



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATION COURT

AT NAIROBI

CAUSE NO. 1204 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

SHADRACK DEI KINYILI.....CLAIMANT

VERSUS

NATIONAL CASH REGISTERS (NCK-R)...RESPONDENT

JUDGMENT

The Claimant in his Memorandum of Claim filed on 31st July 2013 alleged unlawful dismissal of his employment by the Respondent and seeks the following reliefs:

- a) A declaration that the termination of the Claimant's employment by the Respondent was unlawful.
- b) Damages for unlawful and summary dismissal from employment.
- c) Three month salary in lieu of notice, Kshs.102,720.
- d) The remaining months, Kshs,12,326,400
- e) Severance pay Kshs.85,600
- f) Costs and interest for this claim.
- g) Any other relief that this Court shall deem fit to award.

The Respondent filed its statement of defence on 5th September 2013 alleging that the Claimant's affiliation with the Respondent arose out of a mutual agreement with Parley Agencies Limited, the employer and that the Claimant was never its employee.

Claimant's Case

The Claimant testified that he was employed by the Respondent on 1st February 2005 as a maintenance engineer after being interviewed by the Respondent. He was posted to Kisumu as the Western Engineer and subsequently issued with an employment card. The Claimant underwent trainings while working for the Respondent and was issued with training certificates by the Respondent after completing the Hardware Training on All Personas Models of ATMs and the NCR Code of Conduct 2006; English.

He testified that in August 2010 he went for his annual leave but was later called by the Manager in charge of Customer Service, Mr. Mwangangi who informed him that his employment had been terminated. He was not given the reason for the termination. He sought audience with the Managing Director who did not explain anything to him. He testified that he has never known the reason for his termination and was not paid his August salary and pay in lieu of notice.

In cross-examination the Claimant testified that he was not issued with a letter of appointment and his salary was paid by the Respondent but did not have any proof that the money was deposited by NSR, the Respondent. He testified that he received payslips from Parley Agencies Ltd. According to him both the Respondent and Parley Agencies Ltd are one and the same company.

He testified that his leave forms were signed by Mr. Wambugu who was an employee of the Respondent. The claimant conceded that the leave forms showed that Parley Agencies Limited was his employer which is the same company that paid his salary. He further testified that he was terminated in August and that there were payslips for the months of August and September 2010 with one indicating that he earned pay in lieu of notice.

Respondent's Case

RW1, VICTORIA MWENI WAMBUA, testified that she had worked with the Respondent from 1996. RW1 testified that she knew the Claimant. That the Respondent through one of its vendors received a list of potential service providers and sent the names to the respondent for interviews.

RW1 testified that the relationship between Parley Agencies Ltd and NSR, the Respondent herein, is that of Vendor-Supply. It was her testimony that Parley Agencies Limited would offer resources when needed and the Claimant was among the persons sent to the Respondent as a resource by Parley Agencies Limited. The agreement was that the Claimant would work for the Respondent upon meeting certain requirements.

RW1 further testified that the invoice received by the Respondent from Parley Agencies Ltd indicates the services rendered as employment management services. RW1 further testified that the leave form would be processed by Parley Agencies Limited but the forms were signed by the Respondent's representatives for planning purposes. She testified that she was not aware the Claimant had been terminated from the Respondent's offices.

Claimant's Submissions

In the written submissions filed on behalf of the Claimant, it is submitted that by virtue of being interviewed by the Respondent and subsequently commencing work at the Respondent's premises, the Claimant had confirmed that he was the Respondent's employee.

In respect of the reasons for termination the Claimant submitted that the Respondent did not give any reason for the termination contrary to the provisions of Section 45 of the Employment Act. In addition the Respondent did not act in accordance with justice and equity by failing to find a fair reason for termination of the claimant's employment.

The Claimant further submitted that the Respondent did not subject the Claimant to fair process as required under Section 41 of the Employment and he was therefore entitled to the remedies as prayers in accordance with section 49 of the Employment Act.

Respondent's Submissions

The Respondent submitted that it never employed the Claimant and that the claimant was aware of the existence of Parley Agencies Limited. The Respondent submitted that the existence of the employment relationship cannot be determined based on the documents presented by the Claimant which include badges and training certificates without examining the parties behaviour as held in **George Kamau Ndiritu & Another v Intercontinental Hotel [2015] eKLR**.

The Respondent submitted that the Claimant failed to produce any documentation to ascertain which of the two companies paid his salary and had therefore failed to establish an employment relationship between himself and the Respondent. The Respondent relied on the case of **Francis Mwaura Gitau v Nyala Tea Estate Limited [2016]** where Ndolo J. held:

"Moreover, the Claimant testified that his salary was paid monthly through the bank but did not produce any records to prove this... Overall, the Court finds that the Claimant failed to establish the existence of an employment relationship between himself and the Respondent and his claim therefore has no basis and is dismissed with no order for costs."

The Respondent further submitted that it did not employ the Claimant and thus could not terminate the alleged employment relationship.

In respect of the reliefs sought the Claimant submitted that should he be successful, the Claimant is only entitled to one month's pay in lieu of notice as opposed to 3 months in lieu of notice in the absence of any documentation to prove otherwise. In respect of the remaining 30 years' salary pay and severance pay the Respondent submitted that the prayers were fictions and the claimant had not been declared redundant.

Issues for Determination

a) Whether there exists an employer-employee relationship between the parties

Dependent on the finding in (a) above:

b) Whether the Claimant was unlawfully terminated

c) Whether the Claimant is entitled to the reliefs sought.

a) Whether there exists an employer-employee relationship between the parties

The Claimant alleges that he was employed by the Respondent after a successful interview for the position of maintenance engineer. The Claimant testified that he had no document showing that the Respondent was his employer and that was issued with payslips by Parley Agencies Limited. The Respondent on its part alleges that it never employed the Claimant who had been assigned to the Respondent by Parley Agencies Limited. RW1 testified that it only interviewed the Claimant but did not recruit him.

The Claimant in his testimony stated that he believed that Parley Agencies Limited and the Respondent was one Company. The Respondent did not produce any agreement evidencing the relationship between the parties. However, it produced several documents including an Invoice dated 23rd February 2010 annexed as NCR2 whose payment details are indicated as employee management skills. In this Invoice issued by Parley Agencies Limited and addressed to the Respondent the deductions stated at the bottom of the invoice include bank loans of the Claimant. In the NCR Staff Salaries Details for the month of June 2010 annexed and marked as NCR2 to the Respondent's Response, Parley Agencies Limited was to receive a commission of 20% of the gross salaries. Furthermore, the Claimant's Payslips for the months of December 2005, August 2010 and September 2010 were issued by Parley Agencies Limited.

In determining if there was an employment relationship, Section 2 of the Employment Act defines a contract of service as

means 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, 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;

In addition Section 2 defines an employee as a person employed for salary or wages while an employer is defined as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual.

The Claimant in his testimony stated that he did not know the relationship between the Respondent and Parley Agencies Limited. The documents presented by the Claimant included a job card and training certificates issued by the Respondent however the leave forms were issued by the Parley Agencies Limited but approval was granted by the Respondent's representative. RW1 in her testimony stated that the reason leave was approved by the Respondent was for planning purposes. This reason is sufficient to prove that the Claimant had only been assigned to the Respondent. This assignment is also evident in the email dated 12th October 2010 annexed and marked SK8 to the Claimant's Memorandum of Claim in which Mark Mwangangi the Respondent's Field Service Manager informs "All Users Kenya" of the end of the Claimant's assignment with the Respondent.

In agreeing with the Respondent the evidence presented does not indicate the existence of an employer-employee relationship. Moreso, that the Claimant was entitled to leave which he applied for using leave forms from Parley Agencies Limited. The Claimant ought to have interrogated why he was issued leave forms and payslips by Parley Agencies Limited as opposed to the Respondent. The two companies are distinct legal entities. In the absence of an employment relationship with the Respondent, the Respondent was not in a position to terminate the Claimant's employment contract.

In **Maurice Oduor Okech v Chequered Flag Limited [2013] eKLR** Ndolo J.:

*"As held by Kimondo J in the case of **Everret Aviation Limited Vs the Kenya Revenue Authority [2013] eKLR**, in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.*

In the case before me the relationship between the Claimant and the Respondent was evidenced by job cards, local purchase orders and job contracts. 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."

I find that there exists no employment relationship between the parties which would warrant the intervention of the Court. In light of this, the issues on whether the Claimant was unfairly terminated and whether he is entitled to any reliefs become moot.

I find that the claimant sued the wrong party as his payslip and leave forms clearly stated that his employer was Parley Agencies Limited. If he was not sure who was his employer between Parley Agencies and the respondent, the best he would have done is sue both parties so that the court could determine which of them was his employer.

For the foregoing reasons the claim must fail. I accordingly dismiss the same. Each party will bear its costs.

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

MAUREEN ONYANGO

JUDGE