



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 137 OF 2015

STEADMAN ONYANGO OGENDA.....CLAIMANT

VERSUS

INTERNATIONAL CENTRE FOR AIDS CARE AND

TREATMENT PROGRAMS (ICAP) – KENYA.....1ST RESPONDENT

THE MEDICAL OFFICER OF HEALTH,

MOH RARIEDA SUB COUNTY.....2ND RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

Vide his memorandum of claim dated 8th April 2015 and filed on 28th April 2015, the claimant avers that he was employed by the 1st respondent, a non-governmental organisation registered in Kenya, and the 2nd respondent, the Medical Officer of Health, Rarieda Sub County under the Ministry of Health, to work as a peer educator. He avers that he was employed by the 1st respondent and worked under the 2nd respondent from 1st June 2011 to 21st October 2014 when his employment was terminated without any regard for the procedure laid down under the Employment Act, 2007 (the Act). He further avers that the respondents failed to pay his salary for the period – 1st June 2011 to 31st January 2012 at the rate of Kshs.6,000 per month.

The claimant prays for the following remedies –

a. Salary for 01/06/2011 – 31/01/2012	Kshs.48,000.00
b. Underpayment 01/06/2011 – 21/10/2014	Kshs.440,533.35
c. One month's salary in lieu on notice	Kshs.6,000.00
d. Unpaid leave days (21 days)	Kshs.38,862.91
Total	Kshs.533,396.26

The 1st respondent filed a replying memorandum on 14th July 2015. In the replying memorandum dated 29th June 2015, the 1st respondent states that it is an entity of the Trustees of Columbia University in the City of New York and is registered as a Non- Governmental organization in Kenya as ICAP- Kenya. The 1st Respondent works in partnership with the national and county Ministries of Health to strengthen HIV Prevention, Care and Treatment at the county and sub-county level. The 1st respondent confirms working with the 2nd Respondent in Rarieda Sub-County Health Management Team.

The 1st Respondent avers that it is part of a US Government initiative against HIV in Kenya that receives funding through the Centres for Disease Control and Prevention (CDC) and the said funding is intended for national and county Ministries of Health to carry out HIV services. One such recipient of funding is the 2nd Respondent's Rarieda Sub-County Health Management Team.

The 1st Respondent avers that it supports community health strategies run by the County Ministry of Health facilities. In such programs, the County Ministry of Health or the facility involved would engage voluntary community health workers who include peer educators.

The 1st Respondent avers that the Claimant was at all material times engaged by the 2nd Respondent as a voluntary peer educator in a program receiving support through the 1st Respondent as indicated. The 1st Respondent's role in relation to the 2nd Respondent was at all material times limited to funding, technical support and mentorship/supervision. The 1st Respondent was not at any time an employer as claimed.

The 1st respondent denies that there was any employment relationship between it and the claimant.

The 2nd respondent too in its memorandum of reply dated 16th July and filed on 20th July 2015 denies ever employing the claimant. It states it is unaware of the employment status between the claimant and 1st respondent. The 2nd respondent avers that he claimant had access to its premises as a volunteer who received Kshs.6,000 stipend per month from the 1st respondent for transport. It denies that the claimant was entitled to salary from the activities of the 2nd respondent pursuant to an employment contract.

It further denies terminating the employment of the claimant or that the claimant had an employment relationship capable of termination. It avers that the claim discloses no cause of action against it and is for dismissal.

At the hearing of the case the claimant testified on his behalf while the 1st respondent called one witness, one TOM KAMALIKI, its Human Resource Director. The 2nd respondent's case was closed on 27th July 2017 on grounds that it failed to attend court on the hearing date to prosecute its case and also for failing to comply with court orders to pay court adjournment fees and costs arising from adjournment of the case at its instance on 21st March 2017 to the claimant and 1st respondent.

Claimant's Case

The claimant testified that he was employed by the respondents in June 2011 as a peer educator. The job was advertised, he applied and was called for an interview after which he started working. He was stationed at Obaga Dispensary and reported to the Doctor in charge of the facility. He submitted his reports to the 1st respondent's accountant after approval by the doctor in charge.

The claimant testified that he was not issued with a letter of appointment, and was not paid salary from June 2011 to January 2012. The claimant further testified that he was dismissed when he demanded payment for the period June 2011 to January 2012. That two (2) officers of the 1st respondent, Mr. Moses Kidi accompanied by Mr. Tom Ojuok from its Kisumu office dismissed him verbally following receipt of two reminders written by the Chairman of the Management Committee of Obaga Dispensary and Mr. Owila Gordon Obara, Officer in charge of Obaga Dispensary.

The claimant testified that the two officers of the 1st respondent ordered him to hand in all the reports after which they told him that they had gone to the Dispensary to terminate his employment because he was asking for some money which had not been paid to him. He further testified that they demanded that he leaves immediately. He was not issued with any letter of termination of employment.

He prayed for payment of compensation and terminal benefits as prayed.

Respondent's Case

For the respondent MR. TOM KAMALIKI, testified that the claimant was not an employee of the 1st respondent. He testified that the 1st respondent had an agreement with the 2nd respondent to provide technical support and drugs to the Ministry of Health and it was the responsibility of the 2nd respondent to engage staff. He testified that the claimant was engaged by the 2nd respondent.

Determination

It is not contested that there was an agreement between the 1st and 2nd respondents for technical and financial support to several health facilities including the facility where the claimant worked. It is further not contested that the claimant worked as a peer educator at Obaga Health Centre.

In a letter date 21st December 2012, Mr. Owila Gordon Obara wrote "THE ICAP – ACCOUNTANT MADIANY/WICKLIF as follows –

"21st December 2012

RE: STAFF RETURNS

TO THE ICAP – ACCOUNTANT MADIANY/WICKLIF

Dear Sir

Kindly update the account for our PSC Peer Educator, Mr. Steadman Onyango.

Onyango has worked for over 6 months starting from 5th June 2011 to date with no pay.

His Bank account – 0750197395074. Equity – Bondo

ID – 123666576. Telephone 0712672120

We still have one peer Educator and one sample transporter – Rose Achieng Otieno. Female married. Started her services in 16th June 2011 as well. But her case is being well taken care of.

Please kindly update.

Thanks in advance.

Yours Faithfully

Owila Gordon Obura

Officer in Obaga

0720605816”

The claimant further attached copies of records he prepared while working for the respondents dating from 15th June 2011 to 31st January 2012 as proof that he worked during the period.

I am therefore persuaded from the claimant’s testimony and records he produced that he worked for the respondents from 15th June 2011 and that he was not paid up to 31st January 2012.

The claimant further produced bank records and a letter from Mr. Omollo Anthony, the Committee Chairman of Obaga Dispensary Management Committee dated 14th August 2014, at appendix 11 of his documents confirming that the claimant worked at Obaga Dispensary and was not paid. There is therefore no doubt that the claimant was in the employment of the respondents from June 2011.

There has also not been any denial by either the 1st or 2nd respondent that the claimant’s employment was terminated by field officers of the 1st respondent from its Kisumu office on 20th October 2014.

Both respondents have denied being the employer of the claimant who did not have either a letter of appointment or a letter of termination.

The only issues for determination are therefore who was the employer of the claimant between the 1st and 2nd respondents and whether he entitled to the prayers sought.

The Employment Act defines an employment contract as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time. In the present case the claimant worked as a Peer Educator at Obaga Dispensary and was paid for the same. The work was done at the 2nd respondent’s facility and was paid for by the 1st respondent.

According to the definition in Section 2 of Employment Act, an employer is “**any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.**”

Section 54(1) of the Labour Institutions Act provides that –

54. Criminal liability of agent, employer

(1) Where the immediate employer of an employee is himself in the employment of another person and that employee is employed on the premises of that other person, that other person is for the purposes of this Part deemed to be the employer of that employee jointly with the immediate employer.

In the present case both respondents fit into the definition of employer. The 1st respondent was the owner of the project and provided the funding while the 2nd respondent was the beneficiary of the work performed by the claimant at its premises.

For these reasons I find the respondents jointly and severally liable to pay the claimant.

The second issue is whether the claimant is entitled to the remedies sought. The claimant prayed for salary from 1st June 2011 to 31st January 2012. From the letters from Obaga Dispensary and other documents produced by the claimant it is clear that he started working on 15th June 2011. I find that he is entitled to salary from 15th June 2011 in the sum of Kshs.45,000 which I award him.

The claimant did not prove that he was underpaid or demonstrate how he arrived at the figure of Kshs.440,553.35 that he has claimed as underpayments. I find this prayer not proved and decline to grant the same.

The claimant prays for one month's salary in lieu of notice which I award him at Kshs.6,000 being one month's salary in lieu of notice.

The claimant further prayed for unpaid leave days. The claimant did not mention annual leave in his testimony. He has further not demonstrated how he arrived at the figure of Kshs.38,862.91 that he has claimed under this head. I find the prayer not proved and decline to grant the same.

The claimant further prayed for reinstatement. The 1st respondent's witness stated that the project is no longer in existence. In any event the claimant was terminated in 2014 and is not entitled to an order of reinstatement by virtue of Section 12(3)(vii) of the Employment and Labour Relations Court Act which limits the period within which reinstatement can be ordered to 3 years from the date of termination of employment.

The claimant further prayed for damages for unlawful and wrongful termination. The manner in which the claimant's termination was terminated, and the reasons, which have not been controverted by the respondents, was unlawful. He was terminated for asking for money lawfully due to him and was not taken through any process before the termination. Taking into account all relevant circumstances, it is my opinion that six (6) months' salary is reasonable in the circumstances and I accordingly award him Kshs.36,000 as compensation.

Conclusion

In conclusion, I enter judgment for the claimant against the respondent's jointly and severally as follows –

(i) Salary not paid	Kshs.45,000
(ii) Pay in lieu of notice	Kshs.6,000
(iii) Compensation	<u>Kshs.36,000</u>
Total	Kshs.87,000

The respondents will pay claimant's costs for this suit and interest at court rates from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 3RD DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 29TH DAY OF APRIL 2019

MATHEWS NDERI NDUMA

JUDGE