



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1271 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

NICHOLAS OTIENO OGOLA.....CLAIMANT

VERSUS

CABRO (EAST AFRICA) LIMITED.....RESPONDENT

JUDGMENT

The Claimant, Nicholas Otieno Ogola, instituted this claim by a Statement of Claim dated 25th July 2012 and filed on 30th July 2012 seeking full compensation for wrongful dismissal and loss of employment and payment of his terminal benefits against the Respondent, Cabro (East Africa) Limited as below:

- i).... One month’s salary in lieu of notice..... Kshs.30,000/=
- ii).... Salary for the months of
November and December 2010..... Kshs.60,000/=
- iii).... Days worked in January 2011..... Kshs.11,538/=
- iv).... 12 month’s salary compensation for
wrongful loss of employment..... Kshs.360,000/=

Total Kshs.461,538/=

- v).... Certificate of Service

The Claimant avers that he offered the Respondent services until 8th January 2011 when his services were unlawfully and wrongfully terminated after the Respondent’s Accountant, Mr. Job Ndambuki, sent him a short message (SMS) informing him that his services were no longer required. He avers that he was employed by the Respondent orally but that employment had never been reduced into writing. He also avers that having been employed on 16th October 2010 as a Human Resource Manager with a starting salary of Kshs.30,000/=, he was involved in settling employment disputes between the Respondent and some of its employees.

The claimant avers that when he wrote to the Respondent demanding payment of his terminal benefits on 25th January 2011, it wrote back stating that the Claimant was not its employee and that it only engaged him on consultancy basis. That he then engaged the services of a lawyer who wrote a demand letter followed by a reminder letter to the Respondent dated 02nd March 2011 and 14th November 2011 respectively, which the Respondent did not respond to thus making this suit necessary. He prays for award and/or judgment against the Respondent for:-

- i) A declaration that the Claimant’s dismissal was wrongful.
- ii) The Claimant to be paid his terminal benefits of Kshs.461,538/=

- iii) The Respondent to be ordered to compensate the Claimant for wrongful dismissal at the equivalent of 12 months gross salary.
- iv) The Honourable Court to issue such orders and give such directions as it may deem fit to meet the ends of justice.
- v) The Respondent to pay the costs of this claim
- vi) Interest on the above at court rates.

The respondent filed a response to the claim on 23rd May 2017 dated 22nd May 2017 stating that it would be raising a preliminary objection on the grounds that the Claimant's pleadings do not disclose any reasonable cause of action against it as their relationship does not amount to a contract of service within the meaning of the Employment Act. It denies employing the Claimant as a Human Resource Manager stating that their relationship was one where the Claimant approached and presented himself as an independent contractor to assist in resolving disputes between it and the union representing its employees. That when the meetings with the union representatives took place, it noted there was little progress in solving the disputes and it thus paid the Claimant his attendances and reverted to handling its union matters in-house.

The Respondent avers that the Claimant should avail the basic but pertinent particulars of his employment i.e. the date of commencement of his alleged employment, duration of his oral contract of service and evidence of his banks statements proving that he was paid Kshs.30,000/= monthly as he claims.

It admits receiving a letter dated 25th January 2011 from the Claimant but avers that due to the reasons given hereinabove, it could not act on any demand or notice of intention to sue by the Claimant. It further denies that the Claimant is entitled to terminal benefits or compensation as claimed or any other reliefs sought and avers that no action can lie against it for purported wrongful dismissal of the Claimant.

At the hearing, the Claimant testified that he was in charge of hiring, employee discipline and all other Human Resource matters of the Respondent. He also testified that he met and agreed on his terms of employment with the Accountant, Mr. Ndambuki and upon his reporting, the then Finance Manager, Madam Nina discussed his duties with him and he worked from 8 am to 5 pm and occasionally on Saturdays. He further testified that he was paid via Mpesa for the 14 days he worked in October and Kshs.8,000/= as advance for the months of November and December 2011. In cross-examination, the Claimant confirmed that he was in the Respondent's payroll.

The Respondent's General Manager and only witness, Mr. Iftikhar Ahmed, denied having known whether the Claimant was a human resource manager and testified that he did not have any document indicating the Claimant was engaged as an independent contractor but that he had just been informed of the same. He testified that he was not aware whether the Claimant had been served with a notice to show cause letter or invited for a hearing before his dismissal or given sufficient reasons for his dismissal.

Claimant's Submissions

On whether he was an employee of the Respondent, the claimant submits that the Labour Institutions Act defines a "contract of service" partly as "...an agreement whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time..." That Section 9 of the Employment Act, 2007 also obligates an employer to reduce into writing a contract of service, which is for more than three months, which the Respondent failed to do by not issuing him with any appointment letter. He submits that his assertions of not having been given an employment letter were never controverted by the Respondent's witness, indicating that the Respondent's testimony or evidence was full of hearsay and cannot thus have any weight as against his case. He relies on the authority of **Edward Isedia Mukasia Vs. Eldo Supermarket Limited eKLR (2015)** where the Court observed that **Section 10 (7) of the Employment Act 2007** binds employers to proof of terms of employment in the event of non-production of a written contract of employment in all legal proceedings.

The Claimant submits that it is highly unlikely that he would be involved in discussing and committing the Respondent in serious management matters such as attending meetings with union officials if he was not an employee of the Respondent and to be specific, its human resource manager.

On whether the Respondent had a valid reason to dismiss him, he submits that Section 47(5) of the Employment Act provides that ***"for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."***

It is the submission of the Claimant that he was not given any reason for his dismissal and that the Respondent has failed to prove by way of evidence that there was a justifiable reason to dismiss him.

On whether the Respondent observed procedural fairness, he submits that the Respondent did not give him any notice or pay him salary in lieu of notice contrary to the principles of natural justice and section 41 of the Employment Act. That he was also not given an opportunity to be heard nor paid his terminal dues and the respondent therefore did not follow the statutory procedure as required in Section 45(4)(b) of the Employment Act which states ***"...that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee."***

He submits that he is entitled to the terminal benefits that he seeks as he has demonstrated in his case that his dismissal was unfair and unlawful and prays that the Court orders the same in his favour. He also submits that the Respondent should bear the costs of this suit and urges the Honourable Court to award interest on the sums listed from the due date he filed this suit. That he is guided by the reasoning followed by Gikonyo J in **Morgan Air Cargo limited V. Enrest Enterprises Limited f20J4J eKLR** where it was held that the circumstances at hand warranted for the award of interest to be computed on the basis of compound interest. He finally prays that the Court enters judgment in his favour for the orders he has prayed for in his statement of claim.

Respondent's Submissions

The respondent submits that while the Claimant states he was paid via Mpesa, its witness confirmed in testimony that he paid the Respondent's employees via bank accounts and therefore the Claimant was not its employee. He further submits that this Honourable Court has set out the criteria for establishing whether a person is an employee or an independent contractor in Maurice Oduor Okech vs Chequered Flag Limited [2013] eKLR, where the Court was of the view that the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment was critical. That in the case above, the court stated:

“It was not in contest that the Claimant was paid per each completed job. This documentation and mode of payment are not ordinarily found in an employer/employee relationship and it is my finding therefore that the Claimant was not an employee of the Respondent but an independent contractor under a contract for services. Consequently, the Claimant's entire claim which was premised on an employment relationship fails and is dismissed.”

It is also submitted by the Respondent that the Claimant has failed to prove he was paid Kshs. 30,000/= monthly and that the monies he alleges were paid to him as advances for November and December 2011 were but fees for the consultancy work he had carried out for the Respondent and thus the mode of payment does not conform to the usual one in employment.

The Respondent submits that it had no intention to employ the Claimant and as such, it could not issue him with a letter of employment which it still issued to other employees. Further, that it had no control over the Claimant as is with employees and that the Claimant was at liberty to conduct his obligations in the manner he wished.

It is further submitted for the respondent that employment cannot occur in the absence of proof of the same and that the Claimant should have adduced more evidence of employment other than the two sets of minutes of meetings which only prove that he was part of the work force and not necessarily an employee. He relies in the case of Samuel O. Gawo v Alibe Security Services (2014) eKLR where the Court found that in certain circumstances, the employee was bound to show proof of his employment stating:

“Whereas it is the onus of the employer to provide employment particulars relating to an employment contract, the employee is duty bound to, in circumstances like in the instant case adduce evidence in support of employment and the employment contract. We cannot wholesomely rely on section 10 of the Employment Act aforesaid to allow every situation and allegation of claim of employment by a party.”

The Respondent submits that since the Claimant was not an employee, he could not have been unfairly dismissed and as such, he cannot be entitled to terminal benefits that come with employment. That if this court should find that the Claimant was an employee, it should be guided by the provisions of Section 49 of the Employment Act and considering that the Claimant's alleged employment was just under 3 months, his prayer for 12 months' compensation is unreasonably high. Further, that the Claimant has not disclosed how much was advanced to him and as such, it would be unjust to award him the full amount as prayed being that there was money already advanced to him as payment for work done.

The Respondent finally submits that costs are not awarded as a matter of right but at the discretion of the Court which must be exercised judicially and it relies in the case of Little Africa Kenya Limited v Andrew Mwiti Jason (2014) eKLR. That it indeed gave the Claimant reasons as to why it ended its engagement with him in its letter dated 10th February 2011, which also informed him that he was not an employee but an independent contractor who was paid for each completed work.

Determination

The first issue for determination is whether the Claimant was an employee or an independent contractor. The second issue is whether the Claimant's dismissal was unlawful and unfair while the third issue is whether the Claimant is entitled to the prayers and remedies sought.

In the memorandum of claim the claimant did not state when he started working for the respondent. In his evidence he stated that he worked from 16th October 2010 until 8th January 2011 when he received a text message informing him that his services were no longer required. He stated that he was paid by Mpesa Kshs.8,000 in October 2010 and a further Kshs.8,000 as advance in November 2010. It means he was only paid twice. This is consistent with the respondent's letter dated 10th February 2011 (appendix 2(b) of claimant's bundle) in which the respondent stated that he was a consultant and was paid twice for a job concluded on 23rd November and another job concluded on 10th December 2010.

There is no evidence that the claimant demanded for payment of arrears of salary for the months that he alleges that he was not paid. It is not conceivable that a person employed as Human Resource Manager, who issued letters of appointment to staff, would not have his own terms set out in a contract, and would be unknown to the General Manager, only dealing with accountants, as is borne by the evidence on record.

The evidence on record is consistent with the position of the respondent that the claimant was engaged as a consultant to assist the respondent with union matters and was paid a consultation fee upon conclusion of a specific assignments, and that he was only paid twice.

I find no evidence of an employment relationship between the claimant and the respondent with the result that the whole case crumbles. The same is accordingly dismissed with orders that each party bears its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF NOVEMBER 2018

MAUREEN ONYANGO

JUDGE