



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 19 OF 2020

RASHMI MALDE.....CLAIMANT

VERSUS

MUTSIMOTO MOTOR COMPANY LTD.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim dated 17th June, 2020 on the 19th June, 2020 claiming to have been constructively dismissed by the Respondent and not paid his salary. The Claimant prays for the following remedies: -

- a) Salary arrears of Kshs. 1,350,000.**
- b) November 2017 salary of Kshs. 500,000.**
- c) Compensation for the unlawful termination.**
- d) certificate of service under section 51 of the Employment Act.**
- e) Costs of suit to be borne by the Respondent.**

2. The Respondent entered appearance and filed a response to claim on the 20th July, 2020 contending that the claimant was not their employee but an independent contractor hired to install palladium system.

Claimant's Case

3. The claimant avers that he was employed by the Respondent on 19th June, 2017 as an accountant in place of another accountant who had taken leave to travel to India with his wife for medical treatment. Her purpose was to change the accounting system at an agreed salary of Kshs. 500,000 which project was to last for three months.

4. Later on, the Respondent's accountant was fired while still on leave and the Respondent requested the claimant to take over all the duties of the Respondent. The claimant declined the offer on the basis that she was not paid salary for the said job. Her employment therefore came to an end on 27th November, 2017.

5. At the time of termination, the Respondent owed the Claimant salary arrears of Kshs. 1,350,000 together with her November salary of Kshs. 500,000.

6. It is averred that efforts to secure the said arrear fell on deaf ears and the demand letter dated 20th May, 2020 served through her advocates on record was equally not responded to.

7. In a reply to response filed on 18th September, 2020, the claimant maintains that she was not paid and the cheques drawn by the Respondent in satisfaction of the arrears bounced.

8. During hearing the claimant testified as CW-1 and adopted her witness statement dated 17.7.2020 together with the document filed therein. In her testimony, CW-1 testified that the terms of employment were agreed upon on the 17.6.2019 leading to the Respondents response on 19.6.2017. she testified that the Respondent initially paid her in bits and later stopped completely and instead issued her with cheques which were either stopped or bounced. She avers that the installation of the system was a different matter which was not part of the employment terms. She then testified that the Respondent owes her salary arrears of Kshs.1350000 and November salary of Kshs. 500,000.

9. Upon cross examination by Ekesa Advocate, CW-1 testified that that the email dated 24.11.2017 confirmed that the claimant worked for more than the agreed 3 months. On asked whether she participated in the meeting that agreed for the arrears to be paid in installment. She affirmed that she participated but the agreement was on payment of Kshs. 600,000 which was not related to her employment.

Respondents case.

10. The Respondent avers that the claimant was hired as an independent contractor to set up palladium software at an agreed fees of Kshs. 2, 250,000 which task was to be completed within 3 months, however that the claimant failed to complete the task given. The work done was valued and agreed at Kshs 1575,000 which Kshs. 900,000 had already been paid to the claimant leaving a balance of Kshs 670,000. It was agreed that the balance was to be paid in installments with effect from 18th April, 2020 as evidenced by the agreement and undertaking dated 31st March, 2020. The installments were reached through P.O Oiro and company Advocate, who were the claimants advocates at the time.

11. The Respondent thus maintains that the Claimant was an independent contractor and not an employee as pleaded by the claimant.

12. During hearing the Respondent called one witness, **Godfrey Chege**, the Respondent's Human Resource manager as RW-1 who also adopted his witness stement dated 28.9.2021. together with the list of documents therein as Respondents exhibits.

13. According to RW-1 the claimant was hired as an independent contractor on a specific project which was to run for 3 months from June 2017 to October, 2017. In October, 2017 the claimant had only completed 25% of the project which issue was discussed between the parties and the work done valued at Kshs. 1,575,000. That the Respondent paid the claimant Kshs. 900,000 and the balance of Kshs 670,000 was to be paid in installments. He testified also that the claimant used to work three days of a week which were not regulated by the Respondent.

14. On cross examination by Maragia Advocate, RW-1 testified that the assessment report was not in court however that the email extract produced by the Claimant confirms that she had done 25% of the work given. He also testified that the project was to be completed within the 3 months which the claimant failed to complete informing the extension of time.

Claimants Submissions.

15. It was submitted for the claimant that the claimant was employed on 19th June, 2017 vide a letter of offer dated 17.6.2017 and acceptance letter dated 19.7.2017. the terms of engagement were that the claimant was to be paid a net salary of Kshs. 500,000 working for only 3 days a week. Accordingly, that the claimant for all intends and purposes was the Respondent employee as defined under section 2 of the Employment Act and not an independent contractor as envisaged under section 9(1) of the Employment Act.

16. The Claimant also submitted that the Respondent breached its obligation by failing to pay her salary and even admitted as per the email of 27.11.2017, therefore that the Respondent ought to be compelled by this Court to pay the salary arrears and claimant's salary for November, 2017.

17. The claimant also submitted that the agreement dated 31st March, 2020 for payment of Kshs. 670,000 was not for the payment of the salary arrears. It was argued that nothing in the said agreement showed that the pay was in satisfaction of salary arrears.

18. With regard to work done, it was submitted that no evidence was placed before this Court to demonstrate the valuation of the work done and the 25% purported by the Respondent is not backed with any evidence. the claimant then argued that it carried out her duties as instructed and was due to be paid salary which the Respondent failed to pay. The claimant thus prayed for the claim to be allowed as prayed.

Respondent's Submissions.

19. The Respondent on the hand submitted that the claimant was an independent contractor. It was argued that the use of the terms such as salary, employment terms, summary dismissal does not confer an employment relationship rather that the Court ought to investigate the intention of the parties to ascertain whether the intention gave rise to employment contract or not. The Respondent supported its arguments by citing the case of **Fredrick Byakika V Mutiso Menezes international Unlimited [2016] eKlr** and the case of **Edward Ngarega Gacheru V Nation Media Group Limited [2019] eKlr**.

20. The test on whether a person is an employee was further discussed in the case of **Everret Aviation Limited V Kenya Revenue Authority (suing Through the Commissioner of Domestic taxes) [2013] eKlr** where the Court held that:-

“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”.

21. Accordingly, that the claimant was contracted for 3 months for a specific duty to install palladium software which fact was not challenged by the Claimant. Secondly that the claimant worked independently without the supervision of the Respondent as envisaged in the

email of 17.6.2017, where she sought to work 3 days in a week and the 3 days were not decided by the Respondent. This was evidenced by the email of 24.11.2017 where the claimant admitted to have committed to only working for the Respondent for 3 months in fixing the palladium project. Thirdly that the claimant pay was not subject to any statutory deduction or taxes as is the norm for employees.

22. It was then argued that the claimant failed to complete the work done nevertheless that the Respondent valued the work done and paid in part leaving a balance of Kshs. 670,000 which was to be paid in installment as agreed by the parties. It was then argued that the claim is for fees arrears and not salary arrears as such this suit ought to have been filed as a commercial contract and not an employment contract as was held in **Gilbert Sule Otieno V Seventh Day Adventist Church East Africa Ltd (suing on behalf of SDA Church Kiamunyi East) [2014] eKLR**. Therefore, that this Court lack jurisdiction to order for the payment of the admitted fees arrears.

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

24. I have considered the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

- a. Whether the claimant had an employment relationship with the respondent or she was an independent contractor.**
- b. Whether the claimant was unlawfully terminated.**
- c. Whether the claimant is entitled to the remedies sought.**

ISSUE NO. 1

25. There is officially no appointment letter that was issued to the claimant. However there is an Email dated 19th June 2017 written by the respondent who indicated as follows:-

“Dear Rashmi,

As I read your Email, I will put these three months to a trial period after which we will sign a letter of appointment with all agreed terms and conditions into a contract.

It is in this period that I want you feel the company and the way we work whilst I feel you as well, we want to see that you can set up the finance department the palladium software, overhaul the department as that is now the weakest department we have.

We all know the strength of the human capital in Kenya but am sure with right controls and guidance as Titch as proved it you should get it going with our support.

Lets give each other a chance to feel the process and walk together towards delivery of each goal we set.

Thank you and appreciate you for taking the first step.”

26. There is a follow up Email from the claimant dated 27th November 2017 where the claimant avers as follows;

“Dear Raju,

This is not fair, I have worked day and night for this place. I need my full pay as I have worked for it. If you were not happy with the work you should have told me I would have not continued after the 3 months.

You know the truth better than what you have written above hence there is no need for me to justify anything. I have been doing 2 peoples work mine and Ram's and yet when I joined you never told me you were thinking of getting rid of Rams position, I still didn't complain or ask for more.

As of now I am not willing to work for this place until all my arrears have been cleared.”

27. From these 2 Emails, the claimant and respondent agreed to an initial 3 month working relationship whereby the claimant was expected to carry out certain deliverables.

28. It was also agreed that after the three months an appointment letter detailing the agreed terms and conditions of engagement will be made.

29. The claimant also categorically in her letter of November 27th (page 9) of claimant's documents seems to agree to the fact that they had agreed to work together for 3 months and had not been paid as expected.

30. She also indicated she was not willing to work any more until all her arrears had been paid. In her Email of 24th November, 2017 she indicated she was to leave and needed to be cleared by 18th December, 2017.

31. In a reply to this Email by the respondent dated 24th November 2017, the respondent agreed to pay her 3 months pay that end of October 2017 and asked her to clear all work until 18th December. He also expressed the fact that the work the claimant was to do was only 25% done.

32. My reading from the communication between the claimant and respondent, there was no intention of a permanent employment relationship between the 2 of them. It is clear that the claimant was expected to carry out certain tasks within 3 months and was to be paid accordingly.

33. The amount of salary/consideration payable is not clear but from the bank statement produced by the claimant, she was paid certain money by the respondent but in a staggered and sporadic manner.

34. It is my finding that the claimant and respondent had some working arrangement which in my view was for a fixed period of 3 months subject to a review and there is no indication that a review was done and what the new arrangement was like.

ISSUE NO. 2

35. The claimant averred that she was constructively dismissed which fact the respondent denied. As alluded above, the engagement between the parties was for a fixed period of 3 months and once the 3 months lapsed, the contract ended by effluxion of time. The claimant worked beyond the 3 months for one reason or another until November 2017 but that in my view could be attributed to any dismissal but to the terms of the engagement based on performance of specific duties/deliverables.

ISSUE NO. 3 REMEDIES

36. As indicated above the claimant was to be paid certain amounts of money by the respondent but the payments were sporadic.

37. On 31/3/2020 the claimant and respondent entered an agreement detailing how the respondent was to pay 670,000/= owed to the claimant.

38. Under Clause 3 of this agreement, the parties agreed as follows;

“Release and indemnification. By entering into this payment plan, Miss Rahmi Malde agrees to release Mr. Rajen Shah of Mutsimoto Motor Company from any previous claims, actions and/or liabilities due to the debt. The parties agree this Agreement does not release the Debtor of any obligations to pay the debt.”

39. Under this agreement remedies for the payments were agreed upon. It is my finding, that the amounts agreed upon herein was the amount payable to the claimant.

40. I therefore find for claimant as per this agreement and enter Judgment for her for kshs.670,000/= plus costs and interest.

DATED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Maragia for Claimant – present

Ekesa for Respondent – present

Court Assistant - Wanyoike