



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1390 OF 2014**

**ANTONY KARANJA WAINAINA.....CLAIMANT**

**VERSUS**

**ADRIAN COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Memorandum of Claim on 19th August 2014 alleging that he was employed by the respondent from April 2013 to August 2013 when he was unfairly terminated. He further averred that during the said period of service, the Respondent withheld all his salary of Kshs.500,000 per month and paid him only Kshs.200,000. He therefore prays for the following reliefs:

- a) A declaration that the Respondent breached the employment agreement it entered with the Respondent.
- b) A declaration that the Respondent unfairly and unjustifiably terminated the Claimant's employment.
- c) The sum of Kshs. 500,000/= being one month's salary in lieu of notice.
- d) The sum of Kshs.116,666.70 being the payment for 7 leave days accruing
- e) The sum of Kshs.1,870,000.00 being the total outstanding salaries, mileage allowance and telephone allowance, plus interest thereon at the rate of 20% from 8th August 2013 until payment in full.
- f) General damages for frustration of employment agreement and for unlawful and unfair termination of employment equivalent to six months consolidated salary or such other amount that this Honourable Court may deem fit to assess.
- g) Certificate of service.
- h) Costs of the suit plus interest thereon from the date of the award.
- i) Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.

2. The Respondent filed a Memorandum of Response on 20th October 2014 denying ever engaging the Claimant as an employee and averred that she retained him as a consultant in the installation of repeater tests. She therefore denied owing the claimant the reliefs sought and prayed for the suit to be dismissed with costs.

3. The suit was heard on 18.4.2018 and 18.6.2018 when the claimant testified as Cw1 and the respondent's Managing Director, Mr. Benard Wachai Njoroge testified as Rw1. Thereafter both parties filed written submissions.

**Claimant's Case**

4. The Claimant testified that he was employed by the Respondent on 8th April 2013 as a Senior Telecommunications Manager for a monthly salary of Kshs.500,000 plus fuel allowance of Kshs.15,000 and telephone allowance of Kshs.2,500 per month. He further testified that he was never issued with a written contract for the four months he worked for the Respondent. He produced his staff card and business cards to prove the employment relationship with the respondent. He stated that the staff card was issued to every staff member to enable one to access the Respondent's premises and while representing the Respondent.

5. The Claimant testified that he carried out 4 GSM Repeater Systems for the Respondent at the Voyager Safari Camp in Taita Taveta, Kituro High School in Kabarnet, Matibabu Health Centre Ukwala and at the home of CCK Chairman. He also undertook other projects including Home Booster Projects and Indoor Coverage Projects. It is his testimony that 2 projects had been completed within 4 months.

6. He testified that on 8th August 2013, after work, he received a Short Message Service (SMS) informing him that his services had been terminated and that he would be called over the weekend to work on his dues. He contended that he was not served with any notice before the termination and he thereafter never received any communication about his dues as promised. Finally, he contended that he was never paid any salary but he only received Kshs.200,000 which was paid to him in two equal instalments of Kshs.100,000 each month.

7. In cross-examination the Claimant testified that he never signed any written contract with the respondent and the breach complained about was in respect of the verbal agreement. He testified that, although he was never paid Kshs.500,000 per month as agreed, in 2 months he received Kshs.100,000 each month. He denied that he was paid Kshs.200,000 for all the projects he did and contended that he was not in piece work engagement but continuous employment serving in various projects .

8. He testified that he was neither issued with a written contract as agreed nor was he included in the Respondent's payroll and contended that he was cheated by Rw1. He admitted that there was HR Department in the respondent company but stated that he only interacted with it when asking for facilitation in transport or payment of expenses for which records were kept by the same department. He further contended that he routinely prepared weekly reports, including the undated Report marked as exhibit 10, send the report via email. He concluded by stating that he was the second senior most officer in the company.

### **Respondent's case**

9. Rw1, testified he that he employed the Claimant vide an oral agreement to offer consultancy services for the Respondent. He stated that the Claimant was to receive Kshs.200,000 being the agreed rate for both the consultancy services and the completed projects. He denied that there were negotiations regarding permanent employment between the Claimant and the Respondent. He concluded by contending that he paid the claimant all the agreed Kshs.200,000 for the various projects completed and produced copies of emails and banking slip to support her case. He therefore prayed for the suit to be dismissed.

10. In cross-examination Rw1 testified that the Company's policy is that before employment one must submit an application letter thereafter an interview is conducted and upon being successful the person is issued with an appointment letter. He maintained that the Claimant was never employed by the Respondent and that the staff cards produced by the Claimant were not genuine documents.

11. He stressed that there was an oral agreement between the parties for the consultancy services under which the Claimant was to receive a fee. He contended that the Claimant was given specific projects to do but he never had contact with the Respondent's clients. He testified that the Kshs.200,000 he paid the claimant on 28th May 2013 was for the preparation of a design report and stated that he was never put in the respondent's payroll. He further contended that the status report produced by the Claimant as exhibit 10 was not genuine as it was not from the Respondent. He concluded by denying the allegation that he terminated the Claimant's employment and stated that the contract lapsed automatically.

### **Claimant's submissions**

12. The Claimant submitted that he was employed by the Respondent under a contract of service and not a contract for services. That, the Respondent's engagement with the Claimant was exclusive and he could not pursue any other employment while employed by the Respondent. That the Claimant used to log in and out of the Respondent's premises during normal working hours and that he accessed offices using the staff identification.

13. He further submitted that the Respondent has made no mention of withholding tax which is unique for consultancy purposes. He relied on the cases of **Lorna Adhiambo Aling v Safi International AS (2017) eKLR** and **Kenya Hotel & Allied Workers Union versus Alfajiri Villas [2014] eKLR** where the Court in the latter case held:

*“true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual “employment” matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave,...”*

14. The Claimant submitted that the termination was unlawful and unfair because there was no valid reason for termination, no termination notice was issued to the Claimant, no payment was made to the Claimant in respect of accruing an untaken annual leave and no payment in lieu of notice was paid to the Claimant. He relied on the provisions of sections 45 and 43 of the Employment Act and the Court of Appeal decision in **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** which states:

*“The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts...Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken. Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his*

*transgressions. Neither was he given an opportunity to explain himself.”*

15. The Claimant further submitted that the Respondent frustrated the performance of the Agreement by ensuring that there was no written contract of employment and by failing to pay his agreed monthly salary. Finally, he submitted that Rw1 cannot claim that the employment card was not genuine while the Respondent never denied the same in the pleadings.

#### **Respondent’s submissions**

16. The Respondent submitted that the definition of an employee and a contract of service under section 2 of the Employment Act are clear that for one to be regarded as an employee of a particular institution or person there must be a contract of employment whether written or oral. The employment relied on the case of **Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR** where the Court held:

*“In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 actually exists.”*

17. The Respondent submitted that the Claimant was contracted as an independent contractor and that he was to be remunerated after the completion of the works. It is the Respondent’s submission that the card issued to the Claimant was to assist him gain easy access to the Respondent’s project sites and that it neither constitutes a contract nor did it create an employer-employee relationship. She relied on the decision in **Everret Aviation Limited v The Kenya Revenue Authority [2013] eKLR**. She therefore submitted that the Claimant did not produce any documentary evidence to support prove that there existed an employment contract between him and her.

18. The Respondent submitted that the Claimant having been employed as an independent contractor he could not be terminated from employment. The Respondent relied on the case of **George Kamau Ndiritu & another v Intercontinental Hotel [2015] eKLR** and contended that he is not entitled to the reliefs sought and the Court lacks jurisdiction to determine the dispute herein.

#### **Analysis and determination**

19. After careful consideration of the pleadings, evidence and the submissions presented by the parties the following issues arise for determination:

- a) Whether there existed an employment relationship between the parties.
- b) If the answer to (a) above is yes, whether the relationship was unfairly terminated.
- c) Whether the claimant is entitled to the reliefs sought.

#### **Employment relationship**

20. Section 2 of the Employment Act defines contract of service and an employee respectively as follows:

*“an agreement, whether oral or in writing, and whether expressed or implied, to employ, or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract to which Part XI of this Act applies.”*

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

21. In this case, the Claimant contended that the agreement between the parties was an oral agreement in which the Claimant was employed as a Senior Telecoms Manager for a monthly salary of Kshs.500,000 plus fuel allowance of Kshs.15,000 and telephone allowance of Kshs.2,500 per month. He however, he produced employment card issued by the Respondent as proof of the employment relationship. RW1 in his testimony stated that the employment card produced by the Claimant was not genuine and maintained that he only retained the claimant as a consultant under a contract for services.

22. After careful consideration of the pleadings, evidence and submissions, I have noted that the respondent admitted that she issued her claimant with job cards for easy access, identification and for maintenance of corporate image. He did not produce the genuine card she issued to the Claimant and as such, I find that the job card produced by the claimant is genuine. The job card was a confirmation of the claimant’s employee status and a sign of inclusivity to the company for internal and external purposes. I have further noted from the email dated 14th May 2013 by Stanley Maia the Respondent’s Project Manager (defence exhibit) the Claimant was introduced as the champion of the repeater and indoor solutions who would be involved in “all related projects.” The email did not make any reference to the Claimant as a consultant but incorporated him to the company’s establishment and especially in all the projects where he was seen as the champion. Consequently, I find that the claimant has proved on a preponderance of evidence that he was employed by the respondent under a contract of service

23. The foregoing finding is fortified by **Kevin Ochieng Ochieng v Falcon Signs Limited [2018] eKLR** where the Court held:

*“The payslips and job card produced by the claimant are sufficient proof of existence of employment relationship between the claimant and the respondent.”*

24. The Respondent relied on the decision in **Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR**. However the facts in the present case are distinguishable from the cited case because the relationship in that case was evidenced not only by job cards but by also local purchase orders and job contracts which were produced by the Respondent. The Respondent herein alleged that the payment of Kshs.200,000 was made in respect of the completed projects and that the Claimant never completed the other projects but he fell short of proving which projects were completed and which were not.

25. Having found that the claimant was employed under a contract of service, I do not hesitate to add that she had the obligation to reduce the contract of service into writing by dint of Section 9(2) of the Employment Act and further under section 10(7) to produce the written contract or the written particulars prescribed under section 10 (1) to disprove any terms of the contract alleged verbally by the employee in legal proceedings. The said provisions put the burden of proving or disapproving the terms of employment on the Employer. In this case the Respondent never produced any written contract to disprove the terms of service alleged by the claimant in his pleadings and testimony. I therefore return that the claimant was employed under a contract of service for the terms alleged in his pleadings and testimony.

#### **Whether the Claimant's termination was unfair**

26. The Claimant testified that he was terminated on 8th August 2013 via a telephone call and was never given any notice. The Respondent argued that the Claimant could not have been terminated by virtue of the nature his engagement with the Respondent. Having found that the Respondent did not prove that the Claimant was a consultant as opposed to an employee the Respondent ought to have complied with the provisions of the Employment Act. The Claimant was neither informed of the reason for termination nor was fair procedure followed in prior to the Claimant's termination.

27. Under section 45(2) of the Employment Act termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements Procedure is fair if the employee is granted a fair hearing in terms of justice and equity.

28. Under section 41 of the Act, before dismissing an employee on ground of misconduct, poor performance or physical incapacity, the employer is enjoined in mandatory terms to explain to the employee the reason for which termination is being considered. The said explanation must be in a language of the employee's understanding and in the presence of another employee or shop floor union official who are both entitled to air their representation in response to the reasons cited by the employer. Finally, the employer must consider the views by the employee and his chose companion before deciding to dismiss the employee. In this case, the respondent never discharged the foregoing burden of proof. Consequently, I return that termination of the Claimant's contract of service was in contravention of sections 41, 43 and 45 of the Employment Act and was therefore unfair.

#### **Whether the Claimant is entitled to the reliefs sought Declaration**

29. In view of the foregoing, I make declaration that the Respondent breached the employment agreement it entered with the claimant. I further make a declaration that the Respondent unfairly and unjustifiably terminated the Claimant's employment.

#### **Notice and compensation**

30. As a consequence of the said unfair termination, the claimant is entitled to Kshs.500,000 being one month's salary in lieu of notice by dint of section 35 (1) (c) and 49 (1) of the Employment Act. In addition, I award him Kshs.500,000 being one-month salary as compensation for the unfair termination considering his short stint at the company and because he never contributed to the termination through misconduct.

#### **Leave**

31. The Claimant prayed for Kshs.116,666.70 being payment for 7 days earned during the 4 months of service. The said claim is accurate because under section 28 of the Employment Act, he was entitled to 21 days annual leave per year. I therefore grant the prayer for 7 days leave on pro rata basis.

#### **Outstanding salaries, Mileage allowance and telephone allowance plus interest**

32. The Claimant testified that he was entitled to mileage allowance of Kshs.15,000 and telephone allowance Kshs.2,500 per month. He however admitted in evidence that he used to interact with the HR department in matters of transport and expenses meaning that his transport and other expenses connected to his duties were paid. I therefore dismiss the claim for transport. I however award him the claim for telephone expenses and salary arrears for the 4 months worked from 8.4.2013 to 8.8.2013 being Kshs.2,010,000 less the Kshs.200,000 paid which leaves a net of Kshs.1,810,000.

#### **General damages for frustration of employment agreement**

33. The claim for frustration for the employment contract is dismissed for lack legal and contractual basis.

#### **Certificate of service**

34. The Claimant will also be issued with a Certificate of Service as required by section 51 of the Employment Act.

#### **Conclusion and disposition**

35. I have found that the claimant was employed by the respondent under a contract of service from 8.4.2013 to 8.8.2013 when it was unfairly terminated by the respondent. I have further found that he is entitled to salary in lieu of notice, compensation for unfair termination, arrears of salary and telephone allowance and certificate of service.

Consequently, I enter judgment for the claimant against the respondent in the following terms:

Notice	500,000
Compensation	500,000
Salary arrears	1,800,000
Telephone allowances arrears	10,000
<b>Total</b>	<b>Kshs.2,810,000</b>

The award is subject to statutory deductions. The claimant will also have certificate of service, costs and interest at court rates from the date hereof.

**Signed, dated and delivered in Open Court at Nairobi this 15th day of March, 2019.**

**ONESMUS N. MAKAU**

**JUDGE**