



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT IN NAIROBI.

CAUSE NO.1015 OF 2015

(CONSOLIDATED WITH ELRC. NOS. 1014,1016,1017,1018,1019 AND 1020 OF 2015)

REINARD MUTUKU.....1ST CLAIMANT

STELLAMARIES KANINI NZIOKA.....2ND CLAIMANT

BENJAMIN AZINGARE KARANJA.....3RD CLAIMANT

ROSE BOSIBORI.....4TH CLAIMANT

THOMAS MUSYOKA.....5TH CLAIMANT

LAURA ISENDI KARANJA.....6TH CLAIMANT

FELISTER NZINA LOKO.....7TH CLAIMANT

-VERSUS-

SPORTS OUTREACH PROGRAMME LIMITED....RESPONDENT

JUDGMENT

1. The Claimants herein filed separate suits on 16.6.2015 but on 19.10.2015 all the said suits were consolidated under this file. The claimants aver that they were employed by the respondent as teachers on diverse dates until 23.1.2015 when they were retrenched. They therefore prayed for:

(a) Declaration that the termination of their employment was unfair and unlawful.

(b) Compensatory damages plus terminal benefits.

2. The respondent filed defence on 16.10.2015. She denied having employed the claimants and averred that she was only a gratuitous donor providing funding to Sports Outreach Ministry Academy a community school in Mukuru slums. She further averred that she had no proprietary interests in the school or any contractual engagements with any of the school staff including the claimants. She further averred that in January 2015 she discontinued sponsorship to the school due to some irreconcilable differences with the school management. She further denied ever dismissing the claimants and averred that all what she did was to withdraw the sponsorship to the school.

3. During the hearing Mr. Thomas Musyoka Ngila, the claimant in Cause No. 1018 of 2015 testified on behalf of the claimants while the respondent called 4 witnesses. After the hearing, both sides filed written submissions.

Claimant's case

4. Mr. Ngila testified that he was employed by the respondent in 2008 as a teacher and in the same year rose to become the Head teacher He stated that the other claimants were also employed by the respondent who was paying all their salaries. He contended that the respondent was supporting the school, Sports Outreach Academy, including paying teacher's salaries. He further testified that they worked continuously until 23.1.2015 when the respondent's Directors, Mr. Francis Juma, told them that the respondent had withdrawn her support to the school and as such they were left on their own. He therefore concluded that they were retrenched and prayed for the reliefs sought herein, for himself and his fellow claimants.

5. On cross-examination, he admitted that the school started in 2003 but he became the Headteacher in 2008. He further admitted that before the respondent came into the picture, the school was called Angaza Community School. He further admitted that he knew Mr. Joseph Kimathi who was employed by the school and was in charge of communication with donors. He also admitted that Lifespring Chapel was also supporting the school financially.

6. He contended that he was not aware of any acquisition of the school by the respondent. He however admitted that the respondent was supporting sporting activities. He admitted that the school was for children from the slums. He further admitted that Mr. Joel Nzuki was the Headteacher of the school before him and that he left after allegations of rape in the school.

7. He contended that he was reporting to the Directors of the Programme. He admitted that there was a school committee but denied that they were remunerated by the respondent. He admitted that the committee was to manage the school and he was the Secretary. He further admitted that the County was represented at the committee. He denied that Arthur Lumembe and Caroline Adhiambo were employees of the school and contended that they were employed by Sports Outreach Ministry.

8. He denied knowledge of the respondent's policy not to charge any fees. He further denied that there were differences between the respondent and the claimants for charging fees to children. He also denied that Baby Class (Daraja) were paying examination fees but admitted that parents of the rest of the school paid examination fees.

9. He admitted that the land on which the school stood belonged to Boaz Omollo but denied knowledge that it changed hands. He further admitted that the respondent was funding rent, feeding programme and teachers' salaries. He also admitted that the school had a Bank Account and the signatories were committee members.

10. He admitted that in February 2015 he joined another school. He contended that Benjamin Karanja and Stellamaris continued teaching in the school but the rest left to work elsewhere. He contended that his salary was stopped after the respondent withdrew her support from the school. He admitted that after departure of the respondent, the school changed its name to Sloam. He contended that he accounted for all funds given to the school.

Defence Case

11. Pastor Francis Juma testified as RW1. He stated he is a pastor with the Sports Outreach Ministry through which Sports Outreach Institute, a donor, supports programmes in the slums. He testified that the respondent is a Non-Governmental Organization (NGO) which was registered in Kenya in October, 2012 after which the donor started channeling funding through the NGO.

12. He further testified that all the claimants were employed by a community school called SOM Academy which was being supported by the said donor even before the NGO was registered, but after the registration funding was channeled through the NGO. He however, denied the existence of an employment relationship between the claimants and the NGO.

13. On 17.11.2014, RW1 learned that the land on which the school stood had been sold and testified that he notified the donor institute and its President came to Kenya and held meetings with the school Headteacher and the purchaser of the land, (a former Headteacher who was dismissed for misconduct.) After the president returned to America, he terminated the funding to the programme.

14. He contended that the respondent paid terminal due to all the claimants except the Headteacher because he incited parents to take away property including utensils and furniture. He contended that the claimant was ordered to account for the property before he could be paid his dues.

15. On cross-examination, RW1 contended that the claimants were engaged by another NGO, (COMPASSION), to work from 5 p.m. to 6.30 p.m. He admitted that he was the Director of the respondent NGO and he had a lot of information about the school. He reiterated that the school belonged to the community and it continued after the donor withdrew its support. He contended that the NGO paid the terminal dues to the claimants because they were summoned at the D.C.'s office and also because it was salary due to them.

16. Arthur Lubembe, the respondents feeding Programme Manager, testified as RW2. He testified that the Donor Institute supported the SOM Academy, a community school and all through indicated its willingness to buy the land on which the school stood for the benefit of the community. However, when the land was sold to another person and the Head teacher failed to account for the money he collected from pupils the donor withdrew funding.

17. Ms. Carolyn Adhimbo Ajuoga the respondent's Administrator and Programme Co-ordinator testified as RW3 and her duties include Office Management, Finance, and Programme Co-ordination. She was employed by respondent in 2007. She testified that Sports Outreach Institute, USA, agreed to give financial support to the Sports Outreach Programme Mukuru Kwa Njenga slums. The programme aims at rehabilitating street children and the sponsorship was for feeding and teaching. The programme, according to her was not the proprietor of the school.

18. She testified that the school had a Headteacher and a Management Committee which owned and ran the school. She further testified that the school had a bank account and the signatories were members of the school committee. According to her once the respondents forwarded the donor money to the school account, it had no role in managing the same.

19. She further contended that the claimants were teachers employed by the school and not the respondent. She contended also that Mr. Joel Nzuki was also employed by the school but he was dismissed for misconduct. She testified that when Mr. Nzuki bought the land where the school stood, the donor withdrew funding by serving a withdrawal notice to the community leadership, parents, committee and the beneficiaries of SOM Academy.

20. She contended that the respondent's employee at the school were only herself and RW2 and their mandate was only to ensure that the objectives of the sponsorship were adhered to. She denied that the claimants were dismissed by the respondent and averred that many of them continued teaching at the school even after the donor withdrew sponsorship. Finally, she admitted that she was paying the teachers salary after signing a cash voucher.

21. Mr. Josephat Odhiambo Owila testified as RW4. He stated that he was employed by SOM Academy in 2010 as a teacher after being interviewed by the Headteacher Mr. Ngila. He started as a volunteer teacher and thereafter he was enrolled for a salary by the end of July 2010. He contended that there were eleven (11) teachers including the claimants and the school performed very well to an extent of becoming the best in Embakasi in KCPE.

22. In January 2015, he heard rumours that the school compound had been sold by the owner Mr. Omolo to the former Headteacher Mr. Nzuki without involving Pastor Juma. As a result, the donor withdrew funding. He maintained that the claimants were employed by SOM Academy and not the respondent.

23. On cross-examination, RW4 contended that when Mr. Ngila interviewed him, he told him that there was a donor paying rent, salary to teachers and feeding programme. He admitted that he was collecting his salary from Rw3.

Issues for determination

24. I have carefully considered the evidence and the written submissions presented by both sides. There is no dispute that all the claimants were teachers at SOM Academy Mukuru slums Nairobi until 23.1.2015. The issues for determination are:

- (a) Whether the claimants were employed by the respondent at the SOM Academy.
- (b) Whether the claimants were retrenched by the respondent.
- (c) Whether the retrenchment was unlawful.
- (d) Whether the claimants are entitled to the reliefs sought.

Claimant's employer

25. The claimants contended that they were employed by the respondent who was paying their salary including the final salary after the withdrawal of funding to the SOM Academy. They have also produced staff identification cards for some of them. However the respondent has denied any employment relationship with the claimants. She called four witnesses to prove that the claimants were employed by SOM Academy, a community school in Mukuru and her role there was only voluntary and gratuitous funding of the school's rent, salaries and feeding for the children. She produced minutes of the school committee to corroborate the above verbal contention.

26. I have carefully considered the evidence and the submission presented by both sides. The staff identity cards produced by Mr. Thomas Ngila, Rose Bosibori Omweri and Felister Nzisa Loko were not issued by the respondent herein but Sports Outreach Ministry. Secondly, none of the claimants produced any letter of appointment by the respondent or any other form of written evidence.

27. However, the respondent produced minutes of the SOM Academy committee held on 17.11.2014, undated school profile and executive summary of the school which clearly confirm that SOM Academy was a community school which benefited financially from the voluntary donations from the Sports Outreach Institute of America through the Sports Outreach Ministry, Kenya and later through the Sports Outreach Programme an NGO registered in Kenya.

28. The facts of this are very clear that the SOM school and the SOM programme (NGO) were separate and distinct entities and that the latter provided financial sponsorship to the school. The NGO did not enter into any contract of service with the claimants and she did not exercise control over them. The evidence on record proves that the school was managed by a school committee and the Headteacher. It is also clear that the presence of the NGO's two employees at the school were to ensure that the objectives of the donor are met and the day the school violated the objectives, the donor withdrew funding. I therefore return that the claimants have failed to prove by evidence that they were employed by the respondent whom they have wrongly sued as a limited liability company.

29. In view of the finding that the claimants were not employed by the respondent, it's obvious that their suit must fall on its face and as such there is no need to consider the other three issues framed above for determination. Consequently, the suit stands dismissed. I award no costs because of vagueness surrounding the relationship between the parties herein.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE