



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 585 OF 2014

RICHARD KAMUTI NYAMAI.....CLAIMANT

VS

CAPITAL REEF (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The issues in dispute in this claim arise from alleged termination of the Claimant’s employment on 8th August 2014.
2. The Claimant sets out his claim in a Memorandum of Claim dated 27th October 2014 and filed in court on 18th November 2014. The Respondent filed a Memorandum of Defence on 16th December 2014.
3. At the trial the Claimant testified on his own behalf and the Respondent called its Regional Operations Manager, Khatija Admani.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent from 18th December 1994 until 8th August 2014, initially as a loader and later as a general clerk. He was paid a daily wage of Kshs. 1,600.
5. The Claimant claims that his employment was unlawfully terminated on 8th August 2014, after he sustained injuries at the Respondent’s premises as a result of the Respondent’s negligence.
6. The Claimant avers that no reason was advanced for the termination and that there was no prior discussion between him and the Respondent. He claims that the termination was precipitated by the suspicion that he would institute a legal suit for the occupational injuries he had sustained while on duty on 5th August 2014.
7. The Claimant further avers that he was made to work for 12 hours and sometimes for 24 hours per day, without any overtime compensation.
8. The Claimant attributes the termination of his employment to the injuries he had sustained in the course of duty.
9. The Claimant states that he was not registered under a pension or provident fund under the Retirement Benefits Act, a gratuity or service scheme under a collective agreement, the National Social Security Fund or any other scheme established by the Respondent. He therefore claims service pay at the rate of not less than fifteen (15) days’ pay for each completed year of service.
10. The Claimant’s cumulative claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 29,440.00
- b) House allowance for 2.6.2008 - 8.8.2014.....284,160.00
- c) Underpayment when on annual leave.....252,000.00
- d) Service pay @ 15 days’ pay per completed year.....413,538.50

- e) 12 months' salary in compensation.....307,200.00
- f) Accumulated overtime @ 3 hours per week.....864,000.00
- g) Punitive damages
- h) Reinstatement and/or re-engagement
- i) Certificate of service
- j) Costs plus interest

The Respondent's Case

- 11. In its Memorandum of Defence dated 15th December 2014 and filed in court on 16th December 2014, the Respondent denies that it had employed the Claimant from 18th December 1994 to 8th August 2014 and avers that not only could it not have done, so but that the Claimant never was its employee.
- 12. The Respondent further avers that it, from time to time and on a need basis, contracted Ramadhani Walakonya to provide labour services at a rate agreed directly with him and the Claimant had, on some occasions, been a casual member of the 'gang' availed by the said Ramadhani Walakonya and/or Ali Salim.
- 13. The Respondent therefore denies that there was an employer/employee relationship as between it and the Claimant, by reason of the fact that it engaged an independent contractor to provide labour services.
- 14. The Respondent maintains that the Court lacks jurisdiction to entertain this claim.

Findings and Determination

- 15. The first issue for determination in this case is whether there existed an employment relationship between the Claimant and the Respondent.
- 16. In his Memorandum of Claim dated 27th October 2014, the Claimant states that he was employed by the Respondent from 18th December 1994 until 8th August 2014. When he appeared in court however, the Claimant changed the effective date of his employment to 2004. In the same breath, he told the Court that he was a casual from 2001 to 2013. No explanation was given for these striking contradictions.
- 17. The existence of an employment relationship between the parties was a highly contested matter. The Claimant therefore ought to have called independent evidence to support his assertion that he was an employee of the Respondent. Failure to do so, coupled with the unexplained prevarication on the effective date of employment, rendered the Claimant's case doubtful.
- 18. Additionally, the Claimant himself told the Court that there was a system of work at the Respondent known as 'sogi' where workers would be recruited by Ramadhani Walakonya and Ali Salim, who the Respondent maintains were some form of independent contractors.
- 19. Overall, I find and hold that the Claimant failed to convince the Court that he was an employee of the Respondent.
- 20. His claim, which is premised on the existence of an employment relationship, therefore collapses and is dismissed.
- 21. Each party will bear their own costs.
- 22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Ganzala h/b for Mr. Mbuya for the Claimant

Mr. Ondego for the Respondent