



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 2607 OF 2016

WILLIS ODHIAMBO.....CLAIMANT

VERSUS

DAVID NJOGU GACHANJA t/a

D. NJOGU & COMPANY ADVOCATES.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal benefits, accrued salary plus compensation for unfair termination of the claimant's contract of service by the respondent on 8th December 2015. It is the claimants case that the respondent unlawfully failed to pay his salary for 8 months from May 2015 before terminating his services on 8th December 2015 without prior notice or any valid reason. It is further claimant's case that despite demand and even filing of this suit, the respondent has continued to withhold his salary arrears, terminal dues plus 12 months' salary compensation for unfair termination, totaling to kshs. 620,000. He therefore prayed for said amount plus costs and interest.

2. The respondent has denied having employed the claimant as alleged and averred that the claimant was a freelance court Process Server engaged as and when his services were required. The respondent further averred that the claimant served him and other clients simultaneously but he allowed him to use his computer to type Affidavits of service. He therefore denied the alleged unfair termination and nonpayment of salary to the claimant and prayed for the suit to be dismissed with costs because there was never any employment relationship between him and the claimant.

3. The suit was heard on 17.5.2019 and 9.10.2019 when the claimant testified and called two witnesses while the respondent testified as the only defence witness. After the hearing both parties filed written submission.

Claimant's Case

4. Claimant testified that he was employed by the respondent as a Court Clerk and Court Process Server in August 2005 but he was never given a written contract of employment. He however produced copy of a letter dated 22.11.2013 written by the respondent to the Law Society of Kenya acknowledging him as his clerk since 2005 and requesting that he be issued with an Identification Card. He further produced receipt for payment the Card fees paid by the respondent and copy of the Card which was eventually issued by the LSK.

5. The claimant further testified that his starting salary was Kshs. 18,000 per month but in February 2006 it was increased to Kshs. 20,000 per month. He stated that he used to sign salary vouchers every time he was paid his salary. He contended that he worked continuously and his salary was payable at the end of the month in arrears but it always delayed on allegation that the firm was not making money. He further contended that from May to December 2015, he was not paid any salary and added that the said delay and nonpayment of salary made him to look for part-time jobs from other law firms for survival. He also contended that the delays and nonpayment of salaries also forced many employees to leave the respondent.

6. The claimant further testified that on 8.12.2015, the respondent called him to the Boardroom and verbally terminated his employment without prior notice or any valid reason. He contended that the termination was wrongful, unfair, unlawful and it amounted unfair labour practices. He therefore prayed for the reliefs sought in the suit contending that the respondent never paid NSSF and NHIF for him during his tour of duty in the law firm.

7. On cross examination, he admitted that the letter to the LSK dated 22.11.2013 was signed by Mary Mwangi who was an Associate in the firm. He further admitted that he had no proof that Mary Mwangi was an Advocate. He, however contended that when he told the respondent

that he was being denied service due to lack Employment card, the respondent instructed Mary Mwangi to write a letter to the LSK for the required Card. He therefore denied that he was a freelance Court Process Server and maintained that he was employed by the respondent law firm as a permanent employee even when he did part time services to other Advocates. He maintained that he did part time jobs for survival during his free time due delay and nonpayment of salary by the respondent. he admitted that he used the respondent's computer to prepare affidavits of service.

8. He further contended that he worked for respondent for 10 years from 2005 until the respondent called him to the boardroom in the presence of his two sons and told him that his services were no longer required. The claimant admitted that service to other Law firms was a good ground for termination of his services. He, however denied ever being served with any warning letter.

9. Mr. Martin Kimani Kirima testified as Cw2 and stated he joined the respondent as a messenger in May 2006. He further stated that the claimant employed by the respondent as a Clerk and Process server and he was working from 8.00am to 5pm during weekdays. He also contended that the claimant like all the other staff used to sign attendance book in the respondent's office. He confirmed that the respondent used to delay salaries always which forced him to leave the firm in September 2014. He further confirmed that the respondent never used to pay NSSF and NHIF for his employees.

10. On cross examination, Cw2 admitted that he found the claimant in the respondent law firm, and further that he did not know the terms of engagement between the claimant and the respondent. He further admitted that there were always 4 interns in the law firm but denied that they were doing clerical work.

11. Mr. Clive Oyunge Onyancha testified as Cw3 and stated that he was employed by the respondent as an Associate Advocate from 2014 to 1st February 2016. He also confirmed that the claimant was employed by the respondent as the only Clerk and Process Server and that he was working from 8.00 am to 5.00 pm during weekdays. He further confirmed that the there was an Attendance book in the office which was being signed by the subordinate staff. He also confirmed that the respondent used to delay salaries for the staff alleging that the firm was not making money. He contended that he left the firm because of nonpayment his salary arrears which remain outstanding to date. He contended that the issue of nonpayment of salary was a matter which was discussed among the staff in the firm. Finally, he stated that the respondent used to pay his staff using salary vouchers and he never paid NSSF and NHIF for the staff.

12. On cross examination, Cw3 contended that when he joined the law firm, the respondent introduced the claimant to him as his clerk and process server but he did not give him details of terms of his engagement. He however reiterated that he used to discuss salary delays with the other employees because it was common issue to all the staff in the office.

13. He also reiterated that there was an attendance book in the office which was supervised by the respondent's son Steve. He contended that he used to hear him asking staff members including Joan what time they signed the register. On being shown copies of Affidavits of service by the claimant for other law firms, he admitted that he was serving court process during working days and not at night.

Defence case

14. The respondent testified as Rw1 and stated that the claimant was introduced to him as a freelance Process server by his legal Assistant Mr Charles Njenga. He further testified that he used to call the claimant by phone as and when there was service to be made and that continued until late 2015 when he was no longer reachable through his phone. He contended that he rarely met with the claimant and he instead used to send his clerk to take the documents for service to the claimant. He further stated that he also used to pay the claimant in cash through his clerk or pay him by Mpesa. He however produced 35 affidavits of service and fee notes to confirm that the claimant was a freelance process server for many law firms and stated that the claimant typed the said Affidavits of Service using his office computer and caused loss to him.

15. Rw1 further testified that Mary Mwangi was an intern in his law firm and he did not authorize her to write the letter date 22.11.2013 and to forge his signature.

16. On cross examination, Rw1 contended that he saw the said letter when he was served with the claimant's documents herein but admitted that since then he never protested to the LSK or lodged any complaint to the police about the forgery. He further contended that he had employed over 100 people including many clerks and 4 pupils who were helping in clerical work. He maintained that the claimant was a process server who was raising fee notes which were paid by Mpesa. He explained that the money he paid the claimant by mpesa included court fees for filing the affidavits of service.

Claimant's submissions

17. The claimant submitted that he was employed by the respondent within the meaning of section 2 of the Employment Act despite the lack of a written contract because he engaged to render services and payment of salary was made to him. He urged that the witnesses he called had proved that he had employment relationship with the respondent. He contended that the respondent had an obligation to keep and produce employment records of all his staff in these proceedings to controvert his averments but he failed.

18. He relied on **Boniface Ingosi v Stella Builders Limited [2017] e KLR** where Wasilwa J held that the burden of proving or disproving assertion of employment made by an employee rests with the employer and the burden is to be discharged by production of register or records envisaged under section 74 of the Employment Act.

19. The claimant further submitted that he was unfairly terminated in breach of section 45 of the Act because he was dismissed without prior notice or valid reason and that he was just called the boardroom and informed that his services were no longer required. He therefore prayed for compensation for the unfair termination of his employment contract.

20. He further submitted that his evidence that the respondent did not pay his salary for May to December 2015 was not rebutted and urged

that the said claim was corroborated by the evidence of Cw2 and Cw3 who left the respondent for delays and nonpayment of salaries. He therefore prayed for the terminal dues sought in the Claim.

Respondent's submissions.

21. The respondent submitted that the evidence by the claimant and his witness was not credible and contended that he had rebutted the same. He contended that he had proved that the claimant was not his employee but a process server engaged on need basis to served documents. He further contended that he allowed the claimant to type affidavits for service made for him but late discovered that the claimant was typing affidavits for service done for other people and he stopped him. He relied on the 35 affidavits of service for service done for other people and corresponding fee notes to urge that the claimant was not his employee but a freelance process server for hire by anyone. He therefore accused the claimant of using the court for unjust enrichment.

Issues for determination

22. After careful consideration of the evidence and the submissions filed the following issue are for determination:

- (a) Whether there existed any contract of service between the parties herein;
- (b) Whether the said contract of service was unfairly terminated by the respondent;
- (c) Whether the reliefs sought should be granted.

Analysis and Determination

(a) Whether there existed any contract of service between the parties herein.

23. Section 2 of the Employment Act defines contract of service and an employee as:

“an agreement, whether oral or written, 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 foreign contract of service to which part III of this Act applied;

Employee means an individual employed for wages or salary and includes an apprentice and an indentured learner;”

24. The respondent has denied the alleged employment relationship in his defence and his testimony and maintained that the claimant was a freelance process server serving many clients from his office at Maendeleo house. He further contended that he only hired the claimants as an independent contractor on need basis. However, the claimant insisted that he was employed continuously by the respondent verbally for a salary payable on monthly basis. He called two witnesses, both former staff of the respondent who were unanimous that the claimant was employed by the respondent even before them and they left him there as the only Court clerk and process server for the respondent. They confirmed that the claimant like the other staff was working from 8 am to 5 pm Monday to Friday and he used to sign attendance register at the Reception. Cw3, an Advocate and officer of this court, testified that when he joined the respondent in 2014, the respondent introduced the claimant to him as the Clerk and process server. He further confirmed that he used to give instructions to the claimant as the Court clerk for the firm.

25. After careful consideration of the evidence and submissions, I find that the claimant has proved on a balance of probability that he was employed by the respondent vide an oral contract of service. Section 8 of the Act provides that the provisions of the Act applies to both oral and written contracts. It is therefore immaterial whether or not a written contract is given to an employee so long as there is evidence of an oral agreement to render services in exchange for salary or wages.

26. The evidence by Cw2 and Cw3 corroborated the claimant's verbal allegation that he was employee of the respondent from 2005 to 2015. They confirmed that the claimant was the only clerk and process server in the respondent's firm; he had worked for the respondent in that capacity for about ten years; he was working under the supervision of the respondent through signing of an Attendance register; he was being paid salary by the respondent; he was working within the respondent's office; he was using the respondent's computer and furniture; the respondent was paying for the expenses for filing documents at the court registry; and that the respondent was instructing him through Cw3 and other officers of the firm.

27. The foregoing facts are on all fours with the common law description of an employee under a contract of service which I discussed in ***Aloys Obuya Abuje & 5 others Vs Krystalline Salt Ltd [2016] eKLR*** and repeated in ***Gilbert Jedidah Ogango v J.A.B. Orenge Advocates [2018] e KLR*** cited by the claimant herein. In the said cases I set out the ingredients of an employee at common law as follows:

- (a) he is required to comply with the employer's instructions about when, where and how he must work;***
- (b) he has been trained by the employer to gain experience for purposes of working for the employer;***
- (c) he has been integrated into the business operations of the employer so that he is subject to the direction and control of the employer***
- (d) he must render services personally;***

- (e) he has assistants, hired, supervised and paid by the employer;*
- (f) he has worked continuously for a long time;*
- (g) he has specific working hours set by the employer;*
- (h) he is working substantially full-time for the employer and is not free to work for other employers;*
- (i) he performs work in the employer's premises.;*
- (j) he is required to submit regular oral or written report to the employer;*
- (k) he has his business trips or travel expenses paid for by the employer;*
- (l) he has tools, materials and other requirement met by the employer;*
- (m) he is easily dismissed at the will of the employer;*
- (n) he has the right to terminate his contract without incurring any liability.”*

28. In view of the foregoing matters, I am satisfied that the claimant has proved by evidence and on the required standard of balance of probability that he was employed by the respondent under a contract of service and not as an independent contractor. He may have misconducted himself by engaging inside hustle but that did not render him an independent contract.

(b) Whether the contract of service was unfairly terminated

29. Under section 45 of the Act, termination of the employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the claimant has contended that the respondent failed to pay his salary for about 8 months alleging lack of funds and eventually on 8.12.2015 told him that his services were no longer required. The issue of delayed and unpaid salary by the respondent was confirmed by Cw2 and Cw3. That state of affairs means that termination was on account of redundancy and the employer has an obligation to justify the same under section 43, 45 and 47 (5) of the Employment Act, and also to prove that he complied with the redundancy procedure set out under section 40 of the Act. The said procedure requires among others, a mandatory notice of one month in writing to the employee and the area labour officer.

30. In this case, the respondent herein did not walk down the foregoing lane and instead denied the existence of employment between him and the claimant. He further accused him of disappearing from December 2015 and not being reached over his phone. That contention in my view is a contradiction from the respondent's contention that the claimant had an office at Maendeleo House in Nairobi. It is clear that the respondent did not put any effort to prove that he terminated the claimant's services fairly both substantively and procedurally. Consequently, I return that the termination of the claimant's employment was unfair within the meaning of section 45 of the Act because the respondent has failed to prove a valid and fair reason for termination, and that she followed a fair procedure.

(c) whether the claimants is entitled to the reliefs sought.

31. Under section 49 of the Act, the claimant is entitled to salary in lieu of notice and compensation for unfair termination. I therefore I award him Kshs. 20,000 being one month salary in lieu of notice plus Kshs. 160,000 being for 8 months' salary compensation for unfair termination. In awarding the said compensation, I have considered the length of service by the claimant and the fact that he did not contribute to the termination through misconduct.

32. I further award him the un rebutted claim for 7 months and 8 days salary arrears amounting to Kshs.146,153.85. However, the claim for gratuity payment is dismissed because no evidence was adduced to support the same. The claim for leave lacks particulars and evidence to substantiate it. Finally, the claim for the unremitted NSSF and NHIF contribution lacks particulars and evidence that the money was deducted from the claimant's salary by the respondent.

Conclusion and Disposition

33. I have found that the claimant was employed by the respondent under a contract of service. I have further found that the contract was unfairly terminated by the respondent and such the claimant is entitled to some of the reliefs sought in his claim. Consequently, I enter judgment for him in the sum of Kshs.326,153.85 plus cost and interest at court rates from the date hereof. The said award shall be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 21st day of February, 2020

ONESMUS N. MAKAU

JUDGE