



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 524 OF 2017

DANIEL KIMANZI MAITHYA.....CLAIMANT

VERSUS

INTER-SECURITYSERVICE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent seeking the resolution of the unfair and unlawful termination of his employment. He averred that he was employed as a guard in May 2014 until 31<sup>st</sup> December 2015 when his services were terminated by the manager of National Cereals and Produce Board, Kiganjo in Nyeri County. He stated that there was no hearing nor proof of any misconduct before his dismissal. He sought service pay, the one month's salary in lieu of notice – Kshs. 7,800/- as well as leave dues for the leave in the year 2015 when he did not proceed for leave – Kshs. 7,800/-. He also sought the payment for public holidays – Kshs. 2,600/- and compensation for the unlawful dismissal – Kshs. 93,500/- together with costs of the suit.

2. The Respondent filed a defence in which it averred that it was a firm that offered security services to small business organisations and that sometime in the period covering 2014-2015 it had entered into a service level agreement to offer security services to the National Cereals and Produce Board (NCPB) at the NCPB premises at Kiganjo for a period of 10 months. The Respondent asserts that sometime in 2015 the contract came to an end and for that reason there was no employment for the guards including the Claimant herein. It was averred that the Respondent through the operations manager informed the Claimant about the situation and there was a smooth and amicable separation due to the operations of law as the contract with the client had lapsed. The Respondent averred that by the time the cause of action arose the contract had come to an end and that the Claimant was being insincere by alleging that he was unfairly dismissed. The Respondent asserts that the Claimant was working for another company after the Respondent left the NCPB and that it was wrongly sued in the case. It sought the dismissal of the suit with costs.

3. The Claimant and the Respondent sought to have the suit disposed off by way of written submissions in line with Rule 21 of the Rules of this court. The Claimant filed submissions in which it was submitted that the Respondent did not advise of the predicament it had and no notice was issued in terms of Section 35 of the Employment Act. The Claimant submitted that the dismissal was in those circumstances unfair and unlawful. He submitted that the averments in his claim were uncontroverted as no evidence to the contrary was adduced. He urged the grant of the prayers in the claim.

4. The Respondent submitted that the Claimant was hired and his contractual term depended on the life of the service level agreement. It was submitted that sometime in the year 2015 the Respondent's contract with the client came to an end and for that reason the contract between it and the Claimant ended. It submitted that the termination was by an employee of the NCPB and not the Respondent. The case of **Kenya Petroleum Oil Workers Union v Francis Kiarie Kinyanjui t/a Suncor Gas & Petroleum [2014] eKLR** which relied on the cases of **Christine Adot Lopeiyo v Wycliff Mwathi Pere [2013] eKLR**, **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** and **Mwalimu Kalimu Gamumu & 35 Others v Coastline Safaris & 2 Others [2013] eKLR** was cited for the control test. It was submitted that an employer is a person who has the power or the right to control and direct how work is to be performed. The Respondent submitted that the suit did not disclose any cause of action against the Respondent.

5. The Claimant was employed as a guard at the NCPB stores in Kiganjo. The Respondent has exhibited a service level agreement which shows there was a contract to offer services at the stores countrywide and in the contract had a term from 5<sup>th</sup> September 2014 to 31<sup>st</sup> May 2015. There is no exhibit indicating that the Claimant's hire was tied to the term. He asserts that his dismissal was on 31<sup>st</sup> December 2015 and that it was by the manager NCPB. His termination therefore was by someone else other than the Respondent. As the contract with the Respondent had expired on 31<sup>st</sup> May 2015, the Claimant was not an employee of the Respondent at the time of dismissal as the evidence shows. I am in agreement that the control test espoused in various of cases such as that of **Kenya Petroleum Oil Workers Union v Francis Kiarie Kinyanjui t/a Suncor Gas & Petroleum (supra)** delineates who is an employer. The Respondent had no control nor was it capable of directing the Claimant when the dismissal occurred. The Claimant is therefore non-suited against the Respondent and the suit therefore must fail. The suit is therefore dismissed. However, each party is to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 8<sup>th</sup> day of April 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar