



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2351 OF 2016

ERASTUS KWAKA OTIENO.....CLAIMANT

VERSUS

DHANUSH INFOTECH LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant vide a statement of claim dated 18th November, 2016, cited the respondent for unlawful termination, unilateral change in employment terms and exposure to harassment in Gabon by the authorities. It was on the foregoing basis, that the claimant sought against the respondent various reliefs including, general damages, severance pay, unpaid salary, refund of unlawful deductions, unpaid leave, house allowance, underpayment of salaries, salary in lieu of notice, refund of rent paid in Gabon but not utilized, compensatory damages for wrongful and unfair termination, as well as costs of household items purchased in Gabon.
2. The claimant avers vide his statement of claim that he was employed by the respondent's sister company Damatedu Limited with effect from 1st July, 2012 and that he was later forced to sign a second contract through which he was deployed to work in Gabon for the respondent. He averred that he was later exited from employment upon being declared redundant, thus triggering the instant claim.
3. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. The claimant through his Advocate filed two Affidavits of Service sworn by one Mr. Nornael Goganyo on 23rd November, 2016 and 10th May, 2017, through which he deponed that he effected service of the statement of claim and summons to enter appearance upon the respondent.
4. On 18th June, 2021, the court directed that the matter proceeds for formal proof hearing.
5. As directed, the matter proceeded for formal proof hearing on 7th October, 2021, and the claimant testified in support of his case and also called one witness.

Claimant's case

6. The claimant testified as CW1 and at the outset, sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the bundle of documents filed together with his claim, as exhibits before court.
7. The claimant told court that he was initially employed by the respondent's sister company called Damatedu Limited as a consultant. That he started on a gross salary of Kshs 34,000/= and which was later reviewed to Kshs 61,000/=. He told court that he was later forced to sign a new contract by the respondent thus changing his employment terms from permanent and pensionable to one year fixed term contract. That under the new contract, he was to earn a net salary of 2,000 USD.
8. That further, and pursuant to the new contractual terms, he was posted to work outside the country in Gabon. It was his testimony that upon being sent to work in Gabon, the respondent facilitated his issuance with a 3 months business visa/permit as opposed to a work permit. That the respondent promised him that it would facilitate the processing of the appropriate visa/permit in due course.
9. The claimant further told court that the lack of an appropriate visa/permit became a source of harassment from the authorities in Gabon. That specifically on 14th October, 2015, he was summoned to the immigration department of the Gabonese government together with another colleague (CW2). That they were informed of their illegal status in the country hence were given a deadline of 19th October, 2015 within which to leave. That before the expiry of the deadline, they were deported back to Kenya but nonetheless, they continued working for the Gabon offices remotely. He further told court that by then, he had spent the sum of Kshs 200,000/= to purchase household items for his use in Gabon and 12,600 USD in rent, which he had paid on the legitimate belief that he would utilize the same upon obtaining the requisite paper work. That therefore, the unutilized rent was to the tune of 9,800 USD hence he averred that he suffered financial loss.

10. He further told court that the respondent effected unlawful deductions to the tune of 2,900 USD from his salary while he was in Gabon and that his salary was underpaid to the tune of Kshs 659,000/=. It was also his testimony that the respondent later terminated his services on grounds that it had lost a contract with a client. He stated that prior to his termination he had 3 months to serve under his contract and that his termination had nothing to do with his performance.

11. The claimant called Mr. Eric Mugasia, who testified as CW2. On his part, CW2 adopted his witness statement and told court that he worked with the claimant in Kenya and in Gabon. That while working in Gabon, they went through the same harrowing experiences as they were on the wrong visa.

12. In view of the fact that the respondent did not appear in Court for the hearing, the evidence in chief by the claimant was not challenged in cross examination.

Submissions

13. The claimant filed written submissions through which he reiterated the averments contained in his claim. He submitted that his termination on grounds of redundancy was unfair and unprocedural. On this issue, it placed reliance on several authorities including **Aviation & Allied Workers Union vs Kenya Airways limited and 3 others (2012) eKLR, Ibrahim Kamasi Amoni vs Kenital Solar Limited (2018) eKLR, Mary Nyawira Karimi vs Pure Circle (K) limited (2018) eKLR**. The claimant further submitted that his constitutional rights were violated on account of the respondent's actions and omissions hence sought compensatory damages in that regard.

Analysis and Determination

14. Based on the pleadings, the evidence on record as well as the oral testimonies rendered before court, the issues falling for the court's determination are;

i. Whether the Claimant was engaged as an employee on a contract of service or as a consultant on a contract for service?

ii. Whether the claimant was subjected to unfair labour practices?

iii. Whether the claimant's termination was lawful and procedural?

iv. Whether the claimant is entitled to the reliefs sought?

Whether the Claimant was engaged as an employee on a contract of service or as a consultant on a contract for service?

15. The claimant confirmed that he executed a contract with the respondent on 6th August, 2015 and in consideration thereof, was to be earn a net payment of 2,000 USD. The contract whose title reads "consulting agreement", describes the claimant as the "consultant" and the respondent as the "client". In this context, the claimant is cited as follows;

"WHEREAS the consultant is specialized in working as "Oracle Database Administrator" and its relevant segments, the client has approached the consultant and has agreed to provide services which are agreed vide this agreement."

16. It is also notable that on the face of it, the said contract does not bear any semblance to an employment contract, but rather appears to be more of a consultancy agreement. Why do I say so? The contract does not have the clauses ordinarily contained in an employment contract for instance, remuneration, place of work, hours of work, leave, disciplinary issues, performance appraisal etc. Indeed, the clauses contained in the said agreement do not resonate in any way whatsoever with the normal and ordinary terms of an employment contract.

17. The Employment Act defines a "contract of service" to mean:

"An agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies."

18. From the above definition, it is clear that an employee is normally engaged under a contract of service. Section 2 of the Employment Act defines an employee to refer to *a person employed for wages or a salary and includes an apprentice and indentured learner*.

19. On the other hand, under a contract for service a person is engaged to provide a specific service and, in this case, would perform the said service as an independent contractor for a consideration. The Black's Law Dictionary, (9th Edition) defines an independent contractor, in the following terms, *"One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."*

20. The question therefore is, was the claimant engaged as an employee of the respondent under a contract of service or was he engaged as an independent contractor to render consultancy work? The answer to this question lies in the manner in which the parties engaged from the onset, and their respective conduct throughout the pendency of that contract.

21. It is therefore necessary to establish several elements that ordinarily exist in an employment relationship for instance "control". In this respect, was the claimant under the control of the respondent in the performance of his work?

22. In the instant case, the claimant was bound under clause V of the contract to work exclusively for the respondent. It reads as follows;

“The Consultant acknowledges and agrees not to accept any contract or work or to be directly or indirectly employed as an employee, contract employee, service provider or a consultant or by way of any other such arrangement with any entity which is engaged in or proposes to engage in any activity similar to the business of the client during the contract with the client and for a period of six months after cessation/termination of his/ her contract with the client for whatever cause or reason i.e the consultant hereby agrees to work for the client on an exclusive basis.”

23. Further, clause VII of the contract provides as follows as regards transfer;

“Though you have been engaged for a specific position, the client reserves the right to transfer/depute the consultant to any other location, department, establishment or branch of the client group or to customer of the client. In such case, you will be governed by the terms and conditions of service applicable to the new assignment, without any financial impact to either party.”

24. From the foregoing, it would appear that the claimant remained under the exclusive control of the respondent for the duration of his contract. Indeed, it is discernable from the contract that the respondent further determined where the claimant could render his services from.

25. In the case of **Kenya Hotels & Allied Workers Union vs Alfajiri Villas (Magufa) Ltd [2014] eKLR** the court had this to say on the issue;

“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...”

26. In the instant case, the claimant lacked the freedom to render his services as he wished and to whomever he so desired. It was also not within his free will to render his services from any place he may have wanted. Therefore, his engagement with the respondent removed the element of an “independent contractor” and placed him within the realm of an “employer-employee” relationship.

27. Besides, the claimant was paid a salary at the end of every month. This can be discerned from the email communication exchanged between the claimant and the respondent’s staff by the name Leah. For instance, in an email of 22nd March, 2016 whose reference is “salary issue”, the said Leah advised the claimant as follows; *“We are now closing the payroll. Kindly note I will process your salary as communicated since I have not received any other communication in the same regards. Whatever changes you agree with the management can be implemented later.”*

28. Generally, and going by the definition of “employee” in the Employment Act, the term salary is normally invoked in an employment relationship as opposed to a consultancy agreement where a fee note is raised by the consultant.

29. Further, and going by an email of 11th May, 2016 from the said Leah, the claimant had been issued with a laptop to enable him perform his work. The email goes as follows; *“...kindly contact Patrick of IS team and arrange on how you will clear. His records show that you have two laptops.”*

30. In a consultancy arrangement, the client does not avail the tools and resources for which the consultant uses to perform his work.

31. In the case of **Kenneth Kimani Mburu & another vs Kibe Muigai Holdings Limited [2014] eKLR**, the Court found that;

“A Consultant would not normally be provided with the tools of work. The Respondent provided Mburu with the laptop, office facilities, and a phone. The Respondent provided the tools of work, and directed the Claimants in the performance of work.”

32. Coupled with the foregoing, the claimant was issued with a “pay slip”, an “employee code” and was referred to as an “employee” as per the said pay slip.

33. The total sum of the foregoing is that the claimant was for all intents and purposes, an employee of the respondent and the two parties engaged as such. The consultancy agreement was merely a disguise since in reality, the parties were in an employment relationship.

34. I fully adopt and reiterate the holding of the court in the case of **Kenneth Kimani Mburu & another (supra)** to the effect that; **“The Court in determining the first question is not bound by the Parties’ respective declarations on the character of these contracts, but should not disregard the Parties’ intention...It was not necessary that the words ‘employer’ and ‘employee’ be expressed on the face of the agreements, for them to be deemed to be valid employment contracts.”**

35. Therefore, the fact that the parties referred each other as “consultant” and “client” in their agreement, did not take away the fact that what really existed between them was an employer-employee relationship.

36. Having found that the claimant was engaged as an employee of the respondent, I now turn to determine the next issue which is in regards to the engagement between the parties and whether he was subjected to unfair labour practices.

Whether the claimant subjected to unfair labour practice(s)?

37. The claimant has averred that the respondent reduced his salary on several months without any justifiable cause hence subjecting him to unfair labour practices.

38. The right to fair labour practices is guaranteed under **Article 41(1)** of the Constitution. However, the said provision is silent as to what constitutes an unfair labour practice. Be that as it may, it underpins most of the provisions contained in the Employment Act, in particular the rights and duties enunciated thereunder.

39. Consequently, it is not possible to single out a circumstance or incident, that can be deemed as amounting to an unfair labour practice. Accordingly, it would be circumstantial, hence the specific acts of violation alleged to have been committed by an employer, would determine whether or not, there has been an unfair labour practice.

40. In the instant case, the claimant has alleged that the respondent unlawfully effected deductions from his salary and that it also withheld part of his salary thereby underpaying him to the tune of Kshs 392,163/=.

41. The duty of the employer to fully compensate an employee for services rendered is a cardinal rule in any employment relationship. This position is appropriately captured under **Section 17(1)** of the Employment Act (Act) and reads as follows;

“Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service...”

42. From the evidence presented before court through email communication, the respondent did not advance any plausible reason for withholding the claimant’s salary. If anything, it kept apologizing to the claimant and promised to remit the balances due.

43. To this end, and considering the circumstances appertaining this case, it is no doubt that the act of withholding the claimant’s salary without any justifiable cause constituted an unfair labour practice on the part of the respondent. This is coupled with the fact that the actions of the respondent exposed the claimant to financial hardship and pecuniary embarrassment.

Whether the claimant’s termination was lawful and procedural?

44. From the agreement executed between the claimant and the respondent, his contract was to run for one year with effect from 6th August, 2015 and was to terminate on 5th August, 2016.

45. This was not to be, since the respondent vide an email of 6th May, 2016, informed the claimant that;

“As discussed earlier our contract with the client is expiring on 16th June, 2016 and it is not being extended hence we will not be able to sustain you in the organisation. Through this email we are issuing you with the required notice as quoted in your contract with effect from 15th May, 2016.”

46. Essentially, the means through which the claimant’s services were terminated falls within the ambit of redundancy. Section 2 of the Employment Act defines **“redundancy”** to mean **“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”**.

47. Section 40 (1) of the Employment Act addresses this issue and spells out the following conditions which must precede redundancy;

a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and

g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.

48. In this case, the claimant was notified vide email of the intended redundancy. There is no evidence that the said notice was also issued to the labour officer as required under subsection (1) (b). There was also no evidence of the selection criteria applied prior to the claimant being declared redundant.

49. Further, the notice did not indicate whether the claimant was paid severance pay or was compensated for the period he did not proceed on leave. Simply put, there is no evidence that the respondent complied with the conditions prior to terminating the claimant on account of redundancy.

50. In as much as the respondent had the right to reorganize his personnel as it pleased, it was also mandatory that it complies with the procedure stipulated under section 40(1) (a).

51. It is also imperative to note that the provisions of section 40 (1) ought to be read together with section 45 (2) of the Employment Act which provides as follows;

A termination of employment by an employer 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.

52. The reason given for the redundancy was that the respondent had lost a contract with a client hence it could not sustain the claimant any more. The reason seemingly falls within section 43 (2) (c) (ii) of the Employment Act as it was based on respondent's operational requirements. However, the same ought to have proved. This was not done as the respondent did not tender any defence nor participate in the proceedings herein.

53. The court in the case of **Hesbon Ngaruiya Waigi Versus Equitorial Commercial Bank Limited (2013) eKLR** held that;

“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”

54. In a similar fashion, and having found that there is no evidence that the respondent complied with the requirements set out under section 40 of the Employment Act, I return that the claimant's termination on account of redundancy was unfair and unprocedural.

Reliefs

House allowance

55. The claimant has prayed for house allowance in the sum of Kshs 339,660/=. He has confirmed that he was earning a net pay of 2,000 USD. This was also evident from the claimant's pay slip for November, 2015. Net salary is what one takes home after the all deductions have been factored in. It is therefore presumed that in arriving at this figure, the allowances due to the claimant under the contract and by way of law have been factored in. To this end, this prayer fails.

Compensatory damages

56. The claimant has prayed for compensatory damages in the sum of 24,000 USD being equivalent to 12 months of his salary. Having found that his termination was unlawful and unprocedural, I will award him damages equivalent to 4 months. This award has been informed by the fact that the claimant had 3 months to the end of his contract and the fact that the respondent withheld his part of his salary for several months without any justifiable cause, thus subjecting him to unfair labour practices.

Severance pay

57. As I have found herein, the claimant was exited from employment by way of redundancy hence he is entitled to severance pay pursuant to section 40 (1) (g) of the Act.

Salary for June, 2016

58. The claimant has averred that he was not paid salary for June, 2016. I will award him the same as there is no evidence that he was paid, judging from the email communication between the claimant and the respondent.

One months' notice

59. Under section 40 of the Employment Act, an employee who has been terminated on account of redundancy is entitled to one month's notice or payment of salary in lieu thereof. I have noted that the claimant was issued with the requisite notice as he served from the date of the notice, which was on 16th May, 2016 upto 16th June, 2016c, when the redundancy took effect. On this account, the prayer under this head is declined.

Reimbursement of expenses

60. The claimant has prayed for reimbursement of the expenses he incurred in Gabon but remained unutilized. The expenses include purchase of household goods and rent for the months of October, 2015 to February, 2016.

61. From the evidence presented before court, it is evident that the claimant was deployed to Gabon by the respondent. He was solely there on account of the respondent. Indeed, under clause II of the agreement, the respondent was responsible for the claimant's costs for visa and airfare. From the evidence adduced, the claimant's short stay in Gabon and eventual deportation was on account of not possessing the appropriate visa/permit. It was his evidence that since his deportation was unprecedented, he had to leave behind the household goods he had purchased. Further and despite his deportation, he continued paying house rent so as to maintain the house he had leased in Gabon. To this end, he has produced receipts to evidence the expenses.

62. The sequence of the foregoing events as well as the resultant expenses is all attributable to the acts and omissions of the respondent, hence it is liable to reimburse the claimant for his costs to the extent proved.

63. The claimant stated that the monthly rent payable for the house he had leased was 1400 USD. He avers that he only stayed in Gabon for 2 months, hence the rent for the remainder period was unutilized. The receipts annexed by the claimant indicate that he paid rent upto February, 2016. Therefore, the sum of the unutilized rent as can be discerned from the receipts, is for 5 months hence 7,000 USD. I have noted that the receipts bear the names of the claimant and CW2, his former coworker. I will therefore not award the claimant the full amount as claimed, but I will split the figure into half hence he is entitled to 3,500 USD.

64. As regards the costs of the household goods, the claimant claims reimbursement of the sum of Kshs 200,000/=. However, I note that the receipt produced by the claimant as evidence of the purchase does not bear his name. Therefore, his actual contribution to the purchase is not clearly ascertainable hence the claim for reimbursement in this regard is denied.

Salary underpayment

65. The claimant has prayed for the sum of Kshs 659,000/= being the total amount reduced from his salary from the month of August, 2015 till May, 2016. He has produced bank statements to evidence the same which upon perusal, indeed confirm that the claimant was underpaid during the said period.

66. As per his contract, the claimant was entitled to the sum of 2,000 USD net salary hence he was entitled to a total of 18,000 USD for 9 months when he worked for the respondent. This translates to the sum of Kshs 1,827,000 against the prevailing exchange rate then. From the evidence on record, the claimant's total earnings amounted to Kshs 1,340,066.70 for the said 9 months. Therefore, the underpayment translates to the sum of Kshs 486,933.30.

Leave

67. The claimant has prayed for payment of untaken leave days during his contractual period. From the agreement executed between the claimant and the respondent, the same did not resemble an employment contract and indeed, was silent on the issue of leave. It is therefore presumable that the claimant did not proceed on any leave during his period of engagement. From the evidence before me, he had served for a period of 10 months that is from August, 2015 to May, 2016. Under section 28 (1) (a) of Employment Act, an employee is entitled to a minimum of 21 days leave days per annum. When prorated, the claimant had earned 17.5 days at the time of his termination hence is entitled for compensation.

Orders

68. In conclusion, I enter Judgment in favour of the claimant against the respondent as follows;

Compensation equivalent to 4 months' gross salary 2,000 USD at the prevailing exchange rate hence Kshs 112.70 901,600.00

Unpaid salary for June, 2016 203,000.00

Severance pay for 10 months 833.75 USD 93,965.60

Salary underpayment 486,933.30

Accrued leave days (17.5 days) 1,166.7 USD at the

prevailing exchange rate of Kshs 112.70 131,483.00

Reimbursement of rent expense 3,500 USD at the then

prevailing exchange rate 355,250.00

Total **2,172,231.60**

69. The award shall also be subjected to interest at court rates from the date of judgment until payment in full.

70. Costs follow the event, hence the respondent shall bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

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STELLA RUTTO

JUDGE

Appearance:

Mr. George Gilbert for the Claimant

No appearance for the Respondent

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 had 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.

STELLA RUTTO

JUDGE