



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 92 OF 2014

NGERE JOHN GILBERTSON.....CLAIMANT

VERSUS

IMPACT RESEARCH AND DEVELOPMENT ORGANISATION.....RESPONDENT

JUDGMENT

1. The suit was filed on 5/5/2014, the claimant praying for an order for: -

(a) Payment of 28 months' arrear salary in the sum of 677,600.

(ii) Reinstatement to the position held by the claimant prior to termination.

(iii) Interest and costs.

2. The claimant testified as C.W.1 and relied partly on witness statement dated 5/5/2014 as his evidence in- Chief.

3. That C.W.1 was employed by the respondent in April, 2011 having a basic salary of Kshs. 15,000 and transport allowance of Kshs. 2,000 per week and Airtime of Ksh. 300 per week.

4. That the claimant worked as a Community mobiliser to encourage men to undergo circumcision.

5. That the claimant worked until 6/9/2013.

6. That the claimant had no letter of appointment. That he was not paid any salary for the period he worked. That the claimant got food from his home and was evicted by his landlord for failure to pay rent and his household goods were confiscated in distress of rent.

7. That the claimant's employment was verbally terminated by one Rashid Aswan whilst in the respondent's motor vehicle in the presence of other workers. The claimant prays for 28 months' arrear salary. That the claimant wrote a demand letter vide G.S. Okoth Advocates.

8. Under cross-examination the claimant testified that he worked for the respondent for 2 ½ years and had no letter of appointment. That he was not paid salary and no money was submitted to National Social Security Fund (NSSF) on his behalf though he has a National Social Security Fund membership card. That he had a certificate of service dated 6/9/2013 to show that he was employed by the respondent. He produced it as exhibit "5".

9. C.W.1 denied that he was an unpaid volunteer and mobiliser. That the Certificate of Service shows C.W.1 worked from April, 2011 to August, 2013. That he worked under a duty roster.

10. That he was entitled to payment as earlier stated in –Chief.

11. That as at the time of writing the demand letter C.W.1 was still working and claimed arrear salary of kshs. 145,200 as at 7/5/2013. That he now claims Kshs. 667,400.

12. C.W.1 denied that he had no salary and that he was paid allowance only as suggested by Counsel for the respondent. C.W.1 stated that he signed a register daily upon reporting to work. That he earned Kshs. 24,200 per month for 28 months which he now claims for payment in arrears.

13 The respondent called P.W.1, Rashid Asman who testified that he worked for the respondent as a male circumcision surgeon. That he is a

Clinical Officer by training. That he served the respondent from the year 2009 up to April, 2015.

14. That he relied on a witness statement dated 15/9/2015 as his evidence in chief. R.W.1 produced document 1 marked '1' to '5' in support of the respondent's case.

15. R.W.1 denied that the purported certificate of service dated 6/9/2013 and produced by the claimant was written by him. R.W.1 stated that the claimant requested to be taken up by the respondent as a Community volunteer mobiliser on male circumcision.

16. That the claimant was reimbursed his expenses for the services rendered but was never an employee of the respondent.

17. R.W.1 under cross-examination stated that C.W.1 was an influencer. That the respondent employed four (4) health professionals on salary. That the volunteers were paid reimbursable stipend.

18. That the clocking record illustrates access to the office but not employee status. R.W.1 reiterated that the purported Certificate of Service was a forgery.

19. The parties filed written submissions and the issues for determinations are: -

- (a) Whether the claimant was an employee of the respondent and
- (b) Whether the claimant is entitled to the reliefs sought.

Determination

20. In his sworn testimony, C.W.1 did not assert the relief of reinstatement to his job and so that relief was abandoned.

21. The claimant testified that he was employed by the respondent in April, 2011 and worked continuously until 6/9/2013 when R.W.1 verbally terminated his employment.

22. It is not in dispute that C.W.1 rendered services for the respondent. What is in dispute is whether he was a salaried employee or was a volunteer who was paid reimbursable allowance.

23. The claimant worked for a period of 2 ½ years and during all that time he was paid transport and Airtime, reimbursable allowance. The claimant did not demonstrate by way of any letter of demand, and/or letter of appointment that he was entitled to a salary that has not been paid for such a long period of time.

24. The only letter of demand was written on 7/5/2013, by G.S. Okoth Advocate more than two (2) years from the date of purported employment by the respondent in April, 2011.

25. There is contradictory evidence by C.W.1 on the actual date of his employment. In that letter of demand, it was stated to be 22/10/2012 whereas in his testimony under oath it was said to be April, 2011.

26. R.W.1 produced letter dated 25/10/2011 written by the respondent to the claimant introducing the claimant as "one of our volunteered mobilisers". This letter collaborates the testimony by R.W.1 that indeed the claimant was a volunteer mobiliser of the respondent as opposed to a salaried employee of the respondent.

27. The claimant bears the burden of proving on a balance of probabilities in terms of the Evidence Act, Cap. 80 Laws of Kenya that he was a salaried employee of the respondent. That he was entitled to a salary of kshs. 24,600 per month; that he demanded payment of the said salary during the tenure of his employment and that the respondent failed and/or neglected to pay the said salary.

28. The claimant has fallen short of the onus placed upon him above and the Court finds that the claimant has not proved his case on a balance of probabilities.

29. The respondent is a donor funded Non-Governmental Organisation (N.G.O) which has adduced credible evidence of its above board operations using a few salaried employees helped by volunteers who received reimbursable allowance. The Court finds that the claimant was one such volunteer.

30. The suit lacks merit and is dismissed in its entirety.

31. The Court finds this a suitable case for each party to bear their costs of the suit.

Dated and delivered at Nairobi this 17th day of December, 2020.

MATHEWS N. NDUMA

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 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Ochoki for claimant

P.D. Onyango for Respondent

Chrispo – Court clerk.