



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 513 OF 2015

BETWEEN

JOHN OCHIENG ADONGO CLAIMANT

VERSUS

1. REA VIPINGO PLANTATIONS LIMITED

2. KAZUNGU KALAMA T/A KAZUNGU AGRICULTURAL SUPPLY...RESPONDENTS

Rika J

Court Assistant; Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Federation of Kenya Employers [F.K.E] for the 1st Respondent

Mogaka Omwenga & Mabeya Advocates for the 2nd Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on the 20th July 2015. He states he was employed by the 1st Respondent as a Sisal Cutter, on casual basis, on the 1st June 2010. He was injured on the head while on duty. The 1st Respondent threatened to terminate Claimant's contract upon the Claimant expressing his wish to sue the 1st Respondent for work injury compensation. In response to the Claimant's demand letter, the 1st Respondent stated the Claimant was an Employee of the 2nd Respondent, a Contractor of the 1st Respondent. On 27th May 2015, the 1st Respondent made good its threats, and terminated Claimant's contract. The Claimant earned Kshs. 15,000, as of the time of termination. He prays against the Respondents for:-

- a. 1 month salary in lieu of notice at Kshs. 15,000.
- b. Annual leave pay of 5 years at Kshs. 60,000.
- c. Service pay at Kshs. 51,923.

d. Compensation for unfair termination at Kshs. 180,000

Total Kshs. 350,198

e. A declaration that termination was unfair and unlawful.

f. Costs, Interest and any other suitable relief.

2. The 1st Respondent filed its Statement of Response on 8th October 2015. It denies to have ever employed the Claimant. It does not have Casual Employees. It has Outsourcing Agreements with the 2nd Respondent. 2nd Respondent was to provide workers to the Plantation. N.S.S.F contributions were paid for the Claimant by the 2nd Respondent. The 1st Respondent is improperly sued.

3. The 2nd Respondent filed his Statement of Response on the 21st October 2015. His position is that there is no cause of action shown against him in the Statement of Claim. He prays for dismissal of the Claim.

4. Parties agreed in Court on the 13th July 2016, to have the dispute considered and determined on the strength of the Court Record. They confirmed the filing of their Closing Submissions at the last mention in Court on the 20th September 2016.

Claimant's Case: -

5. The Claimant submits he filed Supplementary Documents on 28th July 2016. These are his N.S.S.F Statement, dated 13th July 2016, and Camp Visitor's Pass, approved 14th March 2015. The documents indicate the 1st Respondent was Claimant's Employer. The referral sheet to hospital when the Claimant was injured at work, emanated from the 1st Respondent. It is insincere for the 1st Respondent to state it never employed the Claimant. The Camp Visitor's Pass was approved by the 1st Respondent on 14th March 2015. The 2nd Respondent disowned the Outsourcing Agreement. The 1st Respondent therefore invoked the name of the 2nd Respondent to avoid meeting its statutory obligation to the Claimant.

6. The Claimant urges the Court to find he was employed by the 1st Respondent, and dismissed by the 1st Respondent. He is entitled to the remedies sought, from the 1st Respondent. The 1st Respondent did not justify termination, merely holding onto the argument that it did not employ the Claimant.

1st Respondent's Case

7. The 1st Respondent submits it employed the Claimant on a fixed term contract between June and September 2011. The contract was not renewed on expiry. At paragraph 4 of the 1st Respondent's Statement of Response, the 1st Respondent pleads that the Claimant has never been its Employee.

8. It is submitted for the 1st Respondent that it had an Outsourcing Agreement with the 2nd Respondent. The 2nd Respondent provided various auxiliary support services to the 1st Respondent. These included provision of labour for the Plantation. The N.S.S.F records show the 1st Respondent paid Claimant's contributions up to 31st October 2011. This was up to the period the Claimant served on fixed term contract. After this period N.S.S.F contributions are shown to have been remitted by the 2nd Respondent. The Camp Visitor's Pass is not authentic: it is not shown who gave the approval in the Pass; it does not have the 1st Respondent's stamp; and dates of issue and approval are years apart. If the Claimant is entitled to any relief, he should pursue such from the 2nd Respondent.

2nd Respondent's Case

9. The 2nd Respondent submits the Claimant has expressly stated he was never employed by the 2nd Respondent. At paragraph 13 of the Statement of Claim, the Claimant states it is untrue that he worked for the 2nd Respondent. He is specific he was employed by the 1st Respondent, and had his contract terminated by the 1st Respondent. There is nothing pleaded or proven against the 2nd Respondent. The 2nd Respondent prays for dismissal of the Claim against the 2nd Respondent.

The Court Finds:-

10. The question at the core of the dispute is whether the Claimant was employed by the 1st or the 2nd Respondent? The question whether his contract was validly and fairly terminated hinges on who was his Employer. Parties did not go into the details of termination, suggesting that in their minds, whoever is found to have employed the Claimant should meet his Claim. It is not contested that unfair and unlawful termination occurred; in contestation is who carried out the termination, and who bears responsibility if termination was unfair and unlawful?

11. The 1st Respondent argued the 2nd Respondent was the Employer. The 2nd Respondent argues the 1st Respondent was the Employer.

12. The 1st and 2nd Respondents entered into an agreement on 1st June 2008, where the 2nd Respondent was hired to cut and handle sisal leaves, from specified fields within the Plantation. The 2nd Respondent would engage sufficient number of Workers to meet set targets in sisal cutting. The agreement is dated 1st June 2008 and has no expiry date.

13. The Claimant states he was employed in June 2010. This would be within the life of the Outsourcing Agreement. He states however, he was employed by the 1st Respondent.

14. He was employed by the 1st Respondent indisputably, in a contract dated 27th May 2011. Why would the 1st Respondent employ an Employee who was already employed by the 2nd Respondent?

15. The Court got the impression the triangular relationship created in the Outsourcing Agreement, was meant to shield the 1st Respondent from its contractual and statutory obligations to its Employees. The 1st Respondent is shown in the N.S.S.F records and Camp Visitor's Pass filed in Court on 29th July 2016, to have employed the Claimant. If there were N.S.S.F contributions paid on account of the Claimant by the 2nd Respondent after 30th September 2011, they were paid by the 2nd Respondent as an agent of the 1st Respondent.

16. It was not shown by the 1st Respondent that the Claimant was under the control and direction of the 2nd Respondent. It was not shown at what point the 2nd Respondent employed the Claimant. There were no tools of trade shown to have been provided to the Claimant by the 2nd Respondent. The Camp Visitor's Pass, which the Court finds to be an authentic employment record, shows the Claimant was housed by the 1st Respondent within the 1st Respondent's Plantation. He resided at House Number 254. There was no nexus between the Claimant and the 2nd Respondent. There is no evidence the Claimant was employed under any Outsourcing Agreement. The 2nd Respondent was joined to the Claim ostensibly because the 1st Respondent pointed to the 2nd Respondent, as the Claimant's Employer.

17. The 2nd Respondent is improperly joined to the Claim. ***The Claim against the 2nd Respondent is struck off with costs to be paid by the 1st Respondent.***

18. Having found that the 1st Respondent was the Claimant's Employer, as defined in Section 2 of the Employment Act 2007, it follows the 1st Respondent did not justify termination, or discharge its procedural obligations under Sections 41, 43 and 45 of the Employment Act 2007. The Claimant was injured on the head while at work, cutting sisal for the 1st Respondent. Rather than meet its obligation to

the Claimant under the work injury regime, the 1st Respondent terminated the Claimant's contract and disowned him as an Employee. This was unfair and unlawful.

19. The Claimant is granted compensation for unfair termination the equivalent of 12 months' salary at Kshs. 180,000.

20. The Claimant is granted 1 month salary in lieu of notice at Kshs. 15,000.

21. Evidence of 105 days of unutilized annual leave days is insufficient. It is not shown in the Statement of Claim, the Submissions or other material that the Claimant was owed 105 days of annual leave. He did not support the prayer for gratuity. There was no clause in any individual contract or collective agreement, granting to the Claimant gratuity pay. He is shown in the N.S.S.F records, to have been actively subscribed to the Fund. He is denied service pay under Section 35 [6] of the Employment Act.

22. The 1st Respondent shall meet the costs of the Claim for both the Claimant and the 2nd Respondent.

IN SUM, IT IS ORDERED:

a. The Claimant was an Employee of the 1st Respondent.

b. The Claim against the 2nd Respondent is struck off.

c. Termination was unfair.

d. The 1st Respondent shall pay to the Claimant: the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 180,000; and notice pay of 1 month at Kshs. 15,000- total Kshs. 195,000.

e. Costs to the Claimant and the 2nd Respondent, against the 1st Respondent.

f. Interest allowed at 14% per annum from the date of Judgment.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge