



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 43 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

JOHN MATETE ABAYO.....CLAIMANT

VERSUS

DIGITAL IMAGING SYSTEMS LIMITED.....RESPONDENT

JUDGMENT

The Claimant initially filed his Memorandum of Claim on 13th January 2012 and thereafter filed an Amended Memorandum of Claim on 11th May 2012 seeking the following reliefs:

- a) A Declaration that the termination was unlawful, untimely and an order that the Claimant be paid his dues and benefits of Kshs.1,393,010.00 as aforesaid.
- b) Costs of the claim and interest.

The Respondent filed its Memorandum in Reply on 8th May 2012 denying the Claimant's allegations in the Memorandum of Claim.

The Claimant's Case

The Claimant testified that he worked for the Respondent from the year 2002 to 2004 and from 2007 to 2010. His duties entailed marketing and getting business mostly from persons in the printing field.

He testified that the pay agreement between the parties entitled him to a retainer of Kshs.30,000, housing 8,000 and commissions. It was his case that he was to get an agreement but this was not done. He testified that the commissions were only paid upon the mercy of the Respondent.

In cross- examination the Claimant testified that he was an employee and not a freelance, that there was no specific figure for the commissions and the 3.5% was based on his advocate's assessment. He stated that he had realised that he had no house allowance claim in his initial claim, that his house allowance was paid separately, directly to his landlord. He testified that he was forced to resign.

The Claimant in his written submissions stated that he was employed as a permanent employee and that the provided a NSSF Provisional Statement proved that the Respondent was his employer. That he was constructively dismissed by the Respondent's failure to pay him for two years.

The Claimant further submitted that he was neither subjected to any disciplinary hearing nor accorded an opportunity to be heard. He stated that he was denied housing allowance and was not paid any of his dues. The Claimant relied on the case of **Joseph Kiprotich Bett v Kenya Commercial Bank Limited Cause N0. 243 of 2013** in seeking 12 months compensation.

Respondent's Case

RW1, HABIL OMONDI OWUOR, stated that he was the Managing Director of the Respondent. He testified that he Claimant approached him for assistance after losing his job and it is then that the Claimant was engaged as a freelance sales person earning a commission.

He testified that the Claimant was paid a commission on a case by case basis and he did not earn a 3% commission. Since the Claimant was

not employed he was not entitled to notice or service pay. He stated that the respondent did not pay the Claimant house allowance and only paid NSSF because it was a statutory requirement. According to him the work environment was comfortable and the Claimant received his commission once the Respondent was paid by the Client.

The Respondent submitted that the Claimant did not lead any evidence to show that he was entitled to any commission. Further that the NSSF statement and the Cheque produced by the Claimant neither confirmed that the Respondent was the Claimant's employer nor that the Claimant had sought employment with the Respondent.

The Respondent submits that the Claimant's assertion that he never got paid for one year could only be interpreted to mean that the claimant was not on salary but on a commission. The Respondent further submitted that the Claimant has failed to demonstrate that he was employed by the Respondent. In support of this the Respondent relied on the case of **JOHN KAWA ILUME V GEMINIA INSURANCE COMPANY LIMITED (2014)eKLR** where the Court held:

"... to answer the first issue the Court considered section 2 of the Employment act which defined an employee as a person employed for wages or salary. In the present case the Claimant was being paid in the form of a retainer and commission...Consequently the court agrees with the defence that there was no employment relationship between the parties herein..."

Issues for determination

1. Whether the Claimant was an employee of the Respondent
2. Whether this Court has jurisdiction to determine this matter

1. Whether the Claimant was an employee of the Respondent

The Claimant testified that he worked for the Respondent for a retainer of Kshs.30,000, house allowance and was entitled to a commission which was paid upon the mercy of the Respondent as there was no agreed percentage. To prove his claim the claimant produced his NSSF statements which indicate that he was an employee of the respondent. The claimant further produced a memo dated 30th August 2010 from the respondent requiring him to explain why the office was not opened on 28th August 2010.

Section 2 of the Employment Act defines an employee as follows:

"employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;

From the above definition an employee ought to receive a salary or wages in respect of the agreement between the parties. The Claimant acknowledged that he was to be paid a retainer and commissions as a sales man which work required him to contact customers and get business from persons in the printing field. The relationship between the parties did not create a contract of service under Section 2 of the Employment Act.

I find that there is no proof that the Claimant was an employee of the respondent as he was not employed under a contract of service. The two documents produced by the claimant are not sufficient to establish an employer-employee relationship between the parties.

In **John Kamau Mburu v Program for Appropriate Technology in Health (Path) & Another [2015] eKLR**, Ndolo J. held

*"An employment relationship is not the same as a work relationship. In other words, the mere fact that parties work together does not necessarily give rise to an employment relationship. In **Ontario Ltd v Sagaz Industries Inc. 2001 SCC 59** the Supreme Court of Canada held that in determining whether an employment relationship actually exists, the Court must examine the total relationship between the parties."*

Further in **Evans Musya Musunzar v Jubilee Insurance Company of Kenya Limited [2018] eKLR** the Court held:

"The Claimant further states that while working as Assistant Sales Manager, he occupied an office within the Respondent's offices located in Westlands, Nairobi, from where he operated. Pursuant to the agreement, he was paid a monthly salary comprising of a retainer and a commission.... From the evidence on record, the Claimant was not paid a standard monthly salary and the contract of engagement clearly referred to him as an Agent. In the circumstances, the Court found no trace of an employment relationship as defined in law and the straightforward result is that this Court lacks jurisdiction to entertain the Claimant's claim, which is commercial in nature."

I find that the claimant has not proved that an employment relationship existed between him and the respondent.

Whether this Court has jurisdiction to determine this matter

In the absence of an employer-employee relationship this Court has no jurisdiction to determine this matter by virtue of Section 12 of the Employment and Labour Relations Court Act.

The consequence is the entire suit fails with the result that the same is dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE