



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 93 OF 2015

THOMAS NDETO.....CLAIMANT

VERSUS

HEXAGON AGENCIES LIMITED.....RESPONDENT

J U D G E M E N T

1. The claimant pleaded that at all material time he was a bona fide employee of the respondent having been engaged as part/market analyst which position he held up to the time of his termination. His monthly salary he pleaded was Kshs. 20,000/=.
2. According to the Claimant he served the respondent diligently until 5th July,2014 when the respondent's managing director Mr. Nahendra Shah verbally instructed him to proceed on leave. The reason given was that Mr. Shah was proceeding on holiday out of the country, He informed the Claimant that he would resume work when he returned to the country in August ,2014.
3. In September,2014, Mr. Shah met the Claimant and indicated to him that the respondent was experiencing financial difficulties as such he was advised to resign as the respondent could no longer afford to pay his salary.
4. According to the Claimant's he then asked Mr. Shah to pay his terminal dues so that he could move on with his life. Mr. Shah however vehemently refused to discuss the issue of terminal dues stating that nothing of that notice was contained in his contract of Employment. Mr. Shah however offered to pay him Kshs. 90,000/= being 3 months salary in lieu of notice.
5. The respondent on its part pleaded that the Claimant had never been employed by them or offered any job opportunity and that the only relationship the Claimant had with the respondent was one of a service provider on a retainer and was paid on monthly basis.
6. The respondent further pleaded that the reason it never issued the Claimant with a contract of employment was because the Claimant was never an employee and had never been offered any employment opportunity by the respondent.
7. The respondent also pleaded that the reason why the Claimant was never issue with a termination letter or certificate of service was because the Claimant was never the respondent's employee.
8. In his oral evidence, the Claimant reiterated the averments in the statement of claim and further stated that he was employed in September,2007 as a Marketer. He signed employee information form but was not issued with a formal contract. He worked until 2014.
9. The Claimant further stated that he was paid his salary through a cheque. On 15th of the month he would get an advance salary. It was his evidence that he would raise a debit note against which he would be paid. He further stated that he never went on leave for the period he worked.
10. In cross-examination he maintained that he was an employee and earned a salary not fees. He denied he was a consultant. He however stated that there were some employees who were given pay slips. It was further his evidence that he was registered as a contributor with NSSF and NHIF.
11. The respondents witness Mr. Mahendra Kumar testified that the Claimant was known to the respondent as someone familiar with spare parts for European trucks.
12. His services were therefore hired to market the respondent's products. He denied the Claimant was the respondent's employee. The Claimant was paid as per the invoices raised after making sales.
13. According to Mr. Kumar, the respondent did not terminate the Claimant's service. Rather he was stopped from marketing respondent's produces because the business was not doing well.

14. On the issue of leave, it was his evidence that the Claimant applied for leave because he wanted to be away without pay. He used respondent's leave forms to excuse himself away.

15. The respondent herein denied the Claimant was its employee hence his services could not have been terminated by the respondent.

16. Where there is dispute as to the existence of employer-employee relationship the common law tests is usually to determine who controls the way the work is performed and the result. It usually comes down to the amount of control the employer has over the individual performing the work. Control can also manifest itself on hours of work, payment of salaries, permission to absent oneself from work and so on. There is no one size fits all test. Each case must be decided on its own unique circumstances.

17. The Claimant alleged he was employed by the respondent and produced documents to demonstrate this including application for leave form, a list containing his name as one of the employees who applied for advance and debit notes showing monthly payments by the respondent.

18. The respondent on its part though claiming the Claimant was a consultant marketer and would be paid fees after selling respondents products, did not produce any services contract or memorandum thereof to back the claim that he was a consultant or independent contractor.

19. If indeed the Claimant was an independent contractor earning fees or commission, why would he apply for leave of absence from the respondent. Second on the debit notes exhibited by the Claimant which the respondent never disputed why would there be deductions for days the Claimant was absent if his pay was based on sales made.

20. The inconsistencies in the respondent's allegations in the face of the reasonable evidence tendered by the Claimant leads to only one conclusion that that the Claimant was the respondent's employee and the Court so finds.

21. In the light of the above finding the Court reaches the inevitable conclusion that the Claimant's separation from his contract of employment with the respondent was not in accordance with the provisions of the Employment Act hence unfair.

22. The Court in the circumstances makes the following award in favour of the Claimant

Kshs.

(a) One month's salary in lieu of notice 30,000

(b) Eight months salary is compensation

for unfair termination. 240,000

270,000

(c Costs of the suit.

23. The award save for costs shall attract interest at Court rates from date of judgement until payment in full but shall be subject to taxes and statutory deductions.

24. It is so ordered.

Dated at Nairobi this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge