



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1252 OF 2013

LINUS SIMIYU WAMALWA.....CLAIMANT

VERSUS

BRIDGE INTERNATIONAL ACADEMIES...RESPONDENT

JUDGMENT

1. The claimant brought this suit on 8.8.2013 alleging that he was employed by the respondent under a verbal contract of service from 5.6.2011 and worked continuously until 5.10.2011 when he was summarily dismissed for demanding issuance of a written contract. It is his case that under the verbal contract his basic salary was Kshs.65,000 per month plus house allowance of Kshs.25,000 and a daily subsidy of Kshs.500 to cater for his transport, airtime and other expenses related to the respondent's business. It is further claimant's case that during his employment, he was only paid the daily subsidy after two weeks intervals but the basic salary plus House Allowance was never paid. He therefore prayed for the following against the respondent:

- (a) An order compelling the Respondent to issue a written contract of employment as required by the law, within a prescribed period.
- (b) An order compelling the Respondent to commence issuance of itemized pay statements/pay slips, in future, in accordance to the law, commencing from the date of said order, or as the court deems fit.
- (c) An order compelling the respondent to provide a back to work formulae.
- (d) Costs of this suit.
- (e) Any other or further relief that this Honourable Court may deem just and fit to award to the Claimant in the circumstances.

2. The respondent filed her defence on 11.11.2013 denying the alleged contract of service between herself and the claimant and averred that she engaged the claimant on 6.6.2011 as an independent contractor on temporary basis to do specific assignment or task of data entry and the pay was only Kshs.500 per day and nothing more. She further denied the alleged salary of Kshs.90,000 per month in addition to the daily pay of Kshs.500 and averred that the claimant never worked continuously for one complete month. It is the defence case that the claimant never worked under a contract of service and prayed for the suit to be dismissed.

3. The main issue herein is whether the claimant was employed under a contract for services. On 31.5.2018, the parties agreed to dispense with calling witnesses and opted to dispose the suit by written submissions.

Claimant's Case

4. The claimant submitted that on 6.6.2011 he entered into an oral contract of service with the respondent wherein he was to serve as a Data Entry Clerk earning Kshs.65,000 salary plus Kshs.25,000 House Allowance plus Ksh.500 daily subsidiary for every day he reported as facilitation for fare, airtime among other expenses. The salary was payable monthly but the subsidy was payable every 2 weeks with no statutory deductions and it was paid cash or through Mpesa. He was further entitled to medical care scheme, annual leave and retirement benefits of social security, gratuity and severance pay. He contended that, despite promise by the respondent to reduce the contract into written form, the respondent never did so and when the claimant wrote to demand for the same, he was summarily dismissed on 5.10.2011.

5. He denied the allegation by the defence that he was engaged as an independent contractor and submitted that his engagement by the respondent was in consonance with the factors of a contract of service as set out in Chitty on contracts 27th Edition Vol. 2 at page 703 paragraph 37 – 008. He specifically submitted that the respondent exercised control over him by dictating the time for reporting and leaving work and also by giving him instructions through emails on the job to be done and how to wear identification cards; that he had zero

prospects of having a profit or loss in the engagement but only entitled to the agreed remuneration; that he was considered as part of the respondents organization and had indeed been issued with a staff identification card; that he was carrying on the business of the respondent; that he was entitled to medical care and social security, annual leave and retirement benefits; and that he considered himself as employee of the respondent.

6. The claimant further submitted that he is entitled to a written contract as required under section 9 of the Employment Act and prayed to the Court to compel the respondent to issue him with the same. He also relied on section 16 & 17 of the Act which provides that the employer shall pay entire amount of wages to the employee in respect of the work done and prayed for salary arrears for 7 years totaling to Kshs.7,560,500 calculated on the basis of Kshs.65,000 basic pay, Kshs.25,000 House Allowance plus daily subsidy Allowance for 3 days.

Defence Case

7. The respondent submitted that she engaged the claimant as an independent contractor/casual on 6.6.2011. His job title was Data Entry Clerk and his pay was Kshs.500 per day payable after every 3 weeks. She contended that the claimant never worked continuously but only when there was need for his labour. It is further defence case that the claimant was only employed for specific tasks as opposed to the regular employees who worked continuously for 50 hours a week from Monday to Saturday.

8. She further submitted that her contract with the claimant did warrant to be reduced into writing under section 9 of the Employment Act because he never served for an aggregate of working days equal to 3 months. She submitted that in June 2011 the claimant worked for 19 days in July 21 days, in August 22 days, and in September 22 days. In addition she submitted that the claimant knew of the fact that he was a temporary or casual employee for specific task and periods and that is why he voluntarily invoiced the respondent in that respect on 30th June 2011, 15th July, 29th July, 15 August, 30th August, 15th September 2011.

9. As regards the staff identification card, the respondent contended that it was issued to him for identification and security purposes. She therefore prayed for the finding that the claimant was not employed on permanent basis but as temporary or casual consultant. He further contended that employment cannot be conferred on a person by being issued with tools of trade (computers) or identification badges. She prayed for the suit to be dismissed with costs because the claimant was employed for a specific task which was concluded and his services became superfluous.

Analysis and Determination

10. There is no dispute that the claimant was engaged by the respondent between 6.6.2011 and 5.10.2011. The issues for determination are:

- (a) Whether he was employed under a contract of service or under a contract for services.
- (b) Whether the claimant is entitled to the reliefs sought.

Contract of Service or contract for service

11.. The claimant contends that he was employed under a contract of service under the employment Act and all the elements of an employee as set out by Chitty on Contracts consonate with his engagement by the respondent. The respondent has however denied the alleged contract of service and maintains that the claimant was either engaged as an independent contractor or as temporary or casual consultant.

12. Section 2 of the Employment Act defines “Contract of Service” and “employee” as follows:

“Contract of Service” means 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 but does not include a foreign contract of service to which part XI of this Act applies; “Employee” means a person employed for wages or salary and includes an apprentice and indentured learner.”

13. Chitty on contracts, 27th Edition Vol. 2 page 703 paragraph 37 -008 sets out the factors to consider in determining whether a contract of service exists:

- (a) The degree of control by the employer.
- (b) The employee’s prospect of profit or risk of loss in the relationship.
- (c) Whether the worker was regarded as part of the employer’s organization.
- (d) Whether worker is carrying on business in his own account or carrying on business of the employer.
- (e) The provision of equipment.
- (f) The incidence of tax and national insurance; and
- (g) The parties own view of their relationship

14. After careful consideration of the documentary evidence the submissions presented to me, it is obvious that the claimant engagement by the respondent consonates with the provisions of section 2 of the Act and the essential factors set out by Chitty on contracts. It is admitted by the respondent that the claimant was being paid Kshs.500 wage for every day he worked. It is also obvious that the employer exercised control over the working of the claimant through supervision and repeated instructions. It is also clear that the claimant's time to report and leave work was fixed by the respondent who also provided the tools of trade (computers) and office space. It is also clear that the claimant was restricted to work from the employers premises only under the watch of a supervisor. Finally, it is clear that issuance of staff card, the claimant was regarded as part of the respondents establishment. Consequently, I find and hold that the claimant has proved on a balance of probability that he was engaged under a contract of service by the respondent and not as an independent contractor under a contract for services.

Breach or unfair termination of contract

15. The respondent has submitted that the claimant was temporary or casual employee who never worked continuously for a complete month. That piece of evidence has not been rebutted. Casual employee is defined by section 2 of the Employment Act as:

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for longer period than twenty four hours at a time.”

16. On the other hand section 35(1) of the Act provides for the termination of casual employment in the following terms:

“(a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice.”

17. In my view, the foregoing provisions of the Act takes away protection of the claimant from sudden termination at the end of the day's work. Such protection could only be availed to him under section 37(1) of the Act had he proved that he worked continuously as a casual employee for a period or a number of working days which amount in aggregate to not less than one month or performed a task which was not reasonably expected to end within a period or a number of working days amounting in aggregate to the equivalent of three months or more. Consequently, I find and hold that the claimant has not proved on a balance of probability that his contract of service was breached or was unfairly terminated.

Reliefs

18. In view of the finding herein above that the claimant was properly terminated, I decline to grant the prayers sought. The prayer for issuance of written contract is overtaken by events because the claimant is no longer in the respondent's employ. In addition, the claimant's contract did not require to be in written form. Under section 9 of the Act, written contract of service is required if the engagement is for a period of a number of working days which amount in the aggregate to the equivalent, of three months or more; or which provides for the performance of any specified work which could not reasonably end within a period or a number of days amounting in the aggregate to the equivalent of three months.

19. The claim for itemized payslip is also overtaken by events because of the termination of the claimants services. Likewise, the claim for an order for return to work formulae is also declined for lack of legs to stand on. In any event, section 12 of the ELRC Act limits the jurisdiction to reinstate employees to 3 years after termination.

Conclusion and Disposition

20. For the reasons that the claimant was employed as casual Data Entry Clerk and his services were properly terminated on 5.10.2011, the suit is dismissed with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE