



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 195 OF 2016

SAMUEL WAMBUGU NDIRANGU.....CLAIMANT

VERSUS

2NK SACCO SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant asserts that he was employed by the Respondent as a clerk in May 2011 earning a salary of Kshs. 24,000/- a month. He avers that he served the Respondent with loyalty and diligence until 2nd October 2015 when the Respondent unlawfully dismissed him from its employ without reasonable cause and refused to pay his terminal dues which included the salary for the month of September 2015 – Kshs. 24,000/-, annual leave arrears for the 5 years he had worked for the Respondent – Kshs. 120,000/-, salary in lieu of notice – Kshs. 24,000/-, welfare contributions @200/- per day for 2015 – Kshs. 73,200/-, housing allowance arrears w.e.f May 2011 to 1st October 2015 @ Kshs. 1,500/- pm – Kshs. 90,000/-, damages for wrongful termination – Kshs. 288,000/-, NSSF dues @ 300/- p.m. for 60 months – Kshs. 18,000/-, NHIF dues @ 300/- p.m. for 60 months Kshs. 18,000/- as well as a certificate of service and costs of the suit plus interest.

2. The Respondent in its statement of defence stated that the Claimant was not its employee at any one time. It averred that consequently the Claimant was not entitled to any of the sums sought. It prayed that the Claimant's suit be dismissed with costs.

3. The Claimant testified that presently he was a taxi driver and that he had been employed by the Respondent on 2nd May 2011 as a SACCO clerk earning Kshs. 18,000/- though he did not have any letter of employment. He stated that he was earning Kshs. 24,000/- by the time he left and that the sum was 800/- per day multiplied by 30 days. He testified that he would report at 6.00am and that on 2nd October 2015 he reported at 6.00am as usual and was informed by the supervisor that he was no longer required to report to work. He stated that he went to the manager Ann Kinyua who told him that the stage controller had said that he was to leave the stage. His nickname was Old Timer and he was told his services had been terminated and that he stated that he benefited from SACCO loans. He produced his bank statement showing payments made to him. He also produced the Jijenge loan application form which indicated he was an employee and stated that he was not the one who had filed the form. He thus sought the dues in the claim which were salary in lieu of notice, the 5 years leave dues, welfare contribution of Kshs. 200/- per day, house allowance for 5 years, damages, NSSF and NHIF dues for 60 months as well as costs of the suit.

4. In cross-examination he stated that he did not apply for the job formally and that he was the lower stage clerk issuing receipts to passengers going to Nairobi at the 2NK Shuttle office. He stated that he would be allocated receipts by the SACCO and that his services were terminated by Mr. Charles Ndumia his supervisor. He testified that the bank statement he had, was from the Respondent and that he was paid through their account. He stated that the bank statement with the front office of the Respondent showed credits made into the account and purchase of shares in the SACCO. He stated that he was not a member but an employee and there were deductions for shares. He testified that the salary was not fixed and fluctuated as was evident on the statement. He stated that no one had a payslip and he denied that he was a commission agent. He was paid a salary dependent on the number of vehicles that had gone that day and payment was made at the end of the day. He testified that the sum was paid at the end of the month. He confirmed that there was no agreement for salary at the end of the month. He stated that if you did not work you were not paid. He stated that no one was required to explain absence in case one was absent. He testified that he had not a member of the SACCO and on further cross-examination on the Jijenge form he stated that he was both a member and employee of the SACCO. He confirmed that the statement showed a member's salary advance and he did not believe that was in reference to the loan. He stated that the default in the loan was as a result of the termination of his employment. He testified that the guarantors were affected by the default and they suffered. He has been paying them and he confirmed that the matatus have owners who are members of the SACCO and they are not employees of the SACCO.

5. In re-examination, he testified that he worked for the Respondent from 2011 to 2015 uninterrupted and that he joined the SACCO as a staff member. He confirmed that the loan he took was on the strength of his salary and deductions were from the salary.

6. The Respondent called Ann Nyawira the manager of the Respondent. She testified that she was the manager from 2010 and oversees the day to day running of the organization. She stated that she was in charge of the employees and the technical advisor to the Board of

Directors. She said that she knew the Respondent's employees were permanent and pensionable and there were also some casuals. She stated that the Claimant was a casual employee and he reported on daily basis and earned a salary based on his daily appearance for work. He used to bring customers to the Respondent's vehicles and was paid a commission based on the number of vehicles that he was able to fill in a day. The kitty was shared between the stage commission workers based on their ability to load vehicles. She testified that he was not on payroll and was not entitled to deduction for NSSF and NHIF and that as a member of the FOSA he was entitled to access products such as the one known as member salary. She stated that she knew Mr. Ndumia and that to the best of her knowledge the Claimant had ceased coming to work and that his loan was not performing hence recovery of the loan was made from his guarantors.

7. In cross-exam, she testified that the Claimant deserted his employ and that he was not an employee of the SACCO but a casual who would render services at the stage. She stated that the form he had filled was where he had described himself as an employee and that they had not corrected it. She testified that he was a member not an employee and that their employees had a contract. She stated that the Claimant was not terminated and that he failed to pay his loan and had been accessing the services of the SACCO as a FOSA member.

8. In re-examination she stated that the Claimant was paid by the supervisor at the stage from the commissions earned in passenger collections. She stated that it was the Claimant who filled the form describing himself as employee and that there was no compulsory deduction each month. That marked the end of oral testimony.

9. The Claimant's submissions were to the effect that the application form the Claimant had for the loan was a confirmation that he was an employee of the Respondent. He submitted that he was employed as a clerk. The Claimant submitted that the Respondent did not avail the payroll nor the register to confirm if the Claimant was an employee or not. It was submitted that the Respondent's witness confirmed that the Claimant worked at the stage and he was called an employee by virtue of the work done. Reliance was placed on the case of **Edward Isedia Mukasia v Eldo Supermarket Ltd [2015] eKLR** where the learned Judge held that Section 10(7) of the Employment Act binds employers to proof of terms in the event of non-production of a written contract of employment. He submitted that having been continuously employed for 5 years he was entitled to the safeguards in Section 35 of the Employment Act. He relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the substantive justification and procedural fairness test. He urged the court to grant him the reliefs he had sought in the claim.

10. The Respondent in its submissions asserts that the Claimant was not its employee but was a casual paid at the end of the day by the owners of the matatus on some commission basis. It submitted that there was a difference between a contract for service and a contract of service citing the case of **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** and **Simon Deakin and Gillian S. Morris, Labour Law, 3rd Edition** pages 146 to 168 on the tests used in determining *employment* and *service* such as the control test and the integration test etc. The Respondent also cited the case of **George Kamau Ndiritu & Another v Intercontinental Hotel [2015] eKLR** which cited the case of **Everret Aviation Limited v Kenya Revenue Authority [2013] eKLR**. The Respondent submitted that the traditional test of control of the work by the employer and its integration in the employer's core business are no longer conclusive. The Respondent submitted that there was no documentation showing that the Respondent ever entered into a contract with the Claimant and that the Claimant therefore was an independent contractor under a contract for services. It was argued that the Claimant was not an integral part of the Respondent's business and that the Respondent had no intention of entering into any contract with the Claimant. The Respondent submitted that the fact of joinder to the SACCO was not proof of the employer – employee relationship as other members of the public could join the SACCO and that was not employment. The Respondent urged the court to dismiss the suit with costs to the Respondent.

11. The Claimant herein asserts that he was an employee of the Respondent. He asserted the Respondent paid him Kshs. 24,000/- a month as a salary. However, the account statement he exhibited as proof of payment of salary was not in tandem with his assertion. He himself stated that he was paid some Kshs. 800/- a day which is in keeping with a casual employment. He confirmed that he would only get paid for the days he worked and no more. The Respondent asserts that the Claimant was not its employee but was a commission agent for the matatu owners since all his services were under a contract for service. It is asserted that he was not under the control of the Respondent and therefore did not fit in the paradigm of employee-employer. In our jurisdiction, an employee is defined in the Employment Act in Section 2 as follows:-

Employee means a person employed for wages or a salary and includes an apprentice and indentured learner;

Applying the control test, which is as to whether the employer controls or has the right to control the employee, not only as to the result of the work to be done but also as to the method and means by which the said task is to be accomplished, the question of whether or not there is an employer-employee relationship for purposes of this matter would therefore depend on whether the 'employer' has control over the 'employee'. Put another way, where the element of control is lacking and where the person who works for another does so more or less at his own pleasure and is not subject to definite conditions of work or hours of work, the relationship of employer-employee does not exist. The indicia of this relationship of employer-employee is largely absent in the case before me. A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee's conduct (this is what gives the test the *nom de guerre* – control test). In my considered view, there is insufficient indicia for the assumption of the relationship the Claimant asserts and having failed to discharge the evidentiary burden the Claimant's case is only fit for dismissal. The suit is dismissed but with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 16th day of January 2019

Nzioki wa Makau

JUDGE