



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 88 OF 2014

JOHN WACHIRA GITHONGO.....CLAIMANT

VERSUS

SOYAMA HARDWARE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 23rd June, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 18.07.2014 through Wahinya & Associates. The claimant changed his advocates to Wahome Gikonyo & Company Advocates and filed amended memorandum of claim on 12.01.2017. He prayed for judgment against the respondent for:

- a) Kshs.60, 000.00 being 3 months' pay in lieu of the termination notice.
- b) Kshs. 240, 000.00 being 12 months' pay for compensation for unfair termination.
- c) Immediate reinstatement to employment.
- d) Overtime.
- e) Annual leave for three years.
- f) House allowance for three years.
- g) Public holidays for 3 years.
- h) Any other or better relief that the honourable court may deem fit and just to grant.
- i) Interest on (a) to (g) above at court rates.
- j) Costs of the suit plus interest at court rates.

The respondent filed a statement of defence on 14.08.2014 through Mwangi Kariuki & Company Advocates. The amended response to the claim was filed on 10.02.2017 and the reply to the amended response was filed for the claimant on 16.02.2017.

The claimant's case is that he was employed as a sales manager by the respondent at a monthly salary of Kshs.20, 000.00 per month and on 02.05.2014 he was unfairly and unlawfully dismissed from the

respondent's employment. The respondent's case was that the claimant was an independent contractor paid for specific tasks as contracted by the respondent.

The **1st and main issue** for determination is whether parties were in a contract of employment or in a contract for service.

This court considered the issue in the case of Stanley Mungai Muchai – versus- National Oil Corporation of Kenya, Industrial Court of Kenya at Nairobi Cause No. 447N of 2009 pages 7 to 9 of the court judgment where it was stated, thus:

“The Industrial Court Act, 2011 in Section 2 defines employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The section also defines employer to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

The Employment Act, 2007 in Section 2 defines “Contract of Service” to mean 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 the Act applies.

The court holds that whether the relationship between parties’ amounts to a contract of service or contract for service is an issue both of law and fact but largely, one of fact. There is no doubt that a relationship that is a contract of service, unlike one that is a contract for service, will enjoy the statutory protections accorded by the employment legislation. This is more so in view of the definitions of “employee”, “employer” and “contract of service” under the Employment Act, 2007 and the Industrial Court Act, 2011.

A contract of service invariably relates to “dependent” or “subordinate” employment and a contract for service relates to “independent” or “autonomous” employment. Thus, there is a constant line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service. There is no universal formula for determining existence of a contract of service. *Simon Deakin and Gillian S. Morris, Labour Law, 3rd Edition* pages 146 to 168 have discussed some of the tests used by courts in determining “employment” or “service”. They include the following:

(a) The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work. However the formal or personal subordination of a worker as a test for existence of a contract of service may not apply for highly specialized workers such as in the case of the doctors, lawyers, and other professionals.

(b) The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business. However, staff of independent contractors may as well perform entries integral or primarily part of the business when in fact, they are not employees.

(c) The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

(d) Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of

mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

Since none of the foregoing tests can resolve the issue decisively on their own, in many cases the issue will be resolved by examining the whole of the various elements which constitute the relationship between the parties; this has been called the multiple test”.

The evidence is clear. The claimant was tasked by the respondent to buy hardware materials in Nairobi. The court has considered the arrangement as per the testimony by witnesses. The court returns that the parties did not give details of the terms of the alleged employment. There is no reason to doubt the account as given by the respondent. As per that account, the claimant was assigned to purchase hardware goods for the respondent usually from shops and suppliers situated in the city of Nairobi. For that purpose the respondent deposited the cash for purchasing the goods in the claimant's account and paid the claimant Kshs.5, 000.00 for travel and related expenses. Upon successful finalisation of each assignment, the claimant was paid a further Kshs.15, 000. Thus, for every assignment, there is no reason to doubt the respondent's account that the claimant was paid Kshs. 5,000.00 to travel to buy the goods and upon return, he was paid Kshs. 15, 000.00.

Taking into account the testimony and the arrangement between the parties, the court returns as follows:

a) Under the command theory, the claimant was not an employee because the respondent did not impose control measures on the claimant about the assignment. There was no evidence that the respondent indentified the suppliers or shops the claimant bought the goods from and the respondent imposed no rules on how the claimant would bargain the prices of the goods sold or even delivery time lines in that regard. Other than the respondent providing the necessary funds, the respondent subjected the claimant to no commands in the delivery of the assignment.

b) Under the integration test, it was not established that the claimant was subject to the respondent's rules and procedures. It was not established that the claimant was part of the respondent's staff subject to human resource rules and procedures such as working hours, offs, provision of housing accommodation, provision of medical covers, provision of exist benefits and such other rules about grievance management, disciplinary control or even a promotion system or operational system. Thus under that test the court returns that the claimant was not an employee.

c) Under the economic test, the court returns that the claimant was in charge of his own profits in the sense that the more assignments he accomplished the more he earned. The unsaid and further profit making arrangement necessarily inferred is that the claimant had liberty to choose the suppliers or shops to purchase the goods from – obviously making untold profits or gains one way or the other as long as he was within the respondent's expectations.

d) There appears to have been no promises between the parties as the assignments were piecemeal or task-based. Once an agreed task was accomplished, there was no mutual agreement that the parties would remain in a promise to repeat the arrangement. At best, the assignment based arrangement would have amounted to casual employment, ending at the end of each assignment.

The court returns that the parties were in a contract for service and not a contract of employment. While making that finding the court has further considered the following testimonies:

a) Whenever the claimant purchased the goods or hardware supplies in issue like from the exhibited receipts from Juma Hardware Stores Ltd, the claimant signed in his name, not that of the respondent – meaning in purchasing the goods, he did so for himself, not for the respondent; the suppliers had no privity with the respondent as the claimant was not an agent or employee of the respondent in that regard.

b) There was no evidence to support the claimant's evidence that he earned Kshs.20, 000.00 per month and that he worked for the respondent on a daily basis. Further the claimant never pleaded

the date of his alleged employment. He was inconsistent about his initial salary saying it was initially Kshs. 4, 500.00 then changing and increasing by Kshs. 1, 000.00 per year to Kshs. 14, 000.00 in 2014. The claimant then admitted that it would not be correct to say that in 2011 (when he alleged he was appointed sales manager by the respondent) he earned Kshs. 20, 000.00 per month. The court returns that such was inconsistent and contradictory evidence which was incredible.

c) The respondent's evidence (RW2) that the claimant refused of his own volition to accept any further assignments from the respondent was consistent with the claimant's own testimony that he did not want to work with the respondent any more as he had abandoned the prayer for reinstatement.

As there was no employment relationship, the court returns that the prayers made for the claimant will fail as unjustified and unfounded.

In conclusion, the claimant's suit is hereby dismissed with costs.

Signed, dated and delivered in court at Nyeri this Friday, 23rd June, 2017.

BYRAM ONGAYA

JUDGE