



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. 52 OF 2019**

**MWINYI AHMAD MWINYI HAJI.....CLAIMANT**

**VERSUS**

**MARA CONCORD GAME LODGE**

**T/A LEO INVESTMENT LIMITED.....1<sup>ST</sup> RESPONDENT**

**RAHIM CHATUR.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant sued the respondents for alleged unfair termination and for compensation for the unfair termination.
2. The claimant states that he was employed by the Respondents sometimes in November, 2015 as a manager earning a monthly salary of Kshs. 99,750/-.
3. The claimant worked for the respondents for 1 year, 4 months until the 4<sup>th</sup> of March, 2017 when he was verbally dismissed from employment without any Notice or pay. He contends that he was not subjected to any disciplinary hearing contrary to the provisions of sections 35, 41,44,45,49 and 51 of the Employment Act
4. The claimant prays for the following reliefs; -
  - a) **Terminal dues of Kshs. 66,500.**
  - b) **Leave days not taken for the 1 year, 4 months of Kshs. 99,750.**
  - c) **Compensation under section 49(c) of the Employment Act of Kshs. 1,197,000.**
  - d) **One-month salary in lieu of Notice of Kshs. 99,750**
  - e) **A certificate of service as per section 51 of the Employment Act.**
  - f) **Costs and interest.**
  - g) **Any other relief this Honourable Court may deem fit to grant.**
5. The Respondent entered Appearance on the 26<sup>th</sup> August, 2019 and filed a response to the claim on the 19<sup>th</sup> September, 2019 denying ever employing the claimant and further stated that prior to the year 2017, the 1<sup>st</sup> Respondent was non-existent therefore could not have employ the claimant in any way.
6. The Respondents alleged, it leased a hotel space sometimes in the mid-2017 and occupied space which was earlier occupied by a third party namely; Furahia Africa Promotions Limited. It then denied all the allegation brought forward by the claimant and put him to strict proof thereof.

**Hearing.**

7. This cause proceeded for hearing on the 13<sup>th</sup> July, 2021 where the claimant, **Mwinyi Ahmed Mwinyi-CW-1** adopted his witness statement filed in Court on the 2.8.2019.

8. On cross-examination by Otieno Advocate, he testified that before being employed by the Respondents he was employed by Africa Safaris Club in the year 1978 as a manager and left the said job in the year 2014. He stated that Africa Safaris Club had several branches in Mombasa, Nairobi and countywide such as Mara Buffalo Camp, Mara Lodge among others. It is his testimony that Mara Buffalo Camp, which was a branch of Africa Safaris Club renamed to Mara Concord which is the 1<sup>st</sup> Respondent herein.

9. On further cross examination, he testified that he was employed by the Respondent through its general manager one Frank Neugbar, and was paid by cheques every month throughout his employment at the Respondents'. He then averred that the Respondent did not issue him with an employment letter.

10. The Respondent also called one witness, **Mr. Onkoba Osoro**, the Respondent legal officer as RW-1, who adopted his witness statement and list of documents dated 23.9.2020.

11. On cross examination by Ouma Advocate, RW-1 admitted engaging the claimant sometimes in October, 2016 albeit as a consultant therefore an independent contractor not as an employee. He testified that in 2016 Mara Concord was not in existent however that Leo investment was its sister company and the directors for the said company are different.

12. On further cross examination, he confirmed that the payment voucher given to the claimant indicated that the claimant was paid from a salaries account. Also that the claimant was disengaged on 4<sup>th</sup> March, 2017 verbally and was not given any terminal dues or certificate of service.

13. On re-examination, he stated that the claimant was engaged as a consultant and no statutory deduction were ever remitted for him save for the withholding tax. He further testified that in 2015 the claimant was not an employee of the Leo investment since the space was being occupied by a third party.

#### **Claimants' Submission.**

14. It was submitted for the claimant that, an employment contract can be entered between an employee and an employer either oral or written and cited the case of **Charles Mutua Mwanzi –v Invesco Assurance Company Limited [2016] eKLR** and submitted that the claimant was employed over an oral contract.

15. It was further submitted that it is the duty of the employer under section 8, 9 and 10 of the Employment Act to issue the employee with a contract of employee and to keep all records of all employee at all times. In this he cited the case of **Martin Ileri Ndwiga V Olerai Management Company [2017] eKLR**.

16. On whether the claimant was an employee or an independent contractor, it was submitted that an independent contractor is a registered tax payer, who would ordinarily work on his own hours, run his own business and is free to carry out work for more than one employer at the same time and is not subject to the usual employment matters such as leave, PAYE etc. on the contrary the claimant in this case was an employee who produced a leave application form and the minutes of the meeting held with the Respondents indicating that the claimant was their manager therefore an employee. It is argued further that the Respondent have failed to produce any evidence to support the position that the claimant was an independent contractor.

17. The claimant then cited the case of **Paul Ochieng Agola V Gateway Marine Service Limited [2018] eKLR** where the Court held that:-

**“...On the whole the Court is satisfied there was no Independent Contract between the Parties. There is no oral or documentary proof, of such a contract. The documents availed to this Court strongly suggest there the presence of an Employer-Employee relationship. The Court finds the Claimant was an Employee of the Respondent, within the definition of the terms ‘Employer’ and ‘Employee’ contained in Section 2 of the Employment Act 2007.26. Consequently the Court finds the Respondent failed to prove valid reason, justifying termination of the Claimant’s contract, as required under Section 43 and 45 of the Employment Act. The Claimant was not taken through a fair process under Section 41 and 45 of the Employment Act.”**

18. It was further submitted that, the claimant’s services were terminated without any, reason, no notice and neither was he subjected to disciplinary hearing as provided for under the law. Therefore the termination was unfair in the circumstances. In this they cited the case of **Fredrick Odongo Owegi -v- CFC Life Assurance Limited [2014] eKLR**.

19. The Claimant in conclusion submitted that the claimant was dismissed unfairly and prayed for the reliefs sought to be granted as prayed.

#### **Respondents' Submissions.**

20. The Respondents submitted on one issue; whether there is any employment relationship between the Claimant and the Respondents. The Respondents maintained that there was no employment relationship between the parties and that the claimant only was contracted under contract for service by their consultant Frank Neugbar.

21. The Respondent went further and differentiated contract of service and contract for service by citing the case of **George Kamau Nderitu and another V Intercontinental Hotel and Another [2015] eKLR**. Where the Court held that;

“...There are also various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person’s duties are an integral part of the employer’s business. See *Beloff vs Preddram Limited* [1973] ALL ER 241. The greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. See *Simmons Vs Heath Laundry Company* [1910] 1 KB 543, *O’ Kelly Vs Trusthouse Forte* [1983] 3 ALL ER 456. That test is however not conclusive. The passage cited by the appellant in *Halsbury’s Laws of England Vol I 26, 4th edition paragraph 3* is instructive:

“There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer, stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration”.

22. Accordingly, it was submitted that this Court need to look at the conduct of the parties and not the terms used such as the salaries account alluded to. In this they cited the case of ***Byakika V Mutiso menez International Unlimited [2016] eKLR*** where the Court held that;-

**“The use of the terms such as salary, employment terms and conditions, summary dismissal - such though referred do not confer an employment relationship.”**

23. The Respondents then submitted that they engaged the claimant as an independent contractor for the six months and duly paid him for the services sought. They argued that the claimant’s services came to an end after the agreed 6 months and therefore his employment was not cut short as alleged.

24. The Respondent then prayed for the claim to be dismissed with costs.

25. I have examined the evidence and submissions of the parties herein. The issues for this court’s determination are as follows;-

- 1. Whether the claimant was an employee of the respondent.**
- 2. Whether the claimant was unfairly and unjustly terminated by the respondent.**
- 3. Whether the claimant is entitled to remedies sought.**

#### ISSUE NO.1

26. The respondent had in their response to this claim denied even employing the claimant and stated that prior to 2017, the 1<sup>st</sup> respondent was non-existent.

27. The claimant on his part indicated that he worked for the respondents for 1 year 4 months until 4<sup>th</sup> March 2017 when he was verbally dismissed from employment without notice or pay.

28. The claimant further indicated that he was employed by African Safaris Club which was later renamed Mara Concord – the 1<sup>st</sup> respondent herein.

29. The claimant produced documents such as the Leave form showing he applied for and was allowed to go on a 14 days leave from 17/2/2017 and was to report back on 4/3/2017.

30. He also produced Minutes of a meeting dated 6<sup>th</sup> February 2017 which show that he was present at the meeting.

31. Other than this, he produced his bank statement which shows that he was paid by the respondent from their salary account.

32. In cross-examination, the RW1 finally admitted that they engaged the claimant in October 2016 as consultant and not an employee. Despite this admission, no contract to show the consultancy agreement was produced by the respondent.

33. The respondents also confirmed that the payment voucher given to the claimant indicated that the claimant was paid from a salaries account.

34. Given the admission by the RW1 that they had an engagement with the claimant and that they paid him from a salaries account and without any evidence to the contrary, it is my finding that the claimant was indeed an employee of the respondent.

ISSUE NO. 2

35. Given that the claimant was an employee of the respondent the respondent could not dismiss him for whatever reason without due process. The process envisaged is spelt out under Section 41 of the Employment Act 2007 which states as follows;

***“41. Notification and hearing before termination on grounds of misconduct***

***(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make”.***

36. There is no evidence that the claimant was subjected to any disciplinary process.

37. The claimant told court that he was dismissed verbally and without any apparent reason.

38. The claimant having been dismissed without valid reasons and without due process. It is my finding that the dismissal of the claimant was unfair and unjustified as per Section 45 of the Employment Act 2007 which states as follows;

***“45. (1).....***

***(2) A termination of employment is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***(i) related to the employee’s conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure”.***

ISSUE NO. 3

39. Given my finding above, I find for the claimant and I award him as follows;-

**1. 1 month salary in lieu of notice = 99,750/=**

**2. 10 month salary as compensation for the unfair and unlawful termination**

**= 99,750 x 10 = 997,500/=**

**3. Payment of the terminal due**

**= 15 days salary for the year worked**

**= ½ x 99,750 = 49,815/=**

**GRAND TOTAL = 1,147,125/=**

**Less statutory deductions.**

**4. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED IN OPEN COURT THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Oumo for claimant - present

Otieno for Respondent – present

Court Assistant - Fred