



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 519 OF 2017

COLLINS KIIO ELIJAH.....CLAIMANT

VERSUS

STYROPLAST LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for alleged unfair termination from employment. The Claimant avers that he was employed by the respondent as a machine operator in April 2010 earning Kshs. 15,289/- a month and that he served the Respondent until March 2016 when he was summoned to the Respondent's offices and summarily dismissed. He averred that he enquired for the reasons for termination and was requested by Human Resources to await a call. He averred that he was not issued with a notice nor accorded a hearing prior to dismissal. The Claimant averred that he used to work during holidays and was never paid for overtime worked. He therefore prays for a declaration that the termination was unfair, unprocedural, wrongful and illegal. He seeks 3 months' salary in lieu of notice – Kshs. 45,867/-, one year's salary as compensation for wrongful termination – Kshs. 183,468/-, severance pay – Kshs. 66,889.40, unpaid leave for 7 years worked – Kshs. 93,639/-, a certificate of service as well as costs to the suit.

2. The defence filed by the Respondent averred that the Claimant was on fixed term contracts of employment from 2010 to December 2014 and was not in its employment as at the date of alleged termination. The Respondent averred that on 1st November 2014 it entered into a two-year contract for the provision of labour in its premises with an independent contractor, Insight Management Consultants. The Respondent averred that the Claimant thereafter entered into a three months' contract with the independent contractor running from 26th December 2014 to 26th March 2015 in which he listed the Respondent as his previous employer. The Respondent averred that it paid the Claimant all his dues as of 26th December 2014 as evidenced by the payslip of December 2014. It averred that the dues were particularized into basic pay, house allowance, overtime, public holidays and leave entitlements. The Respondent averred that it ceased being in any contractual engagement with the Claimant as of 26th December 2014 and that there was no justification for a suit against it. It urged the dismissal of the suit as it was unfounded against it for the cause of action that accrued post the 26th December 2014.

3. The Claimant testified as did Shailesh Shah a director of the Respondent. The Claimant adopted his statement and testified that he was dismissed in March 2015. He confirmed that the last payslip in his bundle was for December 2014. He testified that Insight Management paid him from February to April 2015. He stated that when Insight Management came on board, the employees were forced to sign documents. He testified that after 3 months he was dismissed by the Respondent's director without notice. He testified that he was issued with a certificate of service showing that he was employed from 2010 to 2016 and that the certificate was signed by the director of the Respondent.

4. The Respondent's witness Shailesh Shah testified that the Respondent had an agreement with Insight Management to run the day to day activities including payroll and payslip. He confirmed that the Claimant was working at Styroplast under Insight Management and was paid wages and all statutory dues. He stated that it was Insight Management that had terminated the Claimant's employment. He testified that the Claimant worked for the Respondent from 2010 to December 2014 and that all his dues were paid. He said that the Claimant was not forced to sign a contract with Insight Management. He stated that all payrolls, NHIF and NSSF deductions were paid by Insight Management after the company signed a two-year contract with the Respondent in November 2014. He testified that he called for a meeting of the employees and informed the staff of this agreement with insight Management. He however failed to produce the minutes of the meeting.

5. The Claimant's submissions were to the effect that he was presented with an employment agreement in the year 2015 for him to sign. He submitted that the agreement stated that the Claimant would be working under the employment of Insight Management. He however indicated that the signing was coerced as he was warned that failure to sign would occasion him loss of employment. He relied on Section 115 of the Evidence Act and submitted that the law places an obligation the Respondent to disprove the fact of employment. The Claimant submitted that the Respondent ought to have proved that there was a transfer of employees to Insight Management. The Claimant relied on the case of **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR** and submitted that the Respondent's assertion that it had outsourced the Claimant's services to a third party is a mere afterthought. The Claimant submitted that the Respondent had failed to produce any evidence to confirm that there was indeed a transmission of the Claimant from its employment to the third party.

The Claimant submitted that as there was no employment contract between him and Insight Management, his employment could not have been transferred without his consent. He submitted that there was no valid employment between him and Insight Management. The Claimant submitted that the alleged contract of employment dated 14th January 2015 between him and Insight Management which was produced by the Respondent was unknown to the Claimant as he learnt about it during the hearing. He submitted that he should not be bound by such an agreement as he was never discharged from the Respondent's employment until March 2016. He submitted that no outsourcing was done and if there was any then it was irregularly and improperly done. The Claimant submitted that the Respondent should have at least supported the assertion that it informed the Claimant of the agreement between it and Insight Management with evidence. He relied on the case of **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** and submitted that his contract was unfairly terminated as he was not issued with a notice and further that the Respondent failed to prove the reasons for termination.

6. The Respondent submitted that the issues for determination were

- i) Whether the Respondent terminated or was capable of terminating the Claimant's employ as at March 2016
- ii) Whether the Respondent owes the Claimant any overtime or leave payment
- iii) Whether the Claimant is entitled to the prayers sought in the memorandum of claim

7. The Respondent submitted that the Claimant's contract with it and the third party Insight Management Consultants was on fixed term contracts with in-built termination notice without expectancy of renewal. The Respondent relied on the case of **Margaret A. Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR** where the court held that the fixed term contract had its own in-built termination notice. The Respondent submitted that the Claimant was at pains to explain to explain why his NHIF and NSSF statement did not disclose any further contributions from the Respondent post December 2014 and more so March 2016 which is allegedly the date material to his claim. The Respondent submitted that the Claimant had prayed for a certificate of service in the statement of claim, but however had produced a certificate of service dated 27th March 2016 as opposed to the one produced by the Respondent showing that the Claimant worked for it from 2010 to 2014. The Respondent averred that the certificate produced by the Claimant was manufactured for the sole purpose of misleading the court and it should be disregarded. The Respondent submitted that parties are bound by their pleadings and cited the case of **Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR**. The Respondent submitted that as of March 2016 the Claimant was not in its employment and it was also not capable of terminating his services. The Respondent submitted that despite signing the outsourcing agreement with Insight Management in November 2014 it was not until December 2014 that it cleared with all its employees as their fixed term contracts were to lapse in November and December 2014 to pave way for their employment by the 3rd party. The Respondent submitted that it calculated all the dues owing to the Claimant as noted in his December pay slip. The Respondent submitted that the Claimant had confirmed having knowledge of Insight Management Consultants and had filed a personal details form in which he listed the Respondent as his former employer and the Respondent's witness as his referee. Relying on the case of **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union (supra)**, the Respondent submitted that the agreement for the provision of outsourced labour which commenced in November 2014 was succinct on the Claimant's employment status, rights, payments, control and management of the Claimant as the 3rd party's employee. The Respondent submitted that all the Claimant's dues had been paid as enumerated in the muster payroll produced in court as well as the payslips showing that leave, holiday and overtime had been paid. The Respondent submitted that the evidence of payment notwithstanding, the claims of overtime, leave and holiday payments fall under continuing injuries and the Claimant is time barred from recovering the same under Section 90 of the Employment Act. It cited the authority of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR** and urged the court to find that the Claimant is not entitled to any of the prayers sought and his case should therefore be dismissed with costs.

8. The Claimant sued seeking recompense as an aggrieved former employee of the Respondent. From the evidence adduced before the court, there was no nexus between the Claimant and the Respondent as he had ceased being an employee of the Respondent in December 2014. His own documents indicate his last pay from the Respondent was in December after the conclusion of his fixed term contract. As held by Rika J. in **Margaret A. Ochieng v National Water Conservation & Pipeline Corporation (supra)** *the fixed-term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011. The Respondent has no obligation to pay her notice pay as there was no premature termination of the fixed- term contract.* Similarly, the Claimant did not anticipate an extension of the final contract he had with the Respondent. Upon its conclusion his dues were paid. He entered into new contracts and was paid his subsequent salaries by the company to whom the labour services were outsourced being Insight Management Consultants. The Claimant therefore had no viable claim against the Respondent and his suit was misplaced. The only outcome is a dismissal. The suit is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 2nd day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar