



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYAAT MERU

SUIT NO. 5 OF 2017

(Formerly Nyeri ELRC No. 326 of 2017)

JORUM KAINGA MURITHI.....CLAIMANT

VERSUS

THE CHAIRMAN KITHOKA FARMERS CO-OP SOCIETYLIMITED....RESPONDENT

JUDGMENT

1. The Claimant seeks to recover from the Respondent for the dismissal from employment. He averred that he was employed by the Respondent on 1st January 2005 but not issued with a letter of appointment. He worked till 6th March 2015 when he resigned from employment and averred that the resignation was proof that he was a true employee of the Respondent. He asserts that after termination the Respondent ignored and refused to pay him his terminal benefits. He reported the matter to the trade union and the Respondent did not respond to his letter of demand. He therefore sought the payment of benefits amounting to Kshs. 796,614.40 within 7 days of the judgment, interest at the prevailing rate and costs of the suit.

2. The Respondent filed a defence to the suit in which the Respondent denied the Claimant was its employee and that he was not entitled to any dues. The Claimant filed a response against the Respondent's defence and averred that the Respondent was his employer and wrote a letter to NSSF introducing the Claimant as an employee of the Respondent. It was averred the Respondent started forwarding the Claimant's NSSF contributions as per the statement from NSSF. The Claimant averred that the Respondent should be compelled to produce a written record of the Claimant's contract.

3. The Claimant testified on 5th March 2018. He stated that he was employed on 7th February 2000 by the Respondent initially as a casual and later was taken to the secretary manager who gave him terms and conditions of service. He would weigh, collect and deliver milk to the factory from 5.00am and deliver the milk on a first come first served basis at the factory. At times he would leave late. He stated that in January 2005 he was made permanent but was not given a contract of employment and he worked till 6th March 2015 when he resigned. He expected to be paid terminal benefits and he did not receive any hence the suit before court.

4. He was cross-examined after a short *ex tempore* ruling which was in respect to an objection to the production of the letter the Claimant relied on for introduction to NSSF purportedly written by the Respondent. He testified in cross-examination that he was employed on 1st January 2005 and was not given an appointment letter. He stated that it was the duty of the secretary manager to issue the letter. He conceded that he never wrote asking to be issued with an appointment letter. He stated that he was not given terms and conditions but was told what the terms and conditions were. He testified that he had forgotten to indicate what the monthly salary was. He stated that there were muster rolls and vouchers and he confirmed that he did not produce any salary voucher. He was paid in cash. He testified that he delivered the resignation letter but it was not stamped in receipt by the Respondent. He was referred to the letter by the Kenya Union of Commercial Food & Allied Workers which was addressed to the Respondent and stated that there was underpayment. He was asked what the salary should have been and he testified that the amount he received was below the minimum wage. He confirmed there was no recognition or collective bargaining agreement between the union and the Respondent. He did not have any documents on leave. He referred to minutes of the Respondent which were to the effect that he was confirmed to employment. He stated he got the minutes from the files of the society and further that there was nothing to bar him from getting the document. He confirmed that he never got them certified and that they were not signed. He testified that when he resigned, he wrote to the secretary manager of the Respondent seeking his dues and when he sued, he sued the chairman of the society as he is the one who manages the society.

5. The court summoned the alleged author of the letter to NSSF, one Faith Kimathi. She was to appear at the hearing of the case on 7th March 2 days later. She appeared pursuant to the summons and upon being sworn in stated that she was the secretary manager of the Respondent. She denied being the author of the letter to NSSF that was purportedly written by her on behalf of the Respondent.

6. She was cross-examined by the Claimant and she testified that she was employed in 2002 and that the Claimant was selected as a collector.

She stated that the Respondent did not prepare any NSSF contribution and if there was any payment to NSSF that was an arrangement by the Claimant. She testified that the Respondent was not paying any NSSF contributions for any of the persons who were selected by members. She stated that the members paid the recorders and the Respondent paid the members. She testified that the Claimant was paid as a member and that a person who works for 3 hours a day does not qualify for NSSF dues. She denied the Claimant was an employee of the Respondent and he was not identified as an employee but as a person who collected milk for members. She stated that the society had various chairmen during the time the Claimant collected milk for members. She testified that when the members selected the Claimant to collect milk for them, the chairman was Murithi and the current chairman was also in office during the period the Claimant collected milk. She stated she did not receive the Claimant's letter of resignation as it could not be tendered because the Claimant was not an employee. She testified that no one introduced the Claimant to NSSF and that she did not author the letter. She did not know the Claimant's member number and was not the signatory to the letter in question.

7. In re-examination she testified that any communication is accompanied by the minutes of the board and the letters must have the signature of the Chairman. She stated that they did not have any handwritten letters and the correspondence must be on letterhead and a reference number.

8. The second witness called to testify was Julius Karemanu Joel who testified that he was a businessman and a farmer. He knew the Claimant and had recorded a statement which was filed before court. He adopted the statement which stated that he was the chairman of the board of directors of Kithoka Dairy Co-operative Society Limited. He stated the Claimant hailed from Cabuene area and that the Claimant was currently the assistant chief. He testified that the agreement between the Respondent and milk farmers is that the farmers identified him as a suitable person to weigh their milk for collection by the Respondent's vehicle. He stated that practice was that farmers would identify a person who would weigh their milk between at Kshs. 150 per three hours of weighing between 5.30am and 8.30am. The money is deducted from the earnings of milk farmers in every milk collection centre and is paid at the end of the month to the weighing clerk. In case of any issues as to the quality of the milk sold is determined by the members of such milk collection centres and the farmers are the ones who hire and fire the weighing clerks. He stated that the Claimant was not an employee of the Respondent and that the minutes of 14th January 2014 exhibited by the Claimant are a forgery since no board meeting was held on the said date. In any event, he stated, the minutes are not signed as is the practice.

9. He was cross-examined by the Claimant. He testified that he was elected in 2015 and that when he was elected, the Claimant was not an employee of the Respondent but was weighing milk for members of Caguene area and Themba. He stated the Claimant was working for members of that area. He said he represented the interests of the society and there was no part-time or fulltime. He testified that there was a secretary manager and if necessary he would be called for any matters that arise. He said it was not for him to prove the Claimant's case as it was the Claimant who had sued the society and it was for the Claimant to prove. He confirmed he had not produced any documents to show how the Claimant was paid and he was not aware if a person who works for 3 hours is eligible for NSSF contribution. He stated that the amount the Claimant got was calculated from the amounts paid to the members. He testified that he and the secretary manager were responsible for the day to day operations. He stated he could not have introduced the Claimant and that he did not produce the Claimant's letter of employment. He denied coming to court to mislead it but to support the truth. He stated that the Claimant was paid by members and not the society.

10. In re-examination he testified that the Claimant was not an employee of the Respondent and was working for members of Caguene and Themba areas. He stated that the farmers are paid at the end of the month and that was when the Claimant was paid from the money deducted from farmers. He stated that the farmers are the ones who had the capacity to determine who would weigh their milk and in this instance they said they did not want the Claimant to weigh their milk. He testified that the Respondent had no alternative and it had no control over the Claimant.

11. The Respondent filed submissions on 9th April 2018. In its submissions it stated that the Claimant did not produce any letter of appointment or a contract of employment or even a letter of resignation received by the Respondent. The Respondent submitted that the NSSF statement the Claimant produced showed that contributions commenced in April 2005 yet the letter purportedly introducing the Claimant was dated June 2005. It was submitted that this glaring contradiction lent credence to the Respondent's position and testimony that the letter was a forgery made purposely for this suit. The Respondent urged the court to find the claim unmerited and dismiss it with costs.

12. The Claimant's case was that he was underpaid and entitled to payment of leave, house allowance as terminal benefits. The Claimant asserted that he was an employee of the Respondent. He failed to produce any evidence to support this. The Claimant produced a letter which he stated was from the Respondent's secretary manager introducing him to NSSF. The letter was handwritten and on a foolscap paper. The letter was disowned by the purported author Fridah Kimathi. She denied ever authoring it. She came across as a truthful witness who had been summoned by court to shed light on the issue. The NSSF statement produced by the Claimant also shows the Claimant was an individual contributor. If he was under the Respondent then it would have reflected the name of the Respondent as employer. I find the Claimant's case as one based on fallacies and forgery. It was unmerited on all accounts as the Claimant did not even indicate what he earned a month if at all. His evidence was inconsistent with the truth. The Respondent's Chairman testified and clearly indicated the manner the Claimant was engaged by farmers who are members of Kithoka Dairy Co-operative Society Limited. The Respondent therefore was never the Claimant's employer in any way, shape or form. The suit is therefore fit for dismissal and I dismiss it with costs to the Respondent.

It is so ordered.

Dated and delivered at Meru this 9th day of May 2018

Nzioki wa Makau

JUDGE