



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1190 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**RICHARD SABWAMI SIMIYU.....CLAIMANT**

**VERSUS**

**MICHAEL MAINA KARINGA.....1<sup>ST</sup> RESPONDENT**

**SUSAN MUMBI KIHORO.....2<sup>ND</sup> RESPONDENT**

**CLIVE AKORA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

Vide a Statement of Claim dated 1<sup>st</sup> July 2018 which was amended on 18<sup>th</sup> December 2018 and filed on 20<sup>th</sup> December 2018, the Claimant avers that the Respondents unfairly terminated his employment and failed to pay his terminal dues. That on or about 1<sup>st</sup> October 2007 he was employed as a security guard at Akiba United Estate South C. He avers that he worked under the instructions of the Respondents until 28<sup>th</sup> October 2017 when the 2<sup>nd</sup> Respondent orally terminated his employment. He seeks the following reliefs:

- (i) A declaration that the Claimant's termination from his employment was unfair.
- (ii) The Claimant be paid his terminal benefits as set out in the Claim amounting to Kshs.2,110, 652.50.
- (iii) The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (iv) The Respondents to pay the costs of this Claim.
- (v) Interest on (ii) and (iv) above at Court rates.
- (vi) The Respondents be ordered to issue the Claimant with a Certificate of Service as required by the provisions of Section 51 of the Employment Act.

The Respondents filed a Memorandum of Defence on 22<sup>nd</sup> November 2018. They aver that they are all tenants who reside in 29 United Akiba Estate in South C from 2012, 2007 and May 2013 respectively. They aver that the Claimant's attempt to assign fiduciary relationship for the 29 residents on the Respondents is misguided and mischievous in the absence of such association and formal appointment to their alleged positions.

They aver that the individual residents of the Estate separately and periodically procured and paid for the services of the claimant and that he would occasionally accept work outside the estate.

They aver that in 2015, the Claimant and another individual Hesbon Masitsa who was contracted to do gardening and wash cars by the residents sought assistance from the Labour Office on how to obtain NSSF, NHIF and WIBA membership under the working arrangement. They aver that the Labour Officer advised them that it was not possible as there was no employer-employee relationship.

They aver that even if a contract of service existed it would be unfair for the Claimant to demand compensation from an individual who moved into the neighbourhood after his employment began.

The Claimant filed a Reply to the respondent's response on 13<sup>th</sup> December 2018 in which he states that he has never attended any meetings

of the estate and is therefore not privy to the internal arrangements of the estate. That the three respondents are the ones who were tasked with supervising him and to whom he reported. That his salary was paid by the Treasurer in cash or through Mpesa.

The Respondents filed a Supplementary Statement of Defence on 19<sup>th</sup> March 2018. They maintain that there is no employment relationship between the parties and that as at 1<sup>st</sup> October 2007 there was no informal association known as 29 Akiba United in Nairobi South C Estate.

The Respondents further filed a Preliminary Objection on 20<sup>th</sup> March 2019 which the Court ordered to be heard together with the Claim.

The preliminary objection is based on grounds that:

- (i) The Respondents in their Memorandum of Defence dated 16<sup>th</sup> November 2018 denied there being an organisation known as 29 Akiba United South C as such organisation is not in existence and was inapplicable to the alleged association.
- (ii) At Pre-Trial conference on 13<sup>th</sup> December 2018 the Claimant was challenged to justify who his employer was in the dispute, if such an employer existed, the Claimant should endeavour to bring any valid documentation to prove its existence. The Claimant was allowed to do so by 30<sup>th</sup> December 2018.
- (iii) On 20<sup>th</sup> December 2018 the three Respondents received an Amended Statement of Claim naming Michael Karinga as the 1<sup>st</sup> Respondent; Susan Mumbi as the 2<sup>nd</sup> Respondent; and Clive Akora as the 3<sup>rd</sup> Respondents as the persons who employed him.
- (iv) The 3 named persons by their Replying Affidavit dated 25<sup>th</sup> December 2019 have denied ever establishing any employment relationship with the Claimant, and do urge the Court to dismiss the case against them, when the matter comes up for pre-trial on 30<sup>th</sup> April 2019.

### **Claimant's Case**

The Claimant testified and adopted his Witness Statement dated 18<sup>th</sup> December 2018 as his evidence in chief. He further testified that he was notified of the vacancy for a night guard by Hesbon who was a day guard at Akiba Estate. That he accompanied Hesbon to his place of work where he talked to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who asked for his national Identity Card. He testified that the 1<sup>st</sup> Respondent was the Treasurer, the 2<sup>nd</sup> Respondent was the Chairperson and the 3<sup>rd</sup> Respondent was the Secretary of the Estate.

It was his evidence that they told him to work on trial for 7 days after which he was informed that he had qualified and was eventually recruited. That he was paid monthly. He denied being a plumber or a gardener and maintained that he was employed as a night guard at the Estate.

It was his testimony that he was originally paid in cash and later via M-pesa as evidenced by his M-pesa Statement.

In cross-examination, he testified that he was employed by the three Respondents. He further testified that he was employed by the 2<sup>nd</sup> Respondent as the Chairperson who also dismissed him. It was his testimony that he was paid in cash by the 1<sup>st</sup> Respondent who also reviewed his salary.

He testified that on 26<sup>th</sup> or 27<sup>th</sup> October, 2017 he was unwell and he explained his illness to the 1<sup>st</sup> Respondent who gave him Kshs.200 to buy medicine. He testified that the chemist was closed so he went home and reported back to work on 28<sup>th</sup> October 2017 when he found that 2 new guards had been recruited. It was his case that he was sacked.

He denied that he was called back to work as alleged by the 2<sup>nd</sup> Respondent. He testified that on 1<sup>st</sup> January 2018, he called the 2<sup>nd</sup> Respondent who told him that she had not called him back to work as she was busy taking children back to school. That she promised that she would call him the second week after the meeting of the members.

He testified that the 1<sup>st</sup> letter from the Labour Office was received by the 2<sup>nd</sup> Respondent while the 1<sup>st</sup> Respondent declined to receive the 2<sup>nd</sup> letter as it did not bear his name. That the 2<sup>nd</sup> letter dated 19<sup>th</sup> February 2018 was addressed to Estate 29 Akiba. He testified that he did not know if there is an association.

He testified that at the time of his employment, he did not demand benefits that he has sought in the claim. He further testified that he worked for 10 years without off, public holidays or leave.

In re-examination, he testified that he reported to the 2<sup>nd</sup> respondent on all matters of work and the 3<sup>rd</sup> Respondent would give him letters to distribute.

### **Respondent's case**

CLIVE AKORA, the 3<sup>rd</sup> Respondent herein testified as RW1 and adopted his Supplementary Witness Statement dated 21<sup>st</sup> February 2019.

He testified that it is not correct that he was one of the people who employed the Claimant. He testified that he started residing in the estate in

2013 which is the time he met the claimant. He testified that the Claimant used to do some work but also opened the gate. He denied reviewing the Claimants salary.

He testified that there were payments collected from residents for the claimant's payment which the Landlord informed him to pay. He denied there being an association known as 29 Akiba or a treasurer of any association. He testified that he volunteered to take minutes during the Estate meetings. He testified that he was not aware of the Claimant's termination and that he became aware when he was served with documents in respect of the suit. He denies owing the Claimant anything.

In cross-examination, he testified that he is a tenant at the estate but he did not have a copy of the lease agreement or deposit slip as evidence of when he began residing there. He testified that he did not know who employed the Claimant to operate the gate but he was aware that the Claimant was paid for doing so, washing cars and gardening.

He testified that the Claimant did not attend estate meetings but he sent the claimant to circulate the minutes. He testified that there are people who deal with the issue of recruiting a person to man the gate. He testified that at the meeting some of the members proposed that the Claimant should be attached to a security company. He stated that he did not produce the minutes of the estate meetings as he did not find any minutes.

SUSAN MUMBI KIHORO, the 2<sup>nd</sup> Respondent testified as RW2. She denied being a Chairperson of an association known as Akiba United South C or employing the Claimant. She testified that she moved into the estate in 2007 but denied requesting someone to get a guard. She testified that until 2015 she was not concerned with the affairs of the estate. She stated that she was concerned with cleanliness thus she started being referred to as chairlady.

She testified that there were no estate officials. She denied increasing the Claimant's salary. She testified that the Claimant was manning the gate, washing cars and gardening during which time the gate would not be manned. She testified that she would see the Claimant during the day and at night.

She testified that she did not terminate the Claimant's employment and did not know how he left. She denied that she called the Claimant and stated that when the Claimant visited her at her house she informed him that there were other people at the gate. She stated that she informed him that should there be another meeting, she would bring up the issue for discussion. It was her testimony that she is not in a position to respond to the question of leave because she never employed the claimant.

In cross-examination, she testified that she was a permanent resident at the Estate in February 2007. She stated that the resident's held meetings but she did not attend the meetings in any capacity. She testified that she was not aware that the Claimant was paid but the residents contributed Kshs.1,000 each per month. She testified that there are 29 residents. She testified that they would be given a receipt after payment and that the payment was left at the gate with the Claimant or his partner.

She testified that Hesbon introduced the Claimant to the residents. She denied that the Claimant was introduced to her. She testified that she did not know who called the Claimant in 2017 to enquire where he was.

In re-examination, she testified that the Claimant and his assistant refused to be absorbed by a security firm as they would be restricted from doing odd jobs.

MICHAEL MAINA, the 1<sup>st</sup> Respondent testified as RW3. He adopted his Witness Statement dated 21<sup>st</sup> February 2019. He denied employing the Claimant in 2007 as he was living with his uncle at Jamhuri Estate at the time and was not in a position to employ the Claimant. He testified that he moved to South C Akiba Estate in mid-2012.

He testified that he got to know the Claimant because he frequently visited his mother and friend at South C. He denied being elected as treasurer. He however testified that he did volunteer to clean the place and light it. He testified that the residents helped the Claimant come up with a saving plan by keeping the money for him. He testified that after the Claimant left he sent him his savings. He denied paying the Claimant and stated that the agreement was that he was to help the claimant to save.

In cross-examination, he testified that his contribution varied between Kshs.1,000 and Kshs.2,500 which was to encourage the claimant in his savings. He testified that the Claimant assisted him with gardening, cleaning his car and opening the gate.

He testified that at the estate meetings, they discussed estate affairs and contributions by each member. He testified that the guards collected the contributions from each member. He testified that there arose an accountability issue thus receipts would be issued. He testified that he did not have proof that the Claimant gave him money. He testified that he could not confirm that the Claimant worked with Hesbon who was a guard.

He testified that after the Claimant left in November 2017, he paid Kshs.10,000 to the claimant's account being the money he was holding. He testified that the reason the Claimant chose to sue him was that there is a direct link between the Claimant and him based on the M-pesa transactions.

He testified that the Claimant closed and opened the gate during the day and at night. He testified that they had a joint M-shwari account with the Claimant. He testified that he neither had the statement nor did he remember the account number. He testified that now there is someone who opens and closes the gate and they still make contributions with his contribution being Kshs.1,000.

In re-examination, he testified that he was keeping M-pesa accounts because the Claimant had requested him to do so. He testified that he did not employ a night guard and there was no association that could employ a night guard.

He testified that the sole reason that the Claimant enjoyed some benefits was because he was under nobody's control. He testified that no-one employed the claimant.

### **Claimant's Submissions**

The Claimant submitted that the Respondents have not denied knowing

him. That they failed to effect the registration of the association and now want to hide under the fact that the association is not a known entity in law. He relied on the case of **Stanley Mungai Muchai v National Oil Corporation of Kenya [2010] eKLR** and urged the court to be persuaded by the holding therein and dismiss the preliminary objection.

He submitted that it is ridiculous that the Respondent wants the court to believe that he was an unknown stranger who worked for 10 years without pay and left on his own volition. He urged the Court to find that he was employed and stationed at the gate, earned a monthly salary and rather than being engaged as an independent enterprise his services were essential to Akiba 29 United where all the respondents reside.

He relied on the case of **Everret Aviation Limited v Kenya Revenue Authority (through the Commissioner of domestic taxes) [2013] eKLR** where the Court restated the tests for establishing an employment relationship. He submitted that the actual work determined the working relationship and not the Respondent's assertions.

He urged the Court to rely on Section 10(7) of the employment Act that the burden falls upon the employer to prove that an alleged term formed part of the contract. He submitted that he was employed on 1<sup>st</sup> October 2007 jointly by the Respondents as officials of an unregistered association known as 29 Akiba United.

He submitted that there is no indication that the Respondents complied with the provisions of Section 41 of the Employment Act before terminating his employment allegedly for absconding work. He submitted that he is entitled to Kshs.12,822 being one month salary in lieu of notice under Section 35 of the Employment Act. He submitted that he did not go on leave for 10 years and that the Respondents did not avail any leave records or application for leave hence he is entitled to leave pay.

He submitted that his salary was Kshs.5,000 which was reviewed to Kshs.11,150 but he was neither housed nor paid a house allowance. He submitted that he reported to work on a daily basis and that he worked throughout public holidays.

He contended that he was not a member of NSSF therefore Kshs.64,112.50 is payable to him as service pay under section 35 of the Employment Act. He further submitted that he worked overtime from 1800 hrs until 0600 hrs being in excess of 8 hours under Legal Notice No. 53 (Protective Security Services Order 2003).

He submitted that he was not paid his salary for the 28 days worked in October 2017. It was his submission that the termination being unfair he is entitled to 12 months' compensation at Kshs.153,870. He submitted that he is entitled to a certificate of service and costs of the suit.

### **Respondent's Submissions**

The Respondents submit that the Claimant failed to discharge the evidentiary burden under section 107 and 108 of the Evidence Act to support the assertion that they were officials of the alleged informal and unincorporated association. They relied on the case of **Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR** where the Court held that the burden of proof lies with whoever would want the court to find in his favour.

They submitted that Claimant's amendment of the claim was informed by a desire to describe them in a manner that is likely to create a contractual nexus between the Claimant and them. They submitted that the Claimant is not sure who should answer for the claim. They submitted that the Claimant has failed to demonstrate his employment by the 3<sup>rd</sup> Respondent as there is no mention of him in the employment and termination of the Claimant.

They submitted that there is no proof that the residents of Akiba 29 can be represented in a suit in a way that any order of the court will be deemed as binding to all of them. They submitted that the **Mercantile Marine Service Association v Toms [1916] 2KB 243** held that representative action was inapplicable since the various members of the association might be in wholly different positions and might have different defences or seek to disassociate themselves from the suit. It is therefore their submission that for the suit to hold all residents of Akiba 29 must have a common position *vis-a-vis* the claim, that there must not be different defences available to each of them.

They submitted that in the event of an actionable breach by or against an unincorporated association, each member has an equal right to sue and equally bears the burden of being sued alongside all other members. They relied on the decision on **Skair Associates Architects v Evangelical Lutheran Church of Kenya & 4 Others [2105] eKLR** who held that there can be no prosecution of suits by or against unincorporated societies.

They submitted that the extract of the M-pesa Statement does not support the fact that the Claimant was receiving a salary of Kshs.11,150 and supports the assertion that the 1<sup>st</sup> Respondent

was assisting him save.

In respect of the reliefs they submitted that there was no employment relationship thus the reliefs should fail. They further submitted that even if the benefits do accrue they should be claimed within certain periods as there are limitations on how far back the reliefs can go such as

annual leave which under section 28 must be taken within 18 months. They urged that the suit be dismissed with costs.

## **Determination**

The issues for determination are

1. Whether there existed an employment relationship between the Claimant and the Respondents.
2. Whether the Claimant was unfairly terminated
3. Whether the Claimant is entitled to the reliefs sought

### **Whether there existed an employment relationship between the Claimant and the Respondents.**

In his amended Statement of Claim, the Claimant describes the Respondents as the treasurer, chairlady and secretary respectively, of an informal association known as 29 Akiba United. In his testimony, the Claimant stated that he was employed by the Respondents.

Section 2 of the Employment Act defines an employee, employer and contract of service as:

**“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;**

**“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;**

**“contract of service” means 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;**

In **Everret Aviation Limited v Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) [2013] eKLR** Kimondo J. held:

*“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 v 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 v Heath Laundry Company [1910] 1 KB 543**, **O’ Kelly v 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, 4<sup>th</sup> 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”.*

The three Respondents testified that the Claimant opened the gate for them in addition to gardening and washing cars. RW3 testified that he did not know who employed the Claimant to operate the gate but he was aware that the Claimant was paid for doing so. He further testified that he gave the Claimant the minutes of the estate meetings to circulate to the members. RW3 alleged the money sent to the Claimant was the claimants savings. He also testified that the guards collected the contributions from each resident. The M-pesa Statements produced by the Claimant indicate that he received several deposits of money from the 1<sup>st</sup> Respondent. RW2 testified that she was not aware that the Claimant was paid but the residents contributed Kshs.1,000 each, per month.

From the foregoing it is clear that the claimant was employed as a night security guard for the estate and the persons he dealt with directly were the respondents.

As defined in the Act, a contract of service does not have to be in writing. It can be oral and can also be implied from the conduct of the parties or from the facts. What is common is that the employee works and the employer pays.

The respondents have not denied that the claimant worked and was paid for his work. Their only problem is that there was no association and that they have been sued on behalf of the 29 Akiba Estate residents. Since it is the role of the employer to formalise the employment relationship, the respondents cannot blame the claimant for naming them as the persons whom he was in contact with and who supervised and paid him on behalf of the other residents. If the respondents were not comfortable being named as they were, what they should have

done is apply to join all the residents whom as the claimant stated, he did not know, but were known to them.

I find that there was an informal association known as Akiba 29 Estate South C or by whatever other name, who had engaged the claimant as a night guard. There was thus an employment relationship between the claimant and the respondents.

**Was the termination of the claimant's employment unfair?**

The claimant testified that he fell sick on 26<sup>th</sup> or 27<sup>th</sup> October 2017 and reported to the 1<sup>st</sup> respondent who gave him Kshs.200 to buy medicine. That since the chemist was closed he went home. That on his return on 28<sup>th</sup> October 2017 he found two new guards had been engaged. That he approached the 2<sup>nd</sup> respondent for an explanation and she promised to call him back after a meeting of the residents but never called. This evidence was not controverted by the respondents. The 2<sup>nd</sup> respondent confirmed the same in her testimony. These facts amount to an unfair termination as there was no valid reason for the termination and the claimant was not given an opportunity to defend himself.

**Is the claimant entitled to the remedies sought?**

The claimant is entitled to pay in lieu of notice by virtue of Sections 35 and 49(1) of the Act. I award him **Kshs.14,650.90** and house allowance of 15% being **Kshs.2,197.50** being the minimum wage for night watchman under the Regulation of Wages (General) Order 2017. This is in line with Section 26 of the Employment Act and Section 48(1) of the Labour Institutions Act which provides as follows –

Section 26 of the Employment Act

**26. Basic minimum conditions of employment**

- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.**
- (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.**

Section 48(1) of the Labour Institutions Act

**48. Wages Order to constitute minimum terms of conditions of employment.**

- (1) Notwithstanding anything contained in this Act or any other written law?**
  - (a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;**
  - (b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.**

In view of the fact that the claimant did not ask for leave during the period he was in employment, I will award him leave for only 3 years being the limitation period for claims under the Employment Act. This would be at the rate of 21 days per year at the basic rate of pay, a total of 63 days which translates to **Kshs.35,500.30**.

I will award the claimant house allowance also for 3 years on the same basis as leave, in the sum of **Kshs.79,110**.

The claimant's claim for off duty was not proved as he did not lead any evidence in respect thereof. He also did not adduce any evidence in respect of the claim for public holidays and the claim fails. The same applies to overtime.

The claimant is entitled to service pay under Section 35(5) having not been a member of NSSF or any other scheme. I award him 15 days salary for the 10 years worked at **Kshs.84,525**.

The claimant is also entitled to salary for the month of October 2017 having worked for 28 days for which I award him Kshs.14,650.90 plus house allowance of Kshs.2,197.50 being a gross of **Kshs.16,848.40**.

The total award is as follows –

- 1..... One month's salary in lieu of notice..... Kshs.16,848.40
- 2..... 63 days leave (for 3 years)..... Kshs.35,500.30

3..... House allowance (for 3 years)..... Kshs.79,110.00

4..... Service pay..... Kshs.97,202.30

5..... Salary for October 2017..... Kshs.16,848.40

**Total Award      Kshs. 245,509.40**

I thus enter judgment for the claimant against the respondents jointly and severally in the sum of **Kshs.245,509.40**. The 1<sup>st</sup> respondent as Secretary of the Estate Association will issue a certificate of service to the claimant.

The respondents shall pay the claimant's costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**MAUREEN ONYANGO**

**JUDGE**