



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 200 OF 2017

LINUS SONGWA MUSAMAL.....CLAIMANT

VERSUS

BAMCO CONSTRUCTION COMPANYRESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was orally employed by the respondent as a caretaker from November, 2014 at a salary of Kshs. 7,200/= exclusive of house and other allowances.
2. According to the Claimant, he served with loyalty, diligence and full dedication until November, 2015 when the respondent wrongfully and un procedurally terminated his service and refused to pay his terminal dues.
3. The Claimant therefore sought compensation for unfair termination of his service and payment of his terminal dues.
4. The respondent on its part pleaded that the Claimant was never its employee and the Claimant service was through a subcontractor Mr. Daniel Mbayi.
5. According to the respondent the Claimant was an employee of the subcontractor.
6. At the oral hearing the Claimant stated that he was employed in 2014 November to work as a caretaker and worked until 2015 November.
7. According to him he never used to receive his salary on time and when he asked for it, he was sacked. He had not been paid from April, 2015. It is his evidence that Laban Kitur was the one who employed him and was the one paying his salary. It was his evidence that he never saw the agreement between Mr. Kitur and Mbayi. He further said that he never signed the said agreement. The Claimant further denied that the signature on the petty cash vouchers were his. He never had any warning or caution about his work. Before dismissal he was never issued with any warning or show cause letter.
8. During the period he worked, he worked from 7.30pm to 8.00pm and also worked during public holidays. He neither went on leave or paid in lieu.
9. In cross examination, he stated that he had no document to show he worked for the respondent. He further stated that he was never given a termination letter. The Claimant further stated that the respondent used to do construction works and used to employ their own caretakers. In 2014 he met one Laban at a project in Uasin Gishu.
10. He was not aware of Laban was concerned with employment of workers.
11. In re-examination he stated that he used to be paid through petty cash but never used to sign against the payment. He further stated that Laban used to pay him. He was the boss.
12. Respondent's first witness stated that he was Laban Kitur and that he was a contractor. He constructs roads and houses. It was his evidence that when he got jobs he would enter into a labour contract with sub -contractor who would supply Labour . He never dealt directly with workers. In this particular case he had a labour contract with one Mr. Mbayi. It was thus his evidence that he was not the one who employed the Claimant. He however stated that he knew the Claimant as one of the regular workers but denied he was his employee. The Claimant used to work for Mr. Mbayi. When the project concerned was finished, the Claimant requested to remain on site as he looked for another job. Soon thereafter he got a job in the neighbouring site but ran into problems. He therefore asked the Claimant to leave the

completed site as it was going to portray the respondent in bad light. He denied the Claimant was a caretaker.

13. In cross-examination he stated that there was a Labour contract between himself and Mr. Mbayi and that the Claimant need not have signed the same. The Labour contract was signed after the Claimant had left.

14. The contract in issue took only two months but he started seeing the Claimant in 2014 when he was digging trenches and mixing concrete.

15. Respondent's second witness stated that he was Daniel Mbayi and that he dealt with construction works. Whenever a contractor got a job they would contact him. It was his evidence that he knew the Claimant since November, 2014 when he had a job to do in Kipsomba. The Claimant according to him was a header. The Claimant approached him to assist him. He hired him as a casual labourer. The work took two months. They later moved to Karotat where they constructed a dormitory. It was his evidence that the Claimant's name was in the list of workers attached in support of the response. It was further his evidence that workers were paid weekly and that they never defaulted in paying the workers. He denied the Claimant was a caretaker.

16. In cross-examination he stated that the Claimant used to sign petty cash vouchers none of which he produced in court.

17. In re-examination he stated that the petty cash voucher showed the Claimant was paid and he signed on the voucher.

18. The Claimant alleged he was an employee of the respondent. He however did not produce any letter of appointment or any proof to show there was employment relationship with the respondent. The Claimant further denied signing the petty cash vouchers exhibited by the respondent but however stated that the respondent paid him through petty cash vouchers.

19. When the Claimant's services allegedly got terminated he sought intervention of National Legal Aid Awareness Programme (NALEAP) who wrote to the respondent demanding his terminal dues amounting to Kshs 53,000/=. In his memorandum of claim the Claimant further averred that upon termination he demanded payment of his terminal dues from 1st April, 2015 to November 2015 but the respondent declined. Nowhere in the Claimant's pleadings or evidence did he allege that during the time respondent employed him, he never went on leave, was underpaid and that he worked overtime. These were however lumped together in the heads of claim without setting a background of how they accrued.

20. The respondent in the memorandum response however produced evidence to show it had a labour contract between itself and one Daniel Musila Mbayi. The respondent further exhibited evidence to show that Mr. Mbay used to pick money through petty cash vouchers to pay workers. Further Mr. Mbay appeared before Court and admitted that indeed the Claimant was his employee and that he entered in Labour contract with the respondent to supply Labour whenever the respondent got construction jobs.

21. The concept of Labour outsourcing has in the recent past gained ground especially in the construction industry where jobs come as projects and a contractor need not keep a workforce unless there is work to be undertaken. The Court is not new to cases where at the conclusion of a contract some of the outsourced workers sue the contractor claiming unfair termination even where as is the case before me a written Labour outsourcing contract between the contractor and the Outsourcing company.

22. In the case before the respondent has reasonably shown that it had Labour outsourcing contract with one Mr. Mbay. The latter came to Court and testified as much. The Claimant on the other hand did not show, a part from merely alleging that there was an employer-employee relationship between himself and the respondent. From the evidence before me, it was clear that the person who was liable to be sued for unfair termination if at all took place was Mr. Daniel Mbay Musila and not the respondent.

23. The claim in the circumstances is found without merit and is hereby dismissed with costs.

24. It is so ordered.

Dated at Eldoret 30th this day of October 2020

Abuodha Jorum Nelson

Judge

Delivered this 30th day of October 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge