



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 725 OF 2014

BETWEEN

SILAS OKOME..... CLAIMANT

VERSUS

PANESARS KENYA LIMITED..... RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Omao Omosa & Company Advocates for the Claimant

Musa Boaz & Thomas Advocates for the Respondent

JUDGMENT

1. **The Claimant** filed his Statement of Claim on 6th May 2014. Judgment was made initially in favour of the Claimant ex parte, in the sum of Kshs. 2,184,015, on 2nd November 2018.
2. Judgment was set aside by the Court in a Ruling dated 17th May 2019, and the Respondent allowed to respond to the Claim.
3. The Respondent filed its Statement of Response on 23rd May 2019.
4. The Claimant, and Respondent's Human Resource Manager Grace Nzula, gave evidence on 28th January 2021, bringing the hearing to a close.
5. The Claimant adopted his Statements of Claim and Witness on record, in his evidence. He was employed by the Respondent in 1997, in the position of Curve and Designer.
6. His salary was Kshs. 68,400 monthly.
7. He asked the respondent for a pay rise. The Respondent did not raise his salary. Instead, on 17th June 2013, the Respondent terminated his contract.
8. The Respondent deducted Kshs. 200 from the Claimant's monthly salary in N.S.S.F contributions, but did not forward to N.S.S.F.
9. He requested to go on annual leave in May 2013 which was declined.
10. He prays the Court to find that termination was unfair, and award him: -
 - a. 1-month salary in lieu of notice at Kshs. 68,400.
 - b. 17 days worked in June 2013 at Kshs. 22,575.
 - c. Service pay at 15 days' salary over a period of 15.5 years at Kshs. 530,100.

d. House allowance over the same period at 15 % of the monthly salary, amounting to Kshs. 1,908,360.

e. Annual leave at Kshs. 742,140.

f. 12 months' salary in compensation for unfair termination at Kshs. 820,000.

g. Costs and interest.

11. Cross-examined, the Claimant told the Court he did not have an employment letter in 1997. He was earning Kshs. 20,000 monthly, at the beginning. He was designing. The items at the workshop had a price list. The Claimant did not understand how pricing was done.

12. He left employment after he made a demand for pay rise which was declined. He did not have in Court, the letter making this demand for pay rise. He did design on his own, using his own tools. He determined the time for completion of his designs. He arranged his own work. He was assigned work premises by the Respondent. His job card described him as a contractor. He was told by his boss not to return to work, when he sought salary review.

13. He reported the dispute to the Ministry of Labour. Parties attended conciliation meetings. The Claimant attended as did Respondent's Human Resource Manager Grace Nzula. They presented their positions to the Labour Officer. The Labour Officer found and recommended that the Claimant was a piece-rate Worker, who did not merit terminal dues. The Claimant did not agree with this and left the Labour Office, seeking the aid of the Kenya Human Rights Commission. There was no settlement and he approached this Court.

14. Redirected, the Claimant stated that he worked on timelines given by the Respondent. He was instructed by the Supervisor Naomi. He was paid on 15th and 30th of every month. He was not a piece-rate Worker. He did not retain his copy of the letter seeking pay rise. He was offered benefits at Kshs. 22,000 on conciliation, which he rejected as it did not reflect his long years of service.

15. Grace Nzula testified that the Claimant was an Independent Contractor. He was paid piece rate. He deserted after the Respondent declined his demand for immediate increase in the price of the items he was designing.

16. He reported the dispute to the Labour Office. The Labour Officer found and recommended that the Claimant was an Independent Contractor, working on piece rate, and was only entitled to payment for works completed over the month. The Respondent deposited this amount with the Labour Office in full and final satisfaction of the Claim.

17. The Claimant exercised independence in performing his tasks. He had his own timelines. He received payment for pieces made. Payment was based on pieces of work delivered, and billed in specific invoices. There was no employer-employee relationship.

18. The Respondent makes furniture. The Claimant was not on PAYE tax. His pay slip show that the Respondent deducted 3% withholding tax. He was paid in accordance with the items carved. The Respondent did not fire the Claimant. If there was disagreement between the Respondent and any contractor, the contractor simply left, as did the Claimant.

19. Cross-examined, Grace told the Court that she did not have the payment scheduled from 1997. Independent contract is subject to withholding tax of 3%. The Claimant left when he disagreed with the Respondent. He did not work in continuity. The Respondent deposited Kshs. 11,765 at the Labour Office in favour of the Claimant as advised. N.S.S.F and KRA directed at some point that the Respondent should pay contributions and remit PAYE, regardless of the Claimant's status as an independent contractor.

The Court Finds: -

20. The bone of contention is whether the Claimant was an Employee of the Respondent, or an Independent Contractor; whether, if he was an Employee, his contract was terminated unfairly by the Respondent; and lastly, whether he merits the remedies pleaded.

21. On being cross-examined, the Claimant stated: -

- I designed on my own.
- I determined the time of completion of assignment.
- I arranged my own work.
- My job card described me as a contractor.
- The Labour Officer indicated that I was a piece rate Worker.
- The Respondent assigned me premises.

22. This evidence tallies with that of Grace Nzula, who said of the Claimant: -

- He was paid depending on the status of the item.
- He was not on PAYE tax, but withholding tax.
- He used his personal tools for production.
- The Respondent only provided space and assignments.
- Piece- rate Workers were free to leave upon disagreeing with the Respondent.

- The Claimant could work elsewhere while still engaged with the Respondent.

23. The evidence from both Parties as highlighted above, compels the Court to conclude that the Claimant was an Independent Contractor. An Independent Contractor performs work for another Person, according to the Independent Contractor's own processes and methods. This has been the consistent holding in our Courts, in decisions such as *Kenneth Kimani Mburu & Another v. Kibe Muigai Holdings Limited [2014] e-KLR*, *Maurice Oduor Oketch v. The Chequered Flag Limited [2011] e-KLR*, and *Fredrick Yakima v. Menezes International [2016] e-KLR*.

24. The dispute was brought to the attention of the Ministry of Labour. There was conciliation before adjudication. The Conciliator was satisfied, as is this Court, that the Claimant was an Independent Contractor, who made certain designs for Respondent's furniture business, and was paid monthly in accordance with the items designed.

25. Having reached this conclusion, it follows that the Claimant was not in an employer-employee relationship, and would not merit terminal benefits and compensation for unfair termination, as pleaded.

IT IS ORDRED: -

a. The Claim is declined.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 18TH DAY OF JUNE 2021.

JAMES RIKA

JUDGE