



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 275 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**STEPHEN EDWIN OKOTH.....CLAIMANT**

**VERSUS**

**THE ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

The Claimant filed suit against the Respondent on behalf of the Ministry of Transport and Infrastructure (formerly Ministry of Roads) seeking payment of his dues for a period of 5 years. He alleges that he was employed by the Provincial Mechanical Engineer in 2008 as a casual plant operator at Kisumu attached to the Ministry Shovel Wheel loader registration No. G.K.A103M.

He claims that his duties involved going to work for whoever has hired the wheel shovel from the Engineer's office and also carry out minor repairs to the plant. His case is that the Ministry acted in contravention of the Employment Act by failing to confirm him as a permanent employee after 6 months and that he was never paid salary for the 5 years he worked for the regional Mechanical Officer in Kisumu.

The Claimant alleges that his job description entitled him to a monthly salary of Kshs. 17,000.00 and therefore claims Kshs.1,020,000.00 being unpaid salary for the period of 5 years. He prays for judgement to be entered in his favour for the said amount.

The Respondent filed a Statement of Defence on 19<sup>th</sup> June 2014, wherein the respondent denies that there was any employment relationship with the Claimant for the reason that the Respondent does not have any record of the claimant. For that reason the respondent prays for the Claim to be dismissed with costs.

**Claimant's Evidence and Submissions**

At the hearing, the claimant testified that he was employed by the Ministry of Public Works where he was first hired in bush clearing. Thereafter he made an application to work for the Ministry and was hired as a turn boy. That at the time he was being paid by the people who hired the machine

He was thereafter engaged by the Ministry of Public Works in Kisumu as a plant operator from 2008 to 2013 and relies on a letter from the Mechanical engineer dated 8<sup>th</sup> August 2013 (annexed to the memorandum of claim as App. 5). He also relies on work tickets (attached as App. 4) to show that he worked as operator of the shovel wheel loader. That during this period he was not paid any salary for the position which he alleges was Kshs.17,000/= per month. He states that he was not terminated but in 2013, he got his Advocate to do a demand letter to the Ministry to pay him which letter never elicited any response. He urged the Court to order the Respondent to pay him for the entire period that he worked for the Ministry.

In cross-examination Mr. Okoth stated that he was paid Kshs.3,000/= every time the machine was hired and he could not operate the loader without a work ticket. He admitted that for some time the wheel loader was not working during which period he was not paid. He denied that he was called to work when there was work but stated that he had to report on a daily basis so that he could operate the loader whenever work became available. He also stated that he did the work willingly without coercion.

In submissions, counsel submitted that the respondent had the burden to prove that the Claimant was not in their employ which in this case was not discharged contrary to section 10(7) of the Employment Act. Further that the Claimant worked as a casual labourer continuously for a period of 5 years as such, by dint of section 37 of the Employment Act he qualifies for conversion as permanent employee. That despite the fact that there was no contract of employment in existence, the Claimant had produced enough documentation to prove that at all material times he worked under the direction of the Ministry of Public Works.

It is submitted that the Claimant met the conditions prerequisite to working for the respondent by doing a suitability test conducted by officers mandated by the respondent and was issued with an original suitability test certificate by the respondent (App 1 and 2 of the Memorandum of claim). Further that, the work tickets availed by the claimant prove that he was working under the direction and control of the respondent. Counsel submits that all these documentation bear the letterheads and names of the officers in charge of the ministry under which the respondent is directly in charge and therefore cannot deny the authenticity or lack of knowledge of the same. They cite the case of **JOHN MUTISYA & 2 OTHERS -V- RAPID KATE SERVICES LIMITED (2016) eKLR** to buttress this position.

It is further submitted that the allegation that the people who hired him as per his annexures 3 and 5 in his memorandum of Claim had no authority to do so does not hold any water as the Claimant had no control over the Ministry's administration and management. That the persons named in the said documents were representatives of the Ministry at the County level and therefore had implied authority to do all as pertains the proper and continued functioning of work of the ministry and the Claimant had no reason to question otherwise.

That equity will not suffer a wrong without a remedy. It is submitted that it is a fact that the claimant worked for the respondent for a continuous period of five years. It is also a fact that the claimant was never paid. That based on these wrongs, the claimant has approached this Court of justice in earnest belief that he will find favour. Counsel for the Claimant urges the Court to find in favour of the claimant and arrive at a finding that he was indeed in the respondent's service.

Mr. Odeny for the Claimant submits that having established the Claimant was an employee and the Respondent having not produced any payment records he prays for the Claim to be allowed.

### **Respondent's Evidence and Submissions**

The Respondent put up two witnesses: RW1 Moses Amakanji Shitote led evidence that in March 2013 he had been deployed as a District Mechanical Officer, Kisumu with the Mechanical and Transport Department of the Ministry of Roads as in charge of personnel among other duties. He stated that as from 2011 to 2013, there were only 4 Casuals in the workshop employed by the Ministry of Roads paid by the Mechanical and Transport Fund and the Claimant was not one of them.

That the Mechanical and Transport Department has trained and qualified mechanical engineers, technicians, plant mechanics, motor vehicle mechanics, auto electricians and artisans who are deployed on maintenance, inspection, servicing and repairs of vehicles, plants and equipment of mechanical and transport fund.

He denied that the regional mechanical engineer hired the Claimant in 2007 to clear bushes along the roads. That the work ticket No. K173997, the Equipment Registration No. GK A103M was unserviceable and it was not possible that the Claimant was authorised in the year 2008 by the mechanical engineer to take over operations of an equipment which was under repairs.

That during the year 2008 to 2013 there were four regional mechanical engineers namely Mr. J. S. O Agumba, Eng. MS Nabeda, B.M. Maweu and Z A Maangi. He stated that the allegation that the Claimant used to ask the engineer about the status of his employment and the said engineer would answer that the Ministry was looking into it is not true as he does not specify who among the 4 engineers he is referring to.

That it is also not true that the Claimant was required to do servicing and minor repairs to the loader because he alleges that he was plant operator and not a plant mechanic. Furthermore that no officer or engineer would assign a plant operator within a workshop of mechanical and transport department whereas there were designated plant mechanics to do the work.

The witness also led evidence that from the year 2005 to 2010, the equipment GK A103M was unserviceable and from the year 2010 – 2013, the equipment only worked 79 days as per the work tickets filed in Court. In lieu of this that it is not possible that the Claimant worked for 5 years as alleged.

Mr Shitote in his evidence admitted that the Claimant would normally be contacted or called over the phone on a mutual understanding that he would be paid Kshs. 3,000/= by the Client after completing the work as per the M.T.F.I requisition for equipment. That to the best of his knowledge the claimant was never engaged as a casual.

In cross-examination, he admitted that he was not present in 2008 when the Claimant was allegedly hired because he went to Kisumu in 2011 which year he remembers contacting him to work. That the Ministry would pay him Kshs. 3,000 on completion of the work. He alleged that the payment would be received from the Client but he had no evidence of this in Court. He also stated that the Claimant deserted duty in 2013 but admitted that the Claimant worked as per the work tickets in Court.

Mr Shitote also admitted signing a recommendation letter in favour of the Claimant annexed to the memorandum of claim as document 5 but the same was a personal recommendation to the Claimant to help him get a job. He stated that Government recommendations are not in the format presented to Court. Further that the Claimant did not work for the entire period of 5 years but on specific days when he would be called and he would work 3-4 hours a day. He also stated that the work tickets were not proof of employment but an authority to use the vehicle. He further led evidence that for a casual to be employed by the Ministry he would be issued with a casual contract which the Claimant did not have.

RW2 one Zablon Inonda led evidence on the process of engagement of casuals and employees into the Ministry. He stated that the minimum qualification for any person to be considered for engagement is set up in the scheme of service for that particular cadre under which he or she should be engaged, in this case the scheme of service for plant operators applied.

That the regional mechanical engineer may recommend any of the trainees who have completed the training and attachment in the regional workshop and has the minimum qualification and competence required for engagement after ascertaining the need to the Divisional

Headquarters for consideration.

That the recommendation and documents forwarded by the regional mechanical engineers are checked to ascertain their eligibility as per the scheme of service. That the said officer has also to ascertain the availability of funds for payment of the wages of the casual as per the rates available from the Legal Notice for Ministry of Labour, Social Security and Services for the period not exceeding 3 months prior and then forward to the Principal Secretary for consideration and approval after which the person is notified for his/her acceptance of the casual contract.

Mr Inonda stated the Division only learnt of the Claimant through an internal memo from their counsel dated 25<sup>th</sup> November 2013, requesting for information on the Claimant. That the Ministry has never engaged the claimant as a casual or otherwise as the outlined procedure was not followed and as such the Claimant is a stranger.

In addition to the evidence of the parties counsel for the Respondent submitted that it is clear that the Claimant was engaged whenever the equipment - GK A103M, was hired by members of the private sector to go perform work. That it is also clear that an arrangement was made between the claimant, the engineer and the client - that the client would pay the claimant Ksh.3,000/= for the work done. He submits that the letters of recommendation only confirm the claimant's engagement for this private arrangement.

Counsel also referred to procedures for engaging casual in the ministry outlined by RW2, which were never were followed with regard to the claimant. Further that the claimant is adamant that during his engagement he periodically inquired from the engineer as to the status of his employment with the ministry which in counsel's view is an admission by the claimant that he was aware that he was not yet an employee of the ministry.

It is submitted that Section 3(3) of the Employment Act No. 11 of 2007, binds the government such that government employments are always conducted legally within the corpus of relevant legislations, and most specifically in conformity with Section 10 of the Employment Act, which provides for Employment Particulars.

Counsel submits that the claimant's allegations of employment do not fall within any ambit of the Employment Act and that no employer - employee relationship between him and the government has ever existed. That the arrangement between the claimant and the engineer should therefore be treated as a private engagement between private citizens.

That the claimant has evoked equity before this court to come to his assistance. He submits that the principles of equity dictate that: No one is entitled to the aid of a court of equity when that aid has become necessary through his or her own fault. That the claimant has come to court and stated that for five years he received no salary from the government when all he did to mitigate his loss was an inquiry as to the status of his employment from the engineer. That for five years he made no attempts to put his grievance in writing to any other authority or person or government office. That he never attempted to seek any recourse until the independent work that he undertook came to an end which in Counsel's view smirks of carelessness and laches of a great extent.

Ms. Aliongo for the Respondent refers to the claims by the Claimant that he was unaware of the regulations and stipulations of the law with regards to hiring casuals and yet took no steps to find out the procedure. She submits that as an independent contractor under a contract for service no protection under the Employment Act can be found as was held in **CHARLES JUMA OLENG -V- M/S AUTO GARAGE LIMITED AND ANOTHER [2014] eKLR**.

She therefore submits that the claimant's claim be dismissed with costs to the respondent. That in the alternative, should the court finds that the claimant does not deserve compensation in terms of the Employment Act. She submits that part of this cause of action prescribed in terms of section 90 of the Employment Act is time barred as it was not brought within 3 years from the date the cause of action arose. That payment of salary is a distinct cause of action that accrues at the end of every month.

She submits that the claimant has also not accounted for or submitted on how the Kshs.17,000 p.m. is arrived at, instead reliance should be put on the provided payroll for casuals where a figure of Kshs.11,235.00 has been indicated for casuals.

### **Determination**

The issues for determination are whether the claimant was in the employment of the respondent and if he is entitled to the prayers sought.

It is the claimant's case that he was in the respondent's employment from 2008 to 2013. In support of his claim, the claimant produced a letter dated 8<sup>th</sup> August 2013 addressed to "*TO WHOM IT MAY CONCERN*" which is expressed to be signed on behalf of Z. A. MAANGI, the Regional Mechanical Engineer/Kisumu.

The claimant did not produce any employment contract. His only evidence of employment are copies of work tickets for the months of March and April 2011, April and May 2010. There is a fifth work ticket without dates.

It is the respondent's case that the claimant was never employed by the Ministry of Roads at all, and that the shovel that the claimant alleges to have been using was unserviceable between 2005 and 2010, that it is therefore not possible for the claimant to have been employed to operate the same from 2008 to 2013.

It was the evidence of the respondent that the claimant was contracted whenever there was a client who wished to hire the equipment on the understanding that the client would be the one to pay him at the rate of Kshs.3,000.

I find no evidence of employment of the claimant by the respondent. Work ticket entries of 79 days over a period of five months during

2010 and 2011 cannot constitute proof of employment over a period of 5 years. The claimant could not have worked for five years for the Ministry of Roads without pay, without a contract and without a work ticket covering the entire period.

I find no proof of any employment relationship between the claimant and the Ministry of Roads for which the respondent would be liable.

For the foregoing reasons I dismiss the claim. There shall be no orders for costs.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**