



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 579 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th September 2019)

IGNATIUS KIVATA MUTUACLAIMANT

VERSUS

HOSTELING INTERNATIONAL ...RESPONDENT

JUDGMENT

1. The Claimant, Ignatius Kivata Mutua filed a Memorandum of Claim dated 10/04/2015 against the Respondent, Hostel International initially International Youth Hostel Federation which is a corporate body duly registered under the Charity Act in England.

2. He avers that he was employed by the Respondent in 1995 with his duties being subject to the existence of loans agreement between Kenya Youth Hostel Association and the Respondent where he was the Manager for the hostel earning a salary of Kshs. 50,000/=.

3. That following the sale of the Nairobi Youth Hostel Building where he was the Manager and settlement of the loan proceeds by the Respondent, the Respondent failed, refused and or ignored to pay him salaries from the month of May 2013 or withheld his dues without any unjustifiable reason. That this subjected him to unquantified inconvenience and suffering amounting to discrimination.

4. That the said termination of his employment is unfair, illegal, unreasonable and unjustifiable because: the Respondent did not and has not communicated to him the status of his employment while it stopped paying him salaries; he had received credible recognition for efforts in his job prior to his termination; and he was not given any notice before his services were terminated.

5. That despite demand being made and notice of intention to sue having been issued, the Respondent has not made any response to his claim and he thus prays for judgment against it for orders for:-

a. A written notification or explanation to the Claimant on the status of his employment.

b. Payment of one month's salary in lieu of notice.

c. Payment of the Claimant's salaries from the month of May 2013 to date being Kshs. 50,000/= per month x 24months (May 2013 to April 2015) totalling to Kshs. 1,200,000/=.

d. General damages for unlawful and unwarranted termination.

e. Interest on (b), (c) and (d) above.

f. Cost of the suit.

g. Any other or further relief that the Honourable Court may deem fit to grant.

6. The Claimant also filed a witness statement dated 23/06/2016 by the Treasurer and Trustee and former National Chairman of the Kenya Youth Hostels Association, Engineer G.C. Maina. He states that the report dated 04/12/2003 written by International Youth Hostel Federation representative and addressed to his committee is a true position of the Association and that the Claimant is an employee of International Hostels Federations.

7. That a small committee headed by the Chairman, Treasurer and Secretary was the monitoring body and advisory to foresee the performance of the Manager on behalf of the Federation and that the appointment of the Nairobi Hostel Manager was a prerogative of the Respondent as per the Loan Agreement.

8. That the Respondent was to employ its own Manager to run the hostel after it lent money to Kenya Youth Hostels Association to build the Nairobi Youth Hostel. That as per the letter of appointment dated 20/01/1995, the Claimant in *Clause 7* was supposed to attend all training courses locally and internationally organized by his employer.

9. The Claimant filed a Further Witness Statement dated 09/10/2018 stating that all communications and running of the Nairobi Youth Hostel was done directly from the Respondent and himself and that at no one time was he answerable or become an employee of the Kenya Youth Association.

10. That his salaries were paid to him by the Respondent through the Nairobi Youth Hostel and that the said hostel was sold because Kenya Youth Hostels Association was unable to pay the loan proceeds to the Respondent and an agreement was reached between the two parties for the said sale to settle the outstanding loan. That he suffered psychological torture and anguish as he did not have a job and was not prepared for such treatment and that that is the reason he came to this Court.

11. The Respondent filed its Memorandum of Defence dated 20/05/2015 denying the Claimant's allegations and claims and averring that the Claimant was employed by the Kenya Youth Hostel Association which is a distinct legal entity from the Respondent.

12. That there was no employer-employee relationship between it and the Claimant and that the claim is therefore without basis in fact and/or in law, false, misleading, misadvised and is an abuse of the Court process. It prays that the Claimant's cause be dismissed with costs to the Respondent.

Evidence

13. The Claimant, CW1 testified in Court that he wished to rely on his filed Statement, Further Statement, List of Documents and Further List of Documents as his evidence in this case. He stated that the Federation uses the secretariat letterhead to communicate when in the country and that is why they used Kenya Youth Hotel Association letterhead but that his appointing authority was International Youth Hostels.

14. That he received his last pay in April 2013 and that he was terminated without any terminal benefits and in re-examination, he confirmed that there was no document in Court by the Kenya Youth Hotel Association indicating he was their employee or from the Respondent denying he was not its employee. He stated that his terms of employment were to be local terms because he was based in Kenya.

15. CW2, Gideon Maina testified that he wished to rely on his filed statement as his evidence in Court and stated that Kenya Youth Hotel Association is a member of International Youth Hostel Federation. In cross-examination, he stated that he consulted with International Youth Hostel Federation to promote the Claimant and that while the Kenya Youth Hotel Association is still under operation the Claimant is not working there.

16. The Respondent's counsel closed his case after stating that he would not be calling any witnesses.

Claimant's Submissions

17. The Claimant submits that in the ***letter dated 06/11/1995 at page 6; Clause 9c of the loan agreement dated 16/04/1999 at page 17; report dated 04/12/2003 at page 21, 25 and 28 in the Claimant's further list of document***, the Respondent confirmed it had full control and management of the hostel, including but not limited to administration of finance matters as well as the appointment and termination of the Hostel Manager.

18. That the Employment Act defines '***employee***' to mean a person employed for wages or a salary and includes an apprentice and indentured learner and an '***employer***' to mean 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. That from the evidence adduced, there is no doubt that he was an employee of the Respondent.

19. He submits that under **Section 35 and 36 of the Employment Act**, an employer is required to give 28 days' notice of termination or a payment in lieu of notice which the Respondent did not comply with and that to date, he does not know the reasons for termination. That he was also not accorded a fair hearing before the presumed termination and that he received his last salary in May 2013.

20. That his employment was deemed terminated from the implied conduct of the Respondent failing to remit his salary for two years and that this was therefore unfair and unlawful within the meaning of **Sections 43, 45 and 46 of the Employment Act** and he relies in the case of **Moses Ochieng v Unilever Kenya Limited [2018] eKLR**.

21. That he has proved the case of unlawful termination and is therefore entitled to the prayers sought save for prayer (a) which has been overtaken by events and is immaterial. That he prays for this Court to award him 12 months' compensation for unlawful termination at Kshs. 600,000/=.

Respondent's Submissions

22. The Respondent submits that the Claimant failed to prove he was an employee of the Respondent and that he in fact unequivocally

admitted under oath in suits filed in other Courts that he was an employee of Kenya Youth Hostel Association.

23. That the Claimant confirming the same, swore affidavits in *Civil Suit 157 of 2013* and in *Misc. Criminal Application 194 of 2013* as shown in **pages 13, 44, 50 and 79 of the Respondent's Bundle of Documents** and that a statement by a party under oath or in an affidavit may be used as an admission in the course of subsequent litigation.

24. That as per **Sections 107-109 of the Evidence Act**, it is for the party that alleges a fact to be true to prove the existence and veracity of that fact under the basic principle of Evidence and that there was no employment contract between the Claimant and the Respondent.

25. That it never appointed the Claimant but only approved his appointment in a letter of 03/08/2000 by its Deputy General to PW2 confirming that they would 'support' the Claimant's candidacy as the new Manager and that this is shown at **page 12 of the Claimant's bundle of documents**.

26. That this recommendation could not have converted the loan agreement into an employment contract and that the Claimant's own documents contradict his assertions such as the letter promoting him to Manager (page 13 of the Claimant's bundle of documents) being on a Kenya Youth Hotel Association letterhead expressly appointing him 'pursuant to Kenya Youth Hotel Association Staff Terms and Conditions of Service and Rules and Regulations of 1997'. Further, that all payment receipts confirm that he was being paid by Kenya Youth Hotel Association.

27. The Respondent acknowledges that it did not call any evidence but submits that this did not excuse the Claimant from discharging the burden of proof and that until the burden is discharged, the Respondent cannot be called upon to rebut a fact that has not been established. That this Court should thus find the Claimant was an employee of Kenya Youth Hotel Association and it prays that the suit be dismissed.

28. I have examined all the evidence and submissions of the Parties herein. The main issue for determination before Court is who the Claimant's employer was and whether the Claimant is entitled to the remedies sought.

29. On the first issue, I will start from the premise that the Claimant submitted in evidence that he was employed by the Respondent in 1995 as per his appendix which reads as follows:-

"May I draw your attention to Clause II of our loan agreement that the Federation shall have the full control and management of the Hostel, including but not limited to the control of administration and finance matters and the day-to-day running of the hostel; and the hostel Manager shall always be a person appointed by and seconded to the hostel by the Federation or alternatively a person appointed by the KYHA with prior approval in writing of the Federation. The hostel Manager's employment shall not be terminated by KYHA without prior consent in writing of the Federation".

30. This letter makes reference to the Claimant herein and avers that the hotel Manager had to either be appointed or seconded by themselves or be a person appointed by KYHA with the Respondent's prior approval. The same Manager could not be terminated by KYHA without prior consent of the Federation in writing.

31. What I gather from this communication is that the Respondent had a tag on who was appointed as Hostel Manager and how the termination could be done. It is only an employer who has a right to hire and fire as envisaged herein.

32. More control over the activities of the Claimant by the Respondent are evidenced by the Appendix at page 7, 8 and 10 of the Claimant's documents where the Respondent controlled the Claimant's travels and training.

33. Even when the Respondent lost money to the KYHA, Clause 9 of the agreement was explicit about the Respondent's control over the KYHA Manager's appointment and termination.

34. The letter dated 4.12.2003 at page 21 of the Claimant's documents indicate as follows:-

"In 1994 when the then International Youth Hostel Federation (IYHF) President Mr. Friedrich Muth and IYHF Secretary General briefly visited Nairobi, the present Manager Mr. Ignatius Mutua was appointed. At the same time a small management committee was set up to supervise and assist in the running of Nairobi Hostel"

35. These same sentiments are contained in the brief from the Respondent dated March 1999. Page 24 of Claimant's documents, which reiterate at page 25 the appointment of the Claimant as the Hostel Manager in 1994. At page 28 – Clause 8 – the recommendation is that:-

"The appointment of the Nairobi Hostel Manager remains the prerogative of the IYHA".

36. Indeed one cannot appoint a person who is not their employee and the fact that the Respondents always had control over the Claimant's appointment and termination is evident of their position as an employer.

37. There is no evidence adduced before this Court to the contrary that the Respondent was employer of the Claimant.

38. The Respondent filed their defence and submissions but called no witness even to produce documents they wished to rely upon. Their pleadings remained just as that as stated by the Court of Appeal in Civil of Appeal No. 140/2008 at Nairobi **JJA Visram, Mwilu (as she then was) and Otieno Odek** rendered themselves as follows:-

“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marled for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence”.

39. The Claimant’s case remain uncontroverted in the circumstances and it is my finding therefore that the Claimant was indeed an employee of the Respondent.

40. Having found as above, it is also apparent that the Respondent sold off or abandoned their Nairobi business without explaining to the Claimant his position and without paying him off his terminal dues. In the circumstances, I find that the Respondent terminated the Claimant’s services with effect from May 2013. I therefore find for Claimant and award him as follows:-

1. 1 month salary in lieu of notice = 50,000/=

2. 12 months’ as salary for the unlawful termination = 12 x 50,000 = 600,000/=

TOTAL = 650,000/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in open Court this 30th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mutinda holding brief Ayeko for Claimant – Present

Miss Onyango holding brief Gachuhi for Respondent – Present