kichwa Tembo Camp, you will be regarded as an external person not an employee of & Beyond Africa"*. The same agreement provides that the Claimant was to organise for her own leave schedule.

The Respondent has also adduced as evidence the cash and cheque payment vouchers which indicate that the payment was in the form of commission for the massage services offered by the Claimant.

Contract of service relates to an employee who is subordinate or under guidance and dependant on another for their employment while in a contract for service an employee is said to be independent or free and on his own terms for purposes of undertaking a task in an autonomous manner.

Section 2 of the **Employment Act** defines an employee:-

"employee means a person employed for wages and a salary and includes an apprentice and indentured learner.

In the instant case, I find that the Claimant was an employee of the Respondent from 1st January 2007 to 30th June 2009 when her contract of service was terminated and her dues paid. The Claimant signed an agreement dated 2nd July 2009 where she started offering the Respondent independent masseuse therapist services. As such her contract changed to a contract for service. Her services were duly compensated in payment of commission and not salary or wages as defined in the Employment Act. The letter of recommendation adduced as evidence by the Claimant dated 6th July 2015 clearly states the Claimant offered her services on commission basis.

In the case of **Paul Ochieng' Agola v Gateway Marine Services Limited [2018] eKLR** the court held that an Independent Contractor is: a registered taxpayer; will work his own hours; runs his own business; is free to carry out work for more than one employer at the same time; invoices employer each month; and is not subject to usual "employment" matters such as deduction of PAYE, annual leave, and sick leave.

Based on the above I find that the Claimant does not fit in the definition of an employee under the Employment Act but qualifies as an independent contractor who does not enjoy the employment benefits that an employee is entitled to.

The Claimant's prayer for declaration that the termination of the Claimant's employment was unfair and unlawful under Section 43 and 45 of the Employment Act fails as the Claimant was not an employee of the Respondent.

The Claimant's prayer for payment of Kshs.31,004,450 which constitutes one month's salary in lieu of notice, house allowance, service pay, leave allowance, unpaid salary, compensation for the period Claimant was out of employment, baggage commission, overtime and public holidays fails. This is because the period which the Claimant was an employee was from 1st January 2007 to 30th June 2009 and the Claimant was fully compensated as reflected in the schedule of payment of the terminal dues dated 19th July, 2009. The Claimant's engagement from the 2nd of July 2009 was that of an independent contractor.

The Claimant's prayer for a certificate of service succeeds for the period when the Claimant was an employee being between 1st January 2007 to June 2009.

Other than the issuance of certificate of service as set out above, Claimant's claim is without merit and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF APRIL 2021

MAUREEN ONYANGO

JUDGE

ORDER

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE