



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.107 OF 2016

IBRAHIM OMWAYA OYUKA.....CLAIMANT

VERSUS

TIMSALES LIMITEDRESPONDENT

JUDGEMENT

The claimant's case is that he was employed by the respondent from 4th October, 2001 to 18th February, 2015 as a carpenter and his salary was paid upon the inspection and verification of the finished doors. This was done by the respondent's management at the rates provided for in the contract issued to the claimant.

The claim is also that the claimant was entrusted by the respondent to manufacture various prefabricated house panels medium or economy quality doors, specifically external solid panels, window panels, windows and doors.

The claimant's case is also that before his dismissal from employment he was allocated with more work which was not part of his agreement and which required him to clean the factory premises. On 18th February, 2015 the claimant's employment was terminated without notice which was illegal and unfair. The claimant states that he suffered damage and is seeking notice pay, damages for unprocedural termination of employment and the payment of his NSSF and NHIF.

The claimant testified that upon employment he had a contract for a carpenter and he was paid for the number of door and windows he was able to complete at any given time. The respondent's officers would review his work and upon approval, he would be paid per piece of window or door complete.

In the year 2015 the respondent employed different employees for cleaning and construction. The employees were then dismissed and the claimant was allocated these duties which were not part of his contract duties. He asked for clarification and on this basis he was dismissed and nothing was paid.

The claimant also testified that on 18th February, 2015 he was issued with a gate pass to leave the respondent's premises since he had his own work tools which he was allowed to carry with him. The respondent had not given him notice and for the period of contract period there was no payment of NSSF and NHIF. This resulted in unfair termination of employment.

The defence is that the contract issued to the claimant was for an independent contractor and the alleged illegality and unfairness with regard to termination of contract are denied. No terminal dues are owed in damages or compensation. The contract issued to the claimant as not renewed due to low volume of work.

No witness was called by the respondent

At the close of the hearing, both parties filed written submissions.

The claimant was emphatic in his pleadings in paragraph 3 and 4 that as a carpenter his salary was paid upon inspection and verification of the finished doors by the management at a given rate. His work was to manufacture different parts of prefabricated house panels, doors and windows. His salary was based on the completed pieces he did.

The claimant also testified that the respondent did not pay his NSSF or NHIF and at the end of his employment, he was allowed to carry his own work tools which he was using in the allocated duties.

The defence that the claimant was an independent contractor was not challenged in any material way. The respondent produced work schedules setting out the various pieces of works done by the claimant and the payments thereto. The payments were not constant.

In the last contract issued to the claimant and signed 13th February, 2012 it related to piece rate work for the manufacture of door and batten doors and at given specifications. The claimant was to be paid after the inspection and verification of eh finished doors by the respondent's management.

More fundamentally, the claimant' work tools were his own. These tools he was allowed to carry way with him after employment terminated.

It was not in contest that the Claimant was paid per each completed job. The documentation and mode of payment were not ordinarily found in an employer and employee relationship and the Claimant was not an employee of the Respondent but an independent contractor under a contract for services. See **Kenneth Kimani Mburu & Another versus Kibe Muigai Holdings Limited [2014] eKLR** and **Maurice Oduor Okech versus Chequered Flag Limited [2013] eKLR**.

The characterisation of the claimant's employment stands out as one who was contracted to provide as service and was paid upon completion of the same. This created a distinction between him and an employee whose service was differently remunerated as against the claimant whose work had to be verified and approved before payment for the finished products.

There were no statutory deductions or payments. The claimant was engaged as an independent contractor from the start until his employment was changed to cleaning and which he declined on the basis he had a contract with specified duties. In the case of **Kenya Hotels & Allied Workers Union versus Alfajiri Villas (Magufa) Ltd [2014] eKLR** a distinction was made between an employee and an independent contractor and such included payment for work done and the non-payment of statutory dues.

without an employment relationship, the claimant being well defined as an independent contractor and having been paid for work done upon verification, the suit herein cannot be sustained before this court. see **Joseph Nyaga versus United Millers Limited Cause No.267 of 2015 (Nakuru)**.

The claimant is not before the appropriate court over any dispute or claim he may have against the respondent.

Accordingly, the claims made are found without merit and are hereby dismissed in their entirety. Each party shall bear own costs.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU JUDGE

In the presence of: