

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 233 OF 2018

WILLIAM WACHIRA WARUINGE.....CLAIMANT

VERSUS

KAGO MUKUNYA & ASSOCIATES.....RESPONDENT

JUDGMENT

1. The Claimant sued the accounting firm of Kago Mukunya & Associates his erstwhile employer. He averred that he worked between August 2016 and 3rd May 2018 as an accountant/audit assistant. The Claimant averred that he was on duty on 3rd May 2018 when he was verbally terminated without any reasons being given to him. The Claimant averred that the termination was contrary to Section 45 of the Employment Act and he was therefore entitled to compensation for unfair termination at 12 month's gross salary. He averred that he was underpaid and thus sought underpayment for the months of October 2016 – Kshs. 34,918/-, November 2016 to April 2017 – Kshs. 179,508/-, May 2017 to December 2017 – Kshs. 195,426/- and January 2018 to April 2018 – Kshs. 99,672/-. The Claimant sought payment for public holidays = Kshs. 17,297.80 as well as costs of the suit.

2. The Respondent averred in its defence that the Claimant had applied for attachment at the Respondent's Nyeri offices and that there was never an employee-employer relationship between the Claimant and the Respondent. The Respondent averred that during the period of attachment it was under no obligation to offer employment and or pay salary to the Claimant. The Respondent averred that in the event the Claimant intended to be employed, he would have formally applied and if there was a vacancy, the application would have been considered. The Respondent averred that the entire claim was misconceived and thus sought the dismissal of the claim with costs.

3. The Claimant and the Respondent's witness Moses Kago Mukunya testified. The Claimant testified that on 3rd August 2016 he sought attachment with the Respondent an accountancy firm. He stated that he was informed there was a position for attachment and he applied. He stated that the offer of attachment was verbal and begun working in August and worked for 3 months – August, September and October. He said that at the end of October he was told he would be employed as from November. This, he stated, was verbal. He testified that his employment was from November 2016 and he was paid Kshs. 3,000/- in cash for the month of August, September and October and from November it increased to Kshs. 10,000/- also in cash. He stated that he would work from 8am-5pm 6 days a week from Monday to Saturday when they worked till 1pm. He testified that the months of January to June are peak season and he would work from 8am to 8pm. He said from April to June they worked daily including Sundays and Public Holidays with no break. He stated that by November he was a CPA 4 and that he was a clerk from November 2016. He stated that from the month of May 2017 he became an auditing assistant. He was a CPS 5 then and the appointment was verbal. He testified that none of his engagement was documented. He stated that he was dismissed on 3rd May 2018 a Thursday afternoon, he was dismissed verbally as the manager told him to leave. No reason was given and there was no notice. In cross-examination he testified that he was employed from August 2016. He stated that he would like to change paragraph 3 of the claim. He stated that he was engaged and one needs to have passed various exams to be an audit assistant. He stated that he had not passed to be an audit assistant. He was referred to documents presented and stated that he had not passed quantitative analysis prior to 2016. He testified that he qualified in 2016 and he applied 4 days later. He referred to the attachment and stated that he applied for the attachment and it was accepted and he became an audit trainee upon his application being accepted. He stated that he was at the Nyeri branch of the Respondent and that the main office is in Nairobi. He testified that there was no advertisement for employment and he did not apply formally for employment by the Respondent. He stated that he was interviewed later without any application and that he was not aware that he could only be employed from Nairobi. He stated that the man at Nyeri told him he could do the interview at Nyeri. He testified that he was not given a letter of formal employment and that he had a letter of recommendation from G. M. Kariuki. He stated that he was a CPA Section 4 and that Section 3 allowed one to be an accountant. He testified that his entire employment was verbal. He stated that he did not see the need to seek formal employment when he was already employed by the Respondent. In re-examination he testified that there was no advertisement for attachment and that he applied and was given attachment and that he applied at the Nyeri office where he was stationed. He stated that he was never referred to the Nairobi office. He was referred to his exhibits and stated that he was qualified to be an accountant and that what had happened was that the exam for Section 4 was after one year of working as a clerk. He testified that he sought an increment and they acted tough. He stated that everything was done verbally and that he did not need to apply again.

4. The Respondent's witness testified that he was the managing partner at the Respondent. He stated that the Nyeri branch is handled by Mr. Kagucia. He stated that the Claimant was not an employee and that the Claimant was a student studying accounts and wanted practical knowledge. He testified that the Claimant applied to come as an intern to learn practical accounts and did not apply to be an employee. He said that if the Claimant had applied to be employed he would have received the request and if there was a vacancy he would have hired the Claimant. He stated that the branch manager has no power to appoint and that he was the one who would sign the letter of appointment if any is issued. He stated that the letter for internship was dated 2nd August 2016. He testified that the Claimant passed Section 4 CPA II in July 2016 and they would not have granted attachment if the Claimant had not passed. He stated that the Claimant had not passed the exams so he could not be referred to as an accountant. He said that one becomes an accountant when one passes the exams. He stated that the Claimant was not an employee. In cross exam he stated that the Claimant was taken as an intern not employee as he had come to study. He testified that the Claimant was taken as an intern by the branch manager at Nyeri and that it was verbal. He admitted that they did not advertise for the internship. It was put to him whether it was made clear to the Claimant that there was employment opportunity verbally to which he replied

that there was no employment. He stated that the Claimant applied in good faith as there was no advertisement and since the manager had a slot and because it was internship there is no employer-employee relationship. He testified that it was only when the Claimant was sent for out of office work that he was given out of pocket expenses as the Claimant had no salary. He stated that the money given was not a salary. It was put to him that when the Claimant was first employed he was paid in the month of October 5,000/- and from November to April they paid Kshs. 10,000/- to which he replied that there were no such payments as they did not pay the Claimant a salary since he was there as an intern not an employee. He stated that interns are not paid, they are learning and they did not give salary. He testified that the sums given were small amounts and there was fare given and the Claimant did not sign any vouchers. He stated that the Claimant left to continue his studies and when the internship ended he just walked away. He stated that the Claimant was not working as an intern and that the Claimant was learning as an intern. He stated that he was not aware of any employment as employment is under his hand and that it was his practice though not in a policy document. He testified that they had in the past employed other people to work in Nyeri. He stated that he had not advertised for the employees. He stated he did not dispute that the Claimant worked for G. M. Kariuki or not. It was put to him that the Claimant was employed by the branch manager and paid the sums shown and the Claimant was terminated verbally to which he replied that he would like to see the letter of appointment and that the Claimant does not have a letter of appointment. In re-examination he testified that there is no obligation to pay interns as they are given a place to study and the Claimant was the one benefiting. He said that the Claimant was not an employee. He stated that he did not contest the Claimant worked for G. M. Kariuki and that his comment was that the Claimant was not qualified yet as an accountant and should not have been referred to as an accountant. He stated that the manager does not have power to employ. That marked the end of oral testimony.

5. The Claimant and Respondent filed submissions. In his submissions the Claimant submitted that the issues for determination were whether there was an employer-employee relationship, whether the Claimant was unprocedurally and unfairly terminated and whether the Claimant is entitled to reliefs sought. On the first issue he submitted that it is disputed as to whether the employee-employer relationship existed. He submitted that the Respondent did not however dispute that the Claimant indeed worked in their firm for the whole period in issue. It was submitted that it is worth noting that the only thing documented concerning the relationship between the Claimant and the Respondent is the application letter dated 2nd August 2016 for attachment. There is no acknowledgement of receipt neither is there indication of how the Claimant was notified that he was successful on his application. The Claimant submitted that there is nothing to show the terms of engagement even during the alleged 'attachment'. The Claimant submitted that simply the Respondent orally dealt with him and its employees/people engaged in the firm generally. He submitted that the branch manager interviewed him and after being attached between August and October he offered employment in the month of November 2016 which he duly took up. He submitted that his salary was increased variously from Kshs. 5,000/- given during attachment to Kshs. 10,000/-, 12,000/- and 15,000/- at the time of dismissal paid in cash. The Claimant submitted that Section 2 of the Employment Act defined contract of service and an employee. The Claimant submitted that an intern, being either an apprentice or an indentured learner is by definition an employee and that the Claimant was thus an employee from the time he started earning wages or a salary. The Claimant submitted that in any event he testified that he was interviewed by the branch manager and upon success was employed. The Claimant submitted that the contract of employment is implied by conduct of the parties as the Claimant could not be an intern for 21 months. The Claimant submitted that under Section 9(2) of the Employment Act it was the responsibility of the employer to reduce an employment contract into writing. The Claimant submitted that the Respondent could not blame it for its omission as it was not in the habit of keeping records formally for reasons best known to it. The Claimant submitted that he had proved employment and dismissal without reasons being given which was unprocedural and unfair in terms of Section 41 of the Employment Act and the rules of natural justice.

6. The Respondent submitted that the Claimant had attempted to pass himself off as an accountant when he had not passed the exams that would qualify him as an accountant and referred to the KASNEB results of 15.1.2014 and 5.2.2015 and the letter of 23.2.206 from G. M. Kariuki Hardware Limited and a recommendation letter referring to the Claimant as an accountant who had worked for the hardware. The Respondent submitted that the Claimant applied for attachment and there was no employment offered at the Respondent's Nyeri branch. The Respondent submitted that if the Claimant was qualified as an accountant why would he apply for attachment from the Respondent? It submitted that there was no obligation to issue a letter for the termination of an internship and that if there was a humanitarian gesture that cannot be taken as employment.

7. The Claimant asserts he was employed by the Respondent whereas the Respondent asserts the Claimant was an intern. The Claimant applied for internship in August 2016 and from all records was qualified as an accountant in January 2018 per the KASNEB results notification of 17th January 2018. If the internship took long it was because the Claimant had not qualified as an accountant prior to the time he cleared the relevant papers. The Respondent's failure to issue a letter of offer of internship cannot be construed as creating an employee employer relationship as Section 2 suggests there should be a salary offered. There is no evidence that the Claimant was offered or received a salary. In addition, the Claimant did not show when he applied for employment and how he could apply for employment as an audit assistant prior to his qualifying as an accountant. It is akin to a pupil who takes long to clear the bar exam asserting he was employed as an advocate when still doing his pupillage. The fact that the Claimant was engaged as an intern did not by itself create the employment relationship. The Respondent's witness was categorical that no employment was offered to the Claimant. The upshot of the foregoing is that I find the suit devoid of merit. It is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 6th day of February 2020

Nzioki wa Makau

JUDGE