



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.131 OF 2015

ZIPPORAH KEMUNTO ONSOMBI.....CLAIMANT

VERSUS

KISII PRESTIGE SHUTTLE LIMITED..... RESPONDENT

JUDGEMENT

Claim

The claimant filed the claim on 6th May, 2015 on the grounds that on 1st March, 2008 she was employed by the respondent as a general clerk in its passenger transport services. Her duties included sale of travel vouchers, receiving petty cash and general accounting duties. Her employment was unlawfully terminated on 14th February, 2015.

The claim is also that on 14th February, 2015 the claimant was informed to go on suspension for a week without being given any reasons and was not paid her daily wage. Upon returning to work the claimant found she had been replaced. No reasons were given. There was no notice or payment in lieu thereof.

When the claimant was employed she was paid ksh.9, 000.00 per month which was paid daily at the rate of Ksh.300.00. Such wage was an underpayment contrary to the applicable wage orders. Work hours were from 6am to 7pm an overtime of 5 hours without compensation. For the entire duration of employment no annual leave was allocated or a payment made in lieu thereof. For the 14th of February, 2015 no daily wage was paid. No gratuity was paid and for the unlawful termination of employment the claimant is seeking compensation.

The claim is also that as a general clerk the due wage was ksh.13,772.70 and house allowance at 15% all being Ksh.15,838.60 and on the applicable wage orders from the year 2008 to the year 2015 the underpayment claimed is ksh.275,895.60. annual leave total being ksh.70,835.45; work during public holidays ksh.122,292.92; overtime pay ksh.966,133.35; unpaid wage Ksh.662.45; gratuity ksh.63,354.40; notice pay at ksh.15,838.60 and compensation. the claimant testified in support of her claims. the claimant trained as a saloonist when the respondent employed her in the year 2008 when operating under the name of *Kisii Nissan Services* and the name changed in the year 2011 but the management has remained the same. The business is that of passenger transport from Nakuru to Kisii and back. As a general clerk the claimant was issued with a job card and uniform. Mr Samuel Isaboke was the manager and who paid her Ksh.300.00 as a daily wage. There was no housing or any allowance paid in lieu thereof and work would start from 6am to 7pm daily from Monday to Saturday without a break or annual leave and without compensation.

On 14th February, 2015 the claimant went and fuelled the motor vehicles and upon return the manager, Shem Oyugi called her and told her she had no employment. That he had found the claimant absent at work and did not allow her to explain and as sent away. Nothing was paid.

Upon cross-examination the claimant testified that she had been employed by the respondent who was previously called *Kisii Nissan Service*. she was employed as a casual employee since she had gone up to class 8 and had no skill. The respondent company has vehicles from individuals who leave them with the respondent. there is a common office for bookings.

Defence

The respondent in response avers that it is a company registered and not a successor of any company as alleged and the claims made are denied. Without prejudice the defence is also that the claimant was never suspended or terminated in her employment or replaced as alleged as there was no employment with the respondent. the claims made are without merit and should be dismissed.

In evidence the respondent called Mr Shem Oyugi a businessman under *Kisii Prestige Shuttle Limited* and which was incorporated on 15th

February, 2011 and not a successor of any other company. He is a director of the respondent. He testified that he does not know the claimant and was not an employee of the respondent as a general clerk and was not issued with a job card. There was no suspension or replacement at work and all respondent employees are well remunerated and compensated for any overtime work.

Mr Oyugi also testified that he is known to all employees who are issued with a badge with the respondent's name. the respondent business is that of matatu and all employees are paid daily as a rule as there are no permanent employees due to the nature of business. *Kisii Nissan Services* is a different company unrelated to the respondent. the respondent has over 30 vehicles put together by individuals and none had employed the claimant.

Mr Oyugi also testified that the respondent is a limited liability company and a Sacco which belong to its members. There are directors including Mr Isaboke. There is an office with daily employees. From the daily collections, each vehicle must pay a percentage to pay the daily workers at the end of each day. There are work records to show who the employees are and the claimant is not one such employee.

When summons were served, Isaiah Masita who accepted them is a person unknown to the respondent. he is not an employee, not a director or a driver.

At the close of the hearing, both parties agreed to file written submissions. Only the respondent filed written submissions on 26th April, 2019.

The respondent submitted that the assertion by the claimant that she was employed by the respondent from the year 2008 under *Kisii Nissan Service Ltd* is unrelated to the respondent who is a company registered in the year 2011 and not related to any other. The respondent called its director Mr Oyugi and who testified that all its employees have employment cards and there is a list and the claimant is not one such employee and has never been in the employment of the respondent.

Employment is not proved and the mere fact that the claimant believed that the respondent and *Kisii Nissan Services Limited* are related is disapproved by the director as held in **Joseph Kobia Nguthari versus Kiegoi Tea Factory Co. Ltd & 2 other [2016] eKLR**. the claims made against the respondent are without merit and should be dismissed.

Determination

From the pleadings, the evidence and submissions filed by the responded, the issues which emerge for the court determination are;

Whether there was employment between the parties;

Whether there was unlawful termination of employment;

Whether the remedies sought are due.

The claimant's claim is premised on facts that she was employed on 1st March, 2008 as a general clerk by the respondent then known as *Kisii Nissan Services*. A card by *Kisii Nissan Services* is attached to the Memorandum of Claim.

The evidence is also that in the year 2011 the employer changed names from *Kisii Nissan Services* to the respondent. however the claimant has no other record save for the card issued under *Kisii Nissan Services*.

The respondent denied employment with the claimant. That the respondent is a company under its own name and not related to any other party. The respondent was registered in the year 2011 and has a list of its employees and the claimant is not one such employee.

The claimant's Advocate in cross-examination of the respondent's witness did not delve into the issue of the alleged change of names from *Kisii Nissan Services* to the respondent. Mr Oyugi gave emphasis that the respondent company was registered in the year 2011 and became a Sacco with members and he is a director. The respondent is comprised on individual motor vehicle owners who have come together to offer passenger transport service and each vehicle has to pay a percentage used to pay a daily wage to the employees at the office. The claimant was not one such employee.

Section 2 of the Employment Act, 2007 defines an employer to be;

“employer” means 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.

In this regard, where the respondent is a registered company under its own name and with no relations with any other entity before it was registered in the year 2011, it had capacity to employ and given employment terms and conditions.

Equally, an employee is defined under the same provisions. Where the claimant was an employee of any other third party before the respondent was incorporated, such other third party liabilities cannot be conferred upon the respondent which was not in existence at the time that is the year 2008 when employment is alleged to have commenced.

The claims made relate to the period of the year 2008 to the alleged date employment terminated, 14th February, 2015. Where the claimant served under two different entities, *Kisii Nissan Services* and upon being served with the defence where employment is denied, the claimant

ought to have taken the cue and done the necessary amendments. Without the entity *Kisii Nissan Services being enjoined herein* to sue the respondent and seek employment benefits for a period it was not established as a legal person, such cannot be enforced.

Without establishing any employment between the parties and on the basis that employment of the claimant was with *Kisii Nissan Services* and which changed names to the respondent, a key element on the jurisdiction of this court is lost. Parties before this court must establish an employment and labour relations or connected purpose relations as outlined under section 12 of the Employment and Labour Relations Court Act, 2011 for the court to adjudge.

Without any employment relations between the parties as demonstrated in the defence, this court must stop as it is without jurisdiction. To address the other issues outlined would be purely academic.

Accordingly, the claim must fail.

The respondent ought to have addressed these matters of jurisdiction instantly. This was not done.

Suit is hereby dismissed. No orders to costs.

Delivered in open court at Nakuru this 11th July, 2019.

M. MBARU

JUDGE

In the presence of:

Court Assistants: &

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