



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1943 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 2nd October, 2019)

GEOFFREY KAIMENYI MATHIU.....CLAIMANT

VERSUS

NICHOLAS GITOBU GITONGA.....1ST RESPONDENT

CHARITY MAKENA GITOBU.....2ND RESPONDENT

JUDGEMENT

1. The Claimant, Geoffrey Kaimenyi Mathiu filed this claim vide a Statement of Claim on 23/10/2014 for unlawful and unfair dismissal from his employment and payment of his terminal benefits against the 1st Respondent, Nicholas Gitobu Gitonga and the 2nd Respondent, Charity Makena Gitobu.

2. He avers that in 1998, he was employed orally by the Respondents as a domestic worker and night guard at their Zimmerman plot within Nairobi County on a monthly salary of Kshs. 5,500/= and that he used to guard construction materials and perform all other domestic chores assigned to him from time to time.

3. That when the Respondents began constructing rental houses in 1999, he was assigned duties of supervising the construction during the day and when the construction was completed in 2001 he became the caretaker. That he was to ensure tenants paid rent on time, handled complaints from tenants, unblocked the sewerage system and that he doubled up as a night guard.

4. That he was also in charge of payment of water bills, electricity bills, land rent and all other utilities on behalf of the Respondents and that they increased his salary to Kshs. 7,500/= due to the additional roles. He states that he worked for approximately 17 hours every day without annual leave throughout the period of employment and that he was not paid for hours worked overtime.

5. That the Respondent had assigned him a room where he lived with his family until his services were unlawfully terminated vide a letter dated 28/03/2014 through their advocates. He contends that the Respondents failed to give him an employment contract and annexes documents marked *Appx-1 to 4* in support of his claim.

6. He avers that the Respondent did not act in accordance with principles of justice and equity and breached the contract of employment, rules of natural justice and the relevant employment laws. That he was not subjected to any disciplinary process and that his last salary was Kshs. 15,000/= per month which was paid to him either through Mpesa, cash or deductions from rent collected, with authority of the Respondents.

7. That although he worked the entire of March 2014, the Respondents failed to pay him the salary due and that despite demand and notice of intention to sue, he has received no response and he thus prays as follows:

a) A declaration that the Respondents' dismissal of the Claimant from his employment was unlawful, unfair and hence null and void.

b) The Respondent be ordered to pay the Claimant the following:-

i) Unpaid salary for the month of March 2014 Kshs. 15,000

<i>ii) Payment in lieu of notice</i>	<i>Kshs. 15,000</i>
<i>iii) Unpaid leave (15 years)</i>	<i>Kshs. 225,000</i>
<i>iv) Service pay for 15 years worked</i>	
	<i>(Kshs. 7,500 x 15)</i>
	<i>Kshs. 112,500</i>
<i>v) Unpaid overtime for a total of 68,790 hours worked</i>	
<i>vi) including public holidays and a rest day per week worked</i>	<i>Kshs. 6,449,062.50</i>
<i>viii) Damages for unfair dismissal, equivalent of 12 months' salary</i>	<i><u>Kshs. 180,000</u></i>
TOTAL	<u>Kshs. 6,996,562.50</u>

c. An order recommending to the Director of Public Prosecutions to commence investigations under section 51(3) of the Employment Act with a view to prosecuting the directors of the Respondent for any offence committed.

d. An order that the Respondent issues the Claimant with a Certificate of Service.

e. Interest at court rates on (b) above from the date of filing the claim.

f. Costs of this suit.

g. Such other or further relief as this Honourable Court may deem just to grant.

8. The Respondents filed their Defence dated 01/12/2014 denying that the Claimant was their employee or that he was in charge of payments of water bills, land rents, rent collections and any other services as claimed in the Statement of Claim.

9. They aver that the Claimant worked for them and other relatives and friends but on assignments for which he was paid for and deny that they or their advocates terminated the Claimant's employment. That they only engaged him to do temporary works on their premises or send him to various relevant places as need would arise and that on most occasions, he was paid for the work as per understanding with the 2nd Respondent.

10. That the Claimant was not a casual employee and that their relationship goes back to the rural area where he shares a village with the 1st Respondent who on humane grounds assisted him. That the alleged termination letter was a response by their lawyers to the Claimant's lawyers dated 25/03/2014 and that the Claimant's collection of the documents as documentary evidence is not factual and do not justify any of his claims.

11. They continue to aver that the Claimant is on a hunting mission as he knows very well he has been working for other persons such as Bealine Auctioneers and Lifeline Auctioneers on commission basis from 2009 to 2013 and that he has also been an agent and broker of property and many other things.

12. That he also has employment bureau for househelps, gardeners and all sorts of contracts. That the Claimant has not been truthful with his facts as he has not told this Court he has another case related to this subject before the Rent Restriction Tribunal and that he had collected deposits from tenants without disclosing to them. That the Claimant is ungrateful and very crafty and can go to any length to harvest where he has not planted and that they pray for the dismissal of his suit with costs.

13. The Respondents also filed Witness Statements on 26/07/2017 by each of the Respondents, Florence Mungiria and Jacob Muthee. The 2nd Respondent states that she used to give the Claimant odd jobs such as small repairs and unblocking the drainage system and when they built rentals, they gave him two small units next to the rental houses on humanitarian grounds for him to live in and do business for sustenance.

14. That she has even used his employment bureau to get a house girl in January 2013, a period he claims he worked for her and that her sister Florence also got a house girl through the Claimant's business. That when the Claimant got established and married, he rented out the two units and moved into a two bedroom in the main premises where he used to pay rent and that she and the husband sought to renovate the rental houses in 2014. That they gave all the tenants including the Claimant notice to vacate and that is when he filed a case in the Business Premise and Rent Tribunal followed by this claim.

15. The 2nd Respondent states in his statement that he would at times send the Claimant to collect rent for him and the Claimant would then send to him through mpesa mobile money and that the Claimant would then retain some of the money as his fee or the 2nd Respondent would send him fess for the work done.

16. He denies having at any time employed the Claimant as a caretaker or a watchman. Florence Mungiria states that she knows the Claimant

because she and the 2nd Respondent organised and financed his wedding and that she has also contracted him to build a gate and fence her rural home in Meru.

17. That she also knew him as a person who used to sell second hand items. Jacob Muthee confirmed in his statement that the Claimant used to work for Base Auctioneers after having an encounter with him in 2012.

Claimant's Submissions

18. The Claimant submits that **Sections 8, 9 and 10 of the Employment Act** requires every employee to be issued with a contract of service stating the terms and conditions of such employment. That where such contract is not possible to issue immediately **Section 10(1)** makes it mandatory that the document be issued not later than 2 months.

19. The Claimant cites the case of **Martin Ireri Irungu v Olerai Management Company [2017] eKLR** where the court stated that where an employer fails to issue an employee with a written contract of service, the word of the employee is to be believed.

20. That the Respondents fulfilled their obligation under **Section 31(1) of the Act** when they allocated a house to him to live with his family and not on humanitarian grounds and that the description of the duties he performed fits those of a caretaker. He contends that he was therefore an employee of the Respondents.

21. He submits that he was never issued with any disciplinary rules after being employed as required under **Section 12 of the Employment Act** and that he had no idea of the measures to take or redress in case of a grievance relating to employment.

22. That the termination did not comply with **Sections 41, 43 and 45(5) (a) of the Employment Act** as he was not informed of allegations of misconduct against him and was not issued with any warning letters or the requisite notice prior to dismissal.

23. That having been unfairly terminated, it is fair he is paid damages equivalent to 12 months' gross salary and one month's salary in lieu of notice. That since he was never accorded leave for the 15 years he worked for the Respondents, he claims the same under **Section 28(1) (a) of the Act** and also seeks service pay for each completed year of service.

24. That he worked overtime of approximately 9 hours daily from 6am to 11pm, seven days a week and also worked during public holidays without any rest day for the 15 years he was employed. That he has proved he was an employee of the Respondents and prays this Court grants him the reliefs sought in his claim.

Respondents' Submissions

25. The Respondents urged the Court to refer to their **Bundle of Documents** particularly **page 10** which is a copy of a form showing the 2nd Respondent secured a house girl on 18/01/2013 at a fee of Kshs. 2,000/= through the Claimant's business called Geoffka Enterprises.

26. That **page 13 and 14** are copies of certificates of official search from Registrar of Companies showing the Claimant as the proprietor of the businesses. That **page 15** is a copy of the auctioneer's proclamation for Base Auctioneers undertaken by the Claimant showing he was engaged in business with the auction firm.

27. The Respondents rely on the case of **Gilbert Sule Otieno –v- Seventh Day Adventist Church (East Africa) Ltd (sued on behalf of SDA Church, Kiamunyi East) [2014] eKLR** where the Court observed that to determine the true and correct relationship between parties, the Court must go beyond the use of the words *employer* and *foreman*. They urge this Court to deeply interrogate the standing of the parties in this case in light of the foregoing undisputed facts.

28. They submit that a few tests have been used in the past to determine whether a person is an employee or not like whether the person's duties are an integral part of the employer's business or what the mode of payment entailed. They rely on the case of **Maurice Oduor Okech –v- Chequered Flag Limited [2013]** where the court in dismissing the claim, observed that the Claimant was not an employee of the Respondents but an independent contractor under a contract of services and that the documentation and mode of payment were not ordinarily found in an employer/employee relationship.

29. That in **Lorna Adhiambo Aling –v- Safi International AS [2017] eKLR**, the court in answering the question on the rationale of what goes into an employment relationship as against what goes into an independent consultant relationship referred to the case of **Charles Juma Olang v M/S Auto Garage Ltd & another [2014] eKLR** that: "to determine the nature of relationship one has to address the following:-

- a) The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.*
- b) The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.*
- c) The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.*
- d) Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and secondly, mutual promises for future performance. The*

arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.”

30. Further, that the Claimant was not their employee because he was not under direct control or direction from them but worked on his own independent will; he did not enjoy any benefits afforded to an employee including NHIF and NSSF; he was free to engage other people for services he offered; and he did not at all demonstrate to this Court that he has specific working hours he had to adhere to. That the Claimant is therefore not entitled to the reliefs he seeks because there did not exist an employment relationship between them and him in the first instance.

31. That the Claimant was even able to purchase a motor vehicle from the 1st Respondent which he paid for in full and this could not have been possible for a person earning Kshs. 15,000/= per month. The Respondents submit that they should be awarded costs of this suit because costs follow the event and that the laid down principles are espoused in **Section 27 of the Civil Procedure Act**.

32. I have examined all the evidence and submissions of the Parties herein. The issues for this Court’s determination are as follows:-

1. Whether the Claimant was an employee of the Respondent.

2. If yes, whether the Claimant was unlawfully terminated by the Respondent.

3. Whether the Claimant is entitled to the remedies sought.

33. The Claimant has sought to rely on Appendix 1 which are utility bills showing payments on account of Gitobu Nicholas, the 1st Respondent herein. The Claimant showed documents indicting payments to Kenya Re, KPLC, Nairobi City Council, KRA, Ministry of Lands all on account of the 1st Respondent.

34. The Claimant further sought to rely on his Mpesa statement showing transfer of cash to 1st and 2nd Respondent. The transaction on the Mpesa statement show periodic transfer of cash from the Claimant to 2nd Respondent who is wife to 1st Respondent and occasionally to 1st Respondent or from 1st Respondent.

35. Claimant also referred to a letter from the Chief Zimmerman dated 13.10.2014, which indicate he was a Caretaker of the property in question belonging to the Respondent. These events however occurred after the alleged termination of the Claimant on 28/3/2014 as alleged as per Appendix 3.

36. Appendix 3 is however a letter from Respondent’s counsel denying that the Claimant was ever an employee of the Respondents. In the same Appendix 3, the Respondent denied employing the Claimant but averred that thy assisted him with accommodation as he reciprocated by watching over their property and informing them when anything went wrong.

37. In their evidence, the Respondent produced evidence that the Claimant was not their employee but he ran some errands for them and they paid him for the same.

38. The Respondent also produced evidence that the Claimant operated other business which included a house girls bureau and that he also worked for some Auctioneers i.e. Base Auctioneers, Baseline Auctioneers and Lifetime Auctioneers at the same time he claimed to be their employee. They relied on documents from Registrar of Companies, which show that the Claimant owns a business in the name of Geoffka Enterprises, a property Management Company.

39. From the above evidence, it is clear that there was some interaction between the Claimant and Respondents. This interaction saw the Claimant ran errands for the Respondent for which he was paid. In the same period, the Claimant was engaged in other businesses including running a house girls bureaus and also Auctioneering business and which he has not denied.

40. In determining whether there is an employment relationship between an employee and an employer, the test has been set out in various case law. In Halsbury Laws of England Vol. 26, 4th Edition, it is stated as follows:-

“That there is no single test for integrated into the enterprise of remained apart from independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all those factors relevant in a particular case and included in addition to control and integration: the method of payment any obligation to work only for that employer, stipulations as to hours, overtime, holidays, arrangements for payment of income tax and national insurance contribution, how the contract may be terminated, whether the individual may delegate work, who provides tools and equipment and who ultimately bears the risk of loss and the chance of profit”.

41. In **Lorna Adhiambo Aling vs Safi International AS (2027) eKLR** Hon. J. Mbaru made reference to **Charles Juma Oleng versus M/S Auto Garage Limited and Another (2014) eKLR** as follows:-

a. “The control test whereby a servant is a person who is subject to the command of the master as to the manner in v which he or she shall do the work.

b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.

c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers”.

42. This Court also opined in Kenya Engineering Workers Union vs Abyssina Iron and Steel Limited & Jakali Handling Limited (2004) eKLR as follows:-

“That is why ILO Recommendations 198 sets out parameters to guide whether or not an employment relationship exists or not. Under Recommendations 198 Part II of the ILO Recommendations 198 Article 13:-

“Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:-

a) the fact that the work; is carried out according to the instructions and under the control of another party, involves the integration of the worker in the organization of the enterprise, is performed solely or mainly for the benefit of another person, must be carried out personally by the worker, is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work, is of a particular duration and has a certain continuity, requires the worker's availability, or involves the provision of tools, materials and machinery by the party requesting the work;

b) Periodic payment of remuneration to the worker, the fact that such remuneration constitutes the worker's sole or principal source of income, provision of payment in kind, such as food, lodging or transport, recognition of entitlements such as weekly rest and annual holidays, payment by the party requesting the work for travel undertaken by the worker in order to carry out the work, or absence of financial risk for the worker”.

43. Indeed, from the interactions between Claimant and Respondent, he did not work under the Respondent’s instructions at all time, he was free to do other duties of his own choice at his own time, he was not periodically remunerated and he was not given tools with which to carry out his work.

44. The relationship between Claimant and Respondent falls short of what can be perceived to be an employer and employee relationship in the circumstances.

45. Having found as above, I do not find it necessary to delve into the other issues No. 2 and 3 above.

46. I therefore find the claim by the Claimant lacks merit and is therefore dismissed accordingly.

Dated and delivered in open Court this 2nd day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi holding brief Maloba for Claimant – Present

Miss Oduor holding brief Mr. Kitonga for Respondent – Present