



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 602 OF 2016
BETWEEN
PAUL OCHIENG' AGOLA.....CLAIMANT
VERSUS
GATEWAY MARINE SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Chala & Company Advocates for the Claimant

Sherman Nyongesa & Mutubia Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 15th August 2016. He avers he was employed by the Respondent as a Machine Operator, in the year 2012. He earned a monthly salary of Kshs.24,000. He was summarily dismissed by the Respondent, on 19th March 2016. He states his dismissal was unfair, under Section 41, 43 and 45 of the Employment Act, 2007. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 24,000.
- b. Compensation for unlawful termination at Kshs. 288,000
- c. Leave not gone (?) at Kshs. 72,000
- d. Unpaid house allowance at Kshs. 54,000

TotalKshs. 438,000

- e. Costs
- f. Interest.
- g. Declaration that termination was unfair.
- h. Certificate of Service to issue
- i. Any other relief.

2. The Respondent filed its Statement of Response on 14th October 2016. Its position is that the Claimant was not an Employee of the

Respondent. He was an Independent Contractor. There only existed a contract for employment as and when a need arose for his services. The Respondent did not have control of the Claimant when the Claimant undertook his work as a professional excavator. He was paid per work done. He was contracted by other Companies, namely Tiger Claws and Coast Building Projects. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. Parties agreed in Court on 24th October 2017, to have the Claim considered and determined on the strength of the record. They confirmed filing of Submissions on 15th February 2018.

4. The Claimant's position is that he was indeed an Employee of the Respondent, not an Independent Contractor, as alleged by the Respondent. He exhibited a copy of the Workforce Monitoring Report, where he was named among Employees who worked for the Respondent.

5. He relies also, on his Leave Application Form, for the period 17th July 2015 to 3rd August 2015, issued in the name of the Respondent.

6. Among his documents also, is a letter from the Respondent to Claimant's Advocates, dated 1st April 2016, in Response to Claimant's demand letter before filing of the Claim. In this letter, the Respondent refers to the Claimant as a Casual Employee of the Respondent.

7. In ***Fredrick Byakika v. Mutiso Menezes International [2016] e-KLR***, the Court held that an Independent Contractor is: a registered taxpayer; will work his own hours; runs his own business; is free to carry out work for more than 1 Employer at the same time; invoices Employer each month; and is not subject to usual "employment" matters such as deduction of PAYE, annual leave, and sick leave.

8. The evidence presented by the Claimant establishes he was not an Independent Contractor, as claimed by the Respondent.

9. Job Cards exhibited by the Respondent, suggesting the Claimant was an Independent Contractor, are meant to mislead the Court. They do not bear the signature of the Claimant. There are no invoices submitted by the Claimant to the Respondent, calling on the Respondent to make any payment to the Claimant as an Independent Contractor.

10. Once the Court finds the Claimant was an Employee of the Respondent, it would follow the Claimant was unfairly dismissed by the Respondent. There was no notice and valid reason or reasons, communicated by the Respondent to the Claimant, prior to termination. The Claimant urges the Court to allow the Claim.

11. The Respondent's position is that it had a contract for provision of services with the Claimant. This was a contract between 2 Independent Parties. There was no contract of service, giving rise to an Employer-Employee relationship.

12. The Respondent relies on ***Maurice Oduor Okech v. The Chequered Flag Limited [2011] e-KLR***, which concluded that the Respondent had shown through job cards, local purchase orders, and payment to the Claimant per each job completed, that there was no Employer-Employee relationship, but an Independent Contract.

13. The Workforce Monitoring Report does not show the Claimant was an Employee. It was a tool for the Respondent to know who was at work, and who was to be paid what amount, at the end of each day.

14. The Annual Leave Application Form submitted by the Claimant, does not belong to the Respondent. The signatures on the Form are not by the same Person.

15. The Claimant does not deny he worked for other Companies such as Tiger Claws and Coast Building Projects.

16. The Respondent's reply to Claimant's demand letter was not admission that the Claimant was Respondent's Employee, in any capacity, be it Casual or Regular. The reply was done by Respondent's Managing Director who did not have a clear legal definition of who an Independent Contractor or Casual Employee is.

17. Termination law under Employment Act 2007 cannot therefore apply, as the Parties were not in an employment contract. The Respondent prays for the Court to dismiss the Claim.

The Court Finds:-

18. There are 2 main issues in dispute: whether the Claimant was an Employee of the Respondent, or an Independent Contractor engaged by the Respondent to perform excavation work; and whether, if he was an Employee, his contract of employment was unfairly terminated. Is the Claimant entitled to the remedies sought?

19. There is an abundant body of caselaw on Independent Contracts vis-a-vis Employment Contracts. The Parties have relied on ***Fredrick Byakika v. Mutiso Menezes International [2016] e-KLR*** and ***Maurice Oduor Okech v. The Chequered Flag Limited [2011] e-KLR***. The Court has also deliberated on this subject, in ***Kenneth Kimani Mburu & Another v. Kibe Muigai Holdings Limited [2014] e-KLR***.

20. From these cases, it is clear an Independent Contractor performs work for another Person, according to the Independent Contractor's own processes and methods.

21. The Workforce Monitoring Report includes the name of the Claimant. This document does not appear to the Court to be conclusive

proof that the Claimant was an Employee of the Respondent, rather than an Independent Contractor. It is not unusual to find an Independent Contractor working side by side with other Employees, at the same Employer, and even performing same or similar work. The inclusion of the Claimant's name in the Workforce Monitoring Report, therefore, can only establish the Claimant was part of the workforce, rather than conclusively show he was an Employee of the Respondent.

22. The Job Cards exhibited by the Respondent are not signed by the Claimant. They are untitled. They are not filled in, in full. They do not show who checked and approved the work done by the Claimant. They do not show who paid for the work. The description of work goes beyond excavation. They suggest the Claimant did more than excavate. The Job Cards do not disclose their author, or authors.

23. The letter from MD to Claimant's Advocates describes the Claimant as a Casual Employee. It does not state or suggest the Claimant was an Independent Contractor. It is stated specifically, that the Claimant was paid a daily wage. An Independent Contractor is not paid a wage, let alone a daily wage. The Respondent did not show that indeed the Claimant worked for other Companies during this period. There was no Witness or Document, from other entities alleged to have independently contracted the Claimant, brought before the Court. It is not known if the Claimant had any relationship with other Companies. Taking into account the variety of tasks performed by the Claimant as indicated in the Job Cards, there is an element of truth in the Managing Director's explanation, that the Respondent considered the Claimant a Casual Employee, who was engaged on and off, depending on availability of work, between 2012 – 2015. The Respondent states in its Statement of Response, that there existed a contract of employment, as and when the need arose.

24. The Copy of Leave Application Form exhibited by the Claimant, supports strongly, the view that the Claimant enjoyed an employment benefit of paid annual leave. Independent Contractors, as held in the decisions of the Court cited above, do not enjoy employment benefits. They are not entitled to annual leave. The sample Annual Leave Application Forms exhibited by the Respondent, do not show the Form exhibited by the Claimant to be inauthentic. The sample Forms were prepared in 2017, close to the end of the Court's proceedings. The Form by the Claimant is dated 2015. The Respondent did not establish that the sample Forms were in use in 2015. There was no evidence from the Respondent, discounting the authenticity of the Form exhibited by the Claimant. The Court accepts this Form as a valid employment record, and finds the Claimant was availed a benefit due to an Employee.

25. On the whole the Court is satisfied there was no Independent Contract between the Parties. There is no oral or documentary proof, of such a contract. The documents availed to this Court strongly suggest there the presence of an Employer-Employee relationship. The Court finds the Claimant was an Employee of the Respondent, within the definition of the terms 'Employer' and 'Employee' contained in Section 2 of the Employment Act 2007.

26. Consequently the Court finds the Respondent failed to prove valid reason, justifying termination of the Claimant's contract, as required under Section 43 and 45 of the Employment Act. The Claimant was not taken through a fair process under Section 41 and 45 of the Employment Act. He worked for the Respondent between 2012 and 2015. He cannot be treated as a Casual Employee, having worked for the Respondent for 4 years. He merits to be treated as a Regular Employee under Section 37 of the Employment Act, and availed all the benefits, guarantees and protections available to Regular Employees, under the Act.

27. The Claimant did not supply the Court with sufficient material to support his prayer for house allowance. He similarly pleads 'leave not gone,' ambiguously, with no details of the period when annual leave was not taken. He seeks an amount of Kshs. 72,000 without supplying the mode of computation. The prayers on house allowance and 'leave not gone,' are rejected.

28. ***He is granted 1 month salary in lieu of notice, at Kshs. 24,000.***

29. ***He is granted the equivalent of 5 months' salary in compensation for unfair termination of Kshs. 120,000.***

30. ***The Respondent shall release to the Claimant his certificate of Service forthwith.***

31. No order on the costs.

32. ***Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:-

a. Termination of Claimant's contract was unfair.

b. The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 24,000; and equivalent of 5 months' salary in compensation for unfair termination at Kshs. 120,000 – total Kshs. 144,000.

c. Certificate of Service to issue.

d. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

e. No order on the costs.

Dated and delivered at Mombasa this 20th day of March 2018.

James Rika

Judge