



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 368 OF 2016

BOMU ATHUMANI.....CLAIMANT

VS

SURRAJ PURR LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The issues in dispute in this case, as captured by the Claimant in his Memorandum of Claim dated 24th May 2016 and filed in court on 25th May 2016, are unlawful termination of employment and refusal to pay terminal dues.
2. The Respondent’s Response to the Claimant’s claim is dated 17th June 2016.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called Mussa Nassir Mwarika and Arvind Naran Vekarai.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Painter from 2007 until December 2015. He gives his monthly salary as Kshs. 14,300.
5. The Claimant claims that the Respondent terminated his employment in December 2015 without notice and without justifiable cause. He therefore claims the following:

- a) 184 accrued leave days.....Kshs. 114,400
- b) 2 months’ pay in lieu of notice.....28,600
- c) 12 months’ salary in compensation.....171,600
- d) Gratuity @ 15 days’ pay per year.....57,200
- e) General damages
- f) Costs plus interest

The Respondent’s Case

6. In its Response dated 17th June 2016 and filed in court on 20th June 2016, the Respondent states that it is registered as Surajpur Construction Company Limited.
7. The Respondent denies having employed the Claimant and states that it had contracted an independent contractor, by the name Musa Nassir Mwarika, to undertake a painting project at the Respondent’s construction site.
8. The Respondent further states that it had no knowledge of who was hired by the said independent contractor nor was it in control of any hiring and/or termination by the independent contractor.

9. The Respondent maintains that if the Claimant was in any form of employment, then it was on a contract for service with Musa Nassir Mwarika.

10. The Respondent concludes that this Court has no jurisdiction to entertain the present claim, since there was contract of service between the Claimant and the Respondent.

Findings and Determination

11. There are three (3) issues for determination in this case:

- a) Whether there was an employment relationship between the Claimant and the Respondent;
- b) Whether the Claimant has established a case of unlawful termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

12. The first issue for determination is whether there was an employment relationship between the Claimant and the Respondent, capable of enforcement by this Court, which exercises specialised jurisdiction.

13. In his Memorandum of Claim and witness statement, the Claimant states that he was employed by the Respondent as a Painter from around the year 2007 until December 2015. The Claimant claims to have been paid a gross monthly salary of Kshs. 14,300.

14. When he appeared before the Court however, the Claimant changed tune and stated that he was paid a daily rate of Kshs. 300 which was progressively increased to Kshs. 550. No explanation was given for this departure.

15. On its part, the Respondent denies ever employing the Claimant and states that the Claimant would occasionally be engaged by Musa Nassir Mwarika, who worked for the Respondent as an independent contractor. Mwarika confirmed this arrangement in his testimony before the Court.

16. Section 2 of the Employment Act defines an employee as:

“a person employed for wages or a salary and includes an apprentice and indentured learner.”

17. The Claimant did not adduce any independent evidence to support his assertion that he was an employee of the Respondent. In light of the testimony by the Respondent’s Director, Arvind Naran Vekarai, which was corroborated by the testimony of Musa Nassir Mwarika, who claimed the Claimant as his employee, the Claimant ought to have adduced independent evidence to back his word.

18. As held by this Court in ***John Kamau Mburu v Program for Appropriate Technology in Health and another [2015] Eklr*** not every work relationship translates into an employment relationship. It follows therefore that the fact the Claimant may have worked at the Respondent’s sites did not by itself confer an employment relationship.

19. It was incumbent upon the Claimant to prove the existence of an employment relationship, upon which he could lay a claim against the Respondent. Having failed to do so, his entire claim fails and is dismissed.

20. Each party will bear their own costs.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH 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. Mogaka for the Claimant

Mr. Wafula for the Respondent