



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 33 OF 2018**

**ROBERT KYALO MUSYOKA.....CLAIMANT**

**VS**

**CARGILL KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Robert Kyalo Musyoka, brought this claim against Gargill Kenya Limited, seeking compensation for unlawful termination of employment. The Respondent’s line of defence is that the Claimant was not its employee.
2. The Claimant’s claim is found in a Memorandum of Claim dated 12<sup>th</sup> September 2017 and amended on 13<sup>th</sup> April 2018. The Respondent’s defence is by way of a Memorandum of Response dated 11<sup>th</sup> April 2018.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Linet Anyika. The parties also filed written submissions.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondent at a monthly salary of Kshs. 27,000 from July 2007. He adds that he worked continuously for a period of 8 years until 22<sup>nd</sup> September 2015, when the Respondent terminated his employment without prior notice.
5. The Claimant further states that he was not given an opportunity to be heard and that he has not been paid his terminal dues.
6. The Claimant’s case is that the Respondent terminated his employment unlawfully and unfairly. He now claims the following:

- a. One month’s salary in lieu of notice.....Kshs. 27,000
- b. Unpaid annual leave.....207,900
- c. 12 months’ salary in compensation.....297,000
- d. Service pay
- e. Costs plus interest

**The Respondent’s Case**

7. In its Memorandum of Response dated 11<sup>th</sup> April 2018, the Respondent states that the Claimant was not its direct employee but formed part of what was known as a ‘gang’ with a ‘gang leader’ who was employed by the Respondent.
8. The Respondent sets out the following as the *modus operandi* of the ‘labour gangs’:

- a. The Respondent, under the umbrella of the Distributive and Allied Trades Association, had entered into an agreement with the Kenya Shipping, Clearing and Warehouses Workers Union, which Agreement governed casual labourers such as the Claimant;
- b. Under this Agreement, the Respondent would give work to a 'gang leader' who would source for his own 'gang members' to perform the Respondent's tasks;
- c. There was no continuity of service for the 'gang members' and they were only contracted by the Respondent when need arose;
- d. The Agreement provided for the specific rate that would be paid to the 'gang' upon execution of various tasks stipulated in the Agreement.

9. The Respondent denies that the Claimant was employed at monthly salary of Kshs. 27,000 and states that if and when the Claimant formed part of a 'gang', he was remunerated in accordance with the rates stipulated in the Agreement.

10. The Respondent adds that the Claimant was never in its continuous service, and was sourced and recruited to the 'gang' at the sole discretion of the 'gang leader'. Further, the Claimant's wages were not constant, as they were governed by the rates in the Agreement which were revised on diverse dates.

11. The Respondent avers that with effect from July 2014, it had ceased contracting the 'gang leaders' and was instead outsourcing labour from a third party, Insight Management Consultants Limited. The Respondent therefore maintains that it could not have terminated the Claimant's employment in September 2015, as it had ceased engaging the 'gang system' in July 2014.

### **Findings and Determination**

12. The first issue for determination in this case is whether there was an employment relationship between the Claimant and the Respondent, capable of enforcement by the Court.

13. The Claimant claims to have been employed by the Respondent from July 2007 until 22<sup>nd</sup> September 2015, when his employment was terminated.

14. In its defence, the Respondent denies ever entering into an employment relationship with the Claimant. Rather, the Claimant was part of a 'gang' recruited by a 'gang leader'.

15. Section 2 of the Employment Act, 2007 defines an employee as:

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

16. The same section defines an employer as:

**“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”**

17. A contract of service is defined as:

**“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”**

18. As held by my brother, **Makau J** in *Joseph Otieno Ogutu & 24 others v Allied Wharfage Ltd & another* [2016] eKLR, the onus of proving employment under a contract of service lies with the person who alleges its existence.

19. The Claimant's entire claim is premised on the existence of an employment relationship between himself and the Respondent. However, apart from his word, the Claimant did not adduce any independent evidence to prove the ingredients of an employment relationship as defined in law.

20. This Court has stated in the past that not every work relationship gives rise to an employment relationship (see *John Kamau Mburu v Program for Appropriate Technology in Health & another* [2015] eKLR). The Claimant could well have performed tasks given by the Respondent but this did not automatically make him an employee of the Respondent.

21. Because the existence of an employment relationship was a contentious issue, the Claimant ought to have brought independent evidence to back his word. Having failed to do so, his entire claim was unproved and is dismissed.

22. Each party will bear their own costs.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF DECEMBER 2019.**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Otieno for the Claimant

Mr. Juma for the Respondent