



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**CAUSE 677 OF 2014**

**FRANK SAENGER.....CLAIMANT**

**-VERSUS-**

**AFRIKON LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a Memorandum of Claim on 23rd April 2014. He averred that he was employed by the Respondent in the position of Operations Director and was posted at the Olkaria IV Geothermal Power Plant from October to December 2012 and from January 2013 he was working from the Respondent's Head Office in Nairobi. He further averred that he worked for the Respondent until the termination of his contract due to financial difficulties which caused the Respondent not to pay his salary. He therefore prayed for the following reliefs:

- a) Payment of outstanding salary dues of 65,691 Euros.
- b) Payment of one month's salary in lieu of notice of 8,500 Euros.
- c) Damages for breach of contract and section 18 (2) of the Employment Act in Euro denomination.
- d) Compound Interest on (a), (b) and (c) above.
- e) Costs of this suit and interest thereon in Euro denomination or Kenya Shillings Denomination.
- f) Any other relief that this Honourable Court shall deem fit and just to grant in the circumstances.

2. The Respondent filed her Response to the Statement of Claim on 20th April 2015 denying that the Claimant was her employee. She averred that he was engaged as an independent contractor to offer professional services under a contract that was expected to expire on 30th September 2013. She further averred that the remedies sought do not lie in this court and urged the Court to dismiss the Claim.

3. The main issue arising from the pleadings is whether the claimant was engaged by the respondent as an employee or as an independent contractor. When the suit came up for hearing, the Claimant gave his testimony and called Mr. Jungbong Sue as his witness but the respondent never gave any evidence. However, after close of the hearing both parties filed their respective submissions.

**Claimant's case**

4. The Claimant testified as Cw1 and stated that he was employed under a written contract whose terms had been agreed on verbally. He testified that he earned a salary of 8500 Euros per month and was entitled to 30 days' annual leave and a long weekend every month to visit his family in South Africa. He testified that from January to May 2013 his salary was paid through his overseas account. He further testified that from June to December 2013 he did not receive any pay in spite of having worked.

5. He testified that in March 2013, the Respondent's Managing Director donated to him a power of attorney to sign documents for the companies since he, Managing Director, was sickly. He urged the

Court to award the prayers sought in his Memorandum of Claim.

6. In cross-examination, he testified that there were email correspondences that indicated his terms of contract. He however testified that there is no email between him and the Respondent regarding his salary and that the bank statements produce in Court do not indicate that he was paid a salary from January to May 2013.

7. He testified that the emails from the Respondent's Director to him complained that Mr. Jung and himself ignored instructions on work projects and that Mr. Jung admitted liability and proposed to pay. He testified that he was neither an independent contractor nor did he share profits. He however testified that he was offered shares but the shares were never allocated to him.

8. He testified that he never signed any agreement between himself and the Respondent appointing him as an Independent contractor and maintained that he was an employee who worked continuously for 12 months.

9. Mr. Jungbong Sue testified as Cw2 and stated that he was employed by the Respondent from January 2013 to June 2013 as the Technical Director while the claimant was employed by the respondent as the Operations Director from October 2012 to December 2013. He further testified that the claimant and himself were heading a department and that the claimant's salary was paid through the bank. He however confirmed that he never saw any written contract between the Respondent and the Claimant.

10. In cross-examination, he testified that the Claimant had no shares in the Company and he did not know if the Claimant was getting any share of the company profits. He further testified that in his email dated 2nd October 2013 he proposed to the Respondent to give him some of her equipment in settlement of his debt which he had lent her. He admitted that he formed his own engineering company in October 2013 after the respondent went down.

### **Claimant's submissions**

11. The Claimant submitted that he had proved by evidence that he was employed by the Respondent as an Operations Director under a contract of service in line with section 2 and 10 (1) of the Employment Act and not a contract for service. He further submitted that the Respondent did not adduce any evidence to prosecute her defence and rebut his evidence despite being given an opportunity to do so. He therefore contended that his evidence has not been controverted and urged the court to find that he has discharged the burden of proving that he was an employee of the Respondent and not an independent contractor. He relied on the decision in **Peter Wafula juma & 2 Others v Republic [2014] eKLR** .

12. In conclusion, he also submitted that he has proved the terms of engagement and urged the court to find that he is entitled to the prayers sought in his Memorandum of Claim.

### **Respondent's submissions**

13. The Respondent submitted that the bank statements produced by the Claimant were not proof of salary payments but payments that were due to him as a contractor. She observed the statement did not show that the claimant a regular pay salary from September 2012 to October 2013. She further submitted that she did not have any power to dismiss and/or exercise control over the conduct of the Claimant. She relied on this court's decision **Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR** and the English court decision in **Short v Henderson Ltd [1946] 62, T.L.R. 429** where the court discussed the test of employer – employee relationship.

14. She further submitted that the Claimant has failed to demonstrate his duties and responsibilities in his capacity as operations manager. She further contended that the claimant has not proved that she had power to exercise control over his conduct. She submitted that under Section 107 and 109 of the Evidence Act the burden of proof of the existence of an employer-employee relationship lies with the claimant but he has failed to discharge that burden.

15. In conclusion, she urged the court to find that the Claimant is not entitled to the reliefs sought since

the Employment Act only applies to employees under a contract of service unlike the instant case where the Claimant was engaged as an independent contractor under an implied contract for services between himself and the Respondent. She therefore contended that under the Employment and Labour Relations Court Act, the remedies sought should not be entertained. She relied on the decision in **Charles Mutua Mwanzi v Invesco Assurance Company Limited [2016] eKLR** and further submitted that the Claimant had not proved payment of wages.

### **Analysis and determination**

16. The main issues for determination are;

- a) Whether the Claimant was an employee at the Respondent.
- b) Whether the employment contract was unfairly terminated.
- c) Whether the Claimant is entitled to the reliefs sought.

#### **a) Whether the Claimant was the Respondent's employee**

17. It is the Claimant's testimony that he was employed by the respondent as the Operations Director for a monthly salary of 8500 Euros was corroborated by the oral testimony of the CW2. The said evidence regarding the claimant's employment relationship with the respondent has not been controverted since the respondent voluntarily chose not to tender any evidence to prosecute his defence. In addition, the respondent did not deny that she employed CW2 as her Technical Director until he left to begin his own business October 2013. She further did not rebut the claimants evidence that she had financial challenges which made it difficult for her to pay salary to her employees regularly. Consequently, the court finds that the claimant has proved on a balance of probability that he was employed by the respondent as her Operations Director from September 2012 to December 2013.

18. Section 2 of the Employment Act defines a contract of service and an employee as follows:

**“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;**

**“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;”**

19. Courts have over the years dealt with the issue of the distinction between an employee and an independent contractor. In **Martin Juma Kundu v Kemu Salt Packers Production Limited [2016] eKLR**, this Court held that:

***“At common law an employee is one who:***

***(a) is required to comply with the employer's instruction about when, where and how he or she must work.***

***(b) has been trained by the employer to gain experience for purposes of working for the employer.***

***(c) has been integrated into the business operations of the employer so that he is subject to the direction and control of the employer.***

***(d) must render services personally***

***(e) has assistants hired, supervised and paid by the employer***

***(f) has worked continuously for a long time***

***(g) has specific working hours set by the employer***

***(h) is working substantially full-time for an employer and is not free to work for other employers***

***(i) performs work on the employers premises***

***(j) is required to submit regular oral or written report to the employer***

***(k) has his business trips or travel expenses paid for by the employer***

***(l) has tools, material and other requirements met by the employer***

***(m) is easily dismissed at the will of the employer***

***(n) has the right to terminate his contract without incurring any liability***

20. In **Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR** the court held as follows about the indicia of the employer-employee relationship:

***“ ... there must be a selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and, finally the power to control the employee’s conduct...”***

21. In the English case of **Short v Henderson Ltd [1946] 62, T.L.R. 429**, Lord Thankerton held as follows concerning the elements to prove of the employer-employee relationship:

***“these are (a) the master’s power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master’s right to control the method of doing the work; and the master’s right of suspension or dismissal.”***

22. Applying the definitions of employee and employment contract in section 2 of the Employment Act and the tests of employer-employee relationship set out by the aforesaid judicial precedents, the court find that the claimant was indeed employed by the respondent under an oral contract of service. The Claimant stated that his terms of employment were never reduced into writing but it was agreed between him and the respondent and that he was to serve in the position of Operations Director for a monthly salary of 8500 Euros. The claimant’s evidence was corroborated by the oral testimony of the Cw2 and the Bank statements showing payment from the respondent which he contended that it was his salary paid in arrears due the respondent’s financial woes. The said evidence was not controverted by the respondent.

**(b) Whether the respondent unfairly terminated the contract of service through breach.**

23. Under section 45(2) of the Employment Act, termination of an employees contract of service is unfair if it is not grounded on valid and fair reason(s) and/or if done without following a fair procedure. A valid and fair reason is one that relates to the employees conduct, capacity and compatibility or based on the employer’s operational requirements. Fair procedure on the other hand refers to, but not limited to according the employee a fair hearing before termination.

24. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests with the employee who alleges that he was so terminated, while the burden of justifying the reason for the termination rests with the employer. The said burden of proof does not shift unless the employee proves on a balance of probability that the termination did not pass the muster of substantive and procedural fairness set out under section 45 of the Act.

25. Neither the claimant nor the Respondent adduced any evidence as to whether the termination complied with the provision of sections 41, 43 and 45 of the Employment Act. It follows therefore that the claimant has not discharged his burden of proving that his employment contract was unfairly terminated.

26. However, the claimant contended that the respondent breached the contract by failing to pay him salary for June to December 2013 as a result of which he was forced to leave the job and return to South Africa. The said contention was corroborated by Cw2 in his evidence when he stated that he also left the respondent to begin his business in October 2013 after the respondent went down financially and failed to pay salaries. The said evidence was not controverted by the respondent and as such I find that the respondent breached the contract of service by failing to pay the salary to the claimant for about seven months. The said breach was fundamental and the claimant was entitled to repudiate the contract and treat the breach as constructive termination of the contract and demand salary in lieu of notice as he did herein.

**b) Whether the Claimant is entitled to the reliefs sought.**

27. In view of the finding above that the Claimant was employed by the respondent under a contract of service, and that the contract was constructively terminated through breach of a fundamental term of the contract, I find that he is entitled to one-month salary in lieu of notice as prayed being 8500 Euros. The said award is the quantum of damages for breach of the contract of service.

28. In addition, the claim for unpaid salary for the month of June to December 2013 has not been disproved by evidence and it is granted as prayed being, 7 x 8500 Euros equalling to 59500 Euros.

29. In the end, I enter judgment for the claimant against the respondent for the sum of 68000 Euros plus costs and interest at court rates from the date of filing the suit. The award is however subject to the statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019**

**ONESMUS N. MAKAU**

**JUDGE**