



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1001 OF 2016

JOHN JELIX ONYANGO ADERO.....CLAIMANT

VERSUS

WEATHERFORD SERVICES AND RENTAL LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed suit in May, 2016 claiming compensation for unlawful and unfair termination of employment and payment of terminal benefits set out at paragraph 10 of the Statement of Claim including

(i) Unpaid overtime.

(ii) Unpaid leave days

(iii) Salary in lieu of notice

(iv) Unpaid National Social Security Fund (NSSF).

2. The claimant (CW1) testified in support of the suit, stating that he was employed by the respondent on 5/5/2014 as a driver at a basic salary of Kshs.30,000. That he worked 7 days a week, and reported to work at 8 a.m up to 9 p.m. daily. That he was not paid overtime though he worked 4 extra hours daily. That the respondent did not give the claimant letter of employment but he was given an employee's identity card. That he got work instructions verbally from the Area Country Manager – East Africa, M/s Elizabeth Rogo. That on Saturdays the claimant worked up to 12 p.m midnight hence 14 working hours. That Elizabeth Rogo kept promising him that he would be paid overtime.

3. On 30/4/2016, Elizabeth Rogo, sacked the claimant without notice, no reasons given and no opportunity to show cause. The claimant was not given certificate of service. The company did not pay National Social Security Fund (NSSF) dues for the claimant at the rate of 2,520 per month. The claimant claims overtime at the rate of Kshs.1,000 per hour for 4 hours a day from Monday to Friday for 23 months hence Kshs 1,840. For Saturdays the claimant prays for payment of four (4) Saturdays for twenty three months hence Kshs 1,288,000.

4. That the respondent did not get annual leave. The claimant prays ex-gratia of two months' salary for two years worked in lieu of untaken leave.

5. The claimant was cross-examined by Counsel for the respondent and stated that he was interviewed by Elizabeth Rogo, a Manager of the respondent. That he worked for the respondent for two years but did not get a contract of employment. That he was paid salary by Elizabeth Rogo directly in the sum of Kshs 30,000 per month. That he was not given a payslip. That the claimant was supervised by Elizabeth. That he was given a card to access company premises. That he was not under any Human Resource officer. That the respondents trained him on defensive driving. That Elizabeth Rogo terminated his employment. The claimant denied that he was ever an employee of the respondent. He denied that he was employed by Elizabeth. He insisted that the card given to him was not a gate pass but was a work identity card.

6. The Respondent called R.W.1, Vimbei Mutetsi, the Financial Controller of the Respondent in Sub-Sahara Africa. He testified that the claimant whom he knew well was not an employee of the respondent. That the claimant was employed by a former manager of the respondent named Elizabeth Rogo as her personal driver. That the claimant was never employed by the respondent nor was he supervised or paid a salary by the respondent. That M/s Elizabeth Rogo was an Expatriate who hired a personal driver at her own cost. That the Respondent was an oil and gas company and the company trained all drivers, including personal drivers employed by Senior Managers on defensive driving. That the training was not restricted to employees of the company. That pass cards were given to all drivers to access the

company premises, whether they were employed by the respondent or employed by senior managers.

7. That the claimant drove motor vehicle Registration Number KCE 144 s which was not owned by the respondent but was leased by M/s Rogo, who was a Country Manager. That all senior managers including R.W.1 used personal drivers, contracted by the managers themselves on choice.

8. R.W.1 insisted under cross-examination that just like M/s Rogo, it was his personal choice to hire a personal driver. That drivers contracted by managers at times issued invoices to be paid disbursements incurred on duty. That written and oral instructions were issued to the claimant by M/s Rogo and never by the respondent.

9. That the claimant has no cause of action against the respondent. That the suit be dismissed with costs.

Determination

The issues for determination are:-

(i) Whether the claimant was an employee of the respondent.

(ii) If answer to (i) above is in the affirmative, whether the claimant is entitled to the reliefs sought.

10. In answer to issue (i) above, it is pertinent to note that Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya, places an onus on a plaintiff who alleges, to prove the allegations made on a balance of probabilities. The evidential burden of rebuttal only shifts to the defendant once sufficient evidence has been adduced by the plaintiff regarding the cause of action.

11. In the present case, the claimant testified he was interviewed and recruited as a driver by a Country Manager of the respondent, Elizabeth Rogo. That he drove a car belonging to the Manager. That he reported to the manager and got instructions from the manager. That he did not get a letter of employment from the respondent. That he was paid a monthly salary of Kshs 30,000 a month by the manager directly. That he was not given a pay slip by the manager or by the respondent. That he was supervised by Elizabeth. The claimant testified that he was an employee of the respondent despite all the above, because he had an employment card from the Respondent and he was trained on defensive driving by the respondent.

12. R.W.1 Vimbei Mutetsi adduced candid and credible testimony to the effect that he was a Financial Controller of the respondent. That he knew the claimant well as he was a personal driver of a Country Manager named Elizabeth Rogo. That Elizabeth Rogo just like R.W.1 had option to hire personal drivers for their personal cars. That himself and Elizabeth Rogo personally allocated work, supervised and paid the drivers they chose to hire. That the claimant was never an employee of the respondent and was never given any letter of appointment by the respondent.

13. The claimant's testimony that he was an employee of the respondent just because he had an access card to the company premises, was not credible and the Court does not believe it.

14. The Court accepts the testimony by R.W.1 that the card produced by the claimant was given to the claimant to allow him access to the company premises to serve M/s Elizabeth Rogo, a Senior Manager.

15. The claimant has failed to prove on a balance of probabilities that he was employed, supervised, and paid by the respondent. The claimant ought to have sued M/s Elizabeth Rogo and /or joined her to this suit if he had any claims arising from his employment by M/s Elizabeth Rogo, as a personal driver. The claimant had no answer to the testimony by R.W.1, that the motor vehicle he drove, Registration Number KCE 144S was personally owned by M/s Elizabeth Rogo. The claimant has not satisfied any pre-requisite of an employee set out under Sections 28 and 37 of the Employment Act, 2007.

16. It is this Court's considered finding that the claimant was never an employee of the respondent. The suit by the claimant against the respondent therefore lacks merit and is dismissed in its entirety with costs.

Dated and delivered at Nairobi (virtually) this 30th day of September, 2021

Mathews N. Nduma

Judge

Appearances

Mr. Modi for claimant

Muuyu for Respondent

Ekale – Court clerk