



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1140 OF 2013

DOMINIC NYAMAI.....CLAIMANT

VERSUS

CYLINDER WORKS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 13th July 2013 and through the suit sought resolution of the issues he framed as i) non-payment of dues, ii) unfair, unlawful and unprocedural termination of employment. He averred that he was employed by the Respondent as a hydraulic tester from September 2009 to 15th December 2012 when his employment was terminated by the Respondent. He averred that despite serving the Respondent diligently and with commitment the Respondent violated the Claimant's rights by underpaying him and denying him his leave entitlement. The Claimant avers that throughout his employment he was forced to work a total of 50 hours per week from 7.30am to 5pm for day shifts and from 5.30pm to 7 am for night shifts. He thus sought payment of one month's salary in lieu of notice, payment of house allowance, payment in lieu of leave not taken, overtime worked and not paid for, 12 months compensation and costs of the suit as well as interest on the sums claimed. The Respondent filed a statement of response on 5th September 2013 and another statement of response on 1st October 2013. The Respondent averred that the Claimant was hired as a sub-contractor and therefore was mandated to carry out the services on fixed terms and only when work was available. The Respondent averred that there was no overtime due and that the Claimant voluntarily resigned on 6th November 2012. The Respondent denied that the Claimant was entitled to any leave and averred that the Claimant never worked for 12 consecutive months during a leave earning period as envisaged under Section 28 of the Employment Act. The Respondent denied that the Claimant was entitled to any relief from court and urged the dismissal of the Claimant's case with costs.

2. The Claimant testified on 27th October 2015, when he stated that he had no letter of employment and that he was employed by the Respondent from September 2009 till November 2012. He testified he wrote a letter giving notice of intention to terminate his services as he was unwell and was advised that there was little work therefore he would cease working on 15th November 2012. He says there was no notice given, he earned Kshs. 325/- a day and the total earnings varied depending on days worked. He stated that the sum was exclusive of house allowance. He reported to the Labour Office after the dismissal and the issue was unresolved hence his approach to court. He thus sought payment of his leave pay, overtime, house allowance and notice.

3. In cross examination by Mr. Maingi for the Respondent, he stated that he did not have an agreement on days to be worked and that there was no agreement on overtime. He said that there was an agreement for overtime but the Respondent did not pay. He confirmed he used to work when the Respondent had business and was engaged when work was available. He asserted that he was entitled to leave and did not know if a sub-contractor was entitled to leave. He testified that he was engaged in 2009 and had not worked for a full year and that in the year 2012 by November 2012 he had not worked for a whole year. He was referred to the documents filed in the Respondent's bundle and confirmed that he worked for 10 days in May, 12 days in April, and 11 days in February. He stated that he worked in Lunga Lunga and resided at Pipeline which was far and therefore he paid his own rent. He testified that he was terminated without notice and was not paid. He was referred to the letter he had written on 5th November 2012 and confirmed that he had resigned on health grounds. He testified that he was to stop working on 26th November 2012 but was terminated on 15th November. He said that he had sought leave once in writing and that the document was with the Respondent.

4. In re-examination by his counsel Mr. Ogongo, he testified that he was only given an identity card and no letter of appointment was issued. He said he was paid fortnightly and did not take any break between 2009 and 2012. He testified that he was dismissed on 15th November 2012 though he had given a letter of resignation effective 26th November 2012.

5. Testimony for the Respondent was given by, Anthony Maina Keru the Respondent's Administration and Finance Manager. He testified on 19th January 2016 and stated that the company deals with repair of LPG cylinders for oil companies. He said that the Claimant was an independent sub-contractor and that the Claimant signed contract forms whenever he was engaged. He stated that the payment was dependent on the turnout of his job and the Claimant would at times work for 11 days and at times 14 days. He testified that it was not fixed term and that the Claimant was paid for the days worked. He recalled that on 6th November 2012, the Claimant wrote a letter of resignation for

medical grounds and indicated the date of departure as 26th November 2012. He stated that the Claimant appeared on the 26th November with a letter from the labour office and that the Respondent presented the Labour Officer with the Claimant's resignation letter and were advised they would be contacted. He indicated that the Respondent later received a letter of demand from the Claimant's advocate. He testified that when the Claimant wrote the resignation letter the Claimant never indicated there was any debt owing. He testified that there is a leave form for those who are entitled to leave and that the Claimant was not entitled to leave. He said that he had never seen any request for leave form from the Claimant. The witness testified that the payment given for work done is gross and is house allowance inclusive and as far as he was concerned the Claimant was owed nothing.

6. In cross-examination by Miss Makori, he testified that the Claimant was a subcontractor between 2009 and 2012. He stated that the Claimant did not work for 12 consecutive months and that the Respondent had permanent employees who are entitled to leave. He testified that the Claimant just disappeared and that a contractor decides whether he will come to work or not. He stated that the Claimant never made an application for leave and that the leave application cannot be made orally as it has to be approved by him. He stated that night shift is on prior approval of management and if anyone works overtime without approval it is illegal. He testified that one could report to work early but the official time is 8.00am to 5.00pm. He stated that the Claimant was not entitled to house allowance as the sum is gross.

7. In re-examination by Mr. Maingi, he testified that subcontractors are not entitled to leave. That marked the end of the Respondent's case and the parties opted to file written submissions. The file seems to have failed to be mentioned on the date for submissions and a mention was taken on 7th June 2016 for 15th September 2016. It seems it was again not mentioned on 15th September 2016 and was once again fixed for mention on 28th November 2016 when it was directed that the proceedings be typed as another judge of this Court was to render a decision as I had proceeded on study leave. The file was redirected to this court sometime in November 2017 and it was placed in my chambers on 17th November 2017 when I gave direction that judgment would be delivered on 27th November 2017. The delay in rendering this decision is regretted and it is unfortunate that the file remained unresolved for over a year from the time the testimony of parties was concluded. The parties too take blame for the delay. The submissions of the Claimant were filed on 9th February 2016 while those of the Respondent were filed on 15th September 2016 almost 8 months to the day from the date of conclusion of the trial.

8. The submissions of the Claimant filed on 9th February 2016 were to the effect that the Claimant, a hydraulic tester of the Respondent was wrongfully terminated. The Claimant indicated the issues to be resolved where

1. Whether the Claimant was an employee or a subcontractor/independent contractor
2. Whether the Claimant was unfairly, unlawfully and unprocedurally terminated
3. Whether the Claimant is entitled to terminal benefits

The Claimant submitted that the Employment Act under Section 2 defined an employee as a person employed for wages or salary and that the term employee includes an apprentice and indentured learner. The Claimant submitted that the Employment Act does not define who a sub-contractor is. The Claimant relied on the case of **Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR** where Radido J. emphasized that an independent contractor's contract is a contract for work and not a contract for service or to use ordinary language a contract of employment. The Claimant submitted that he was orally employed as hydraulic tester but was not given a contract of employment. The Claimant submitted that the tender of a resignation did not auger well for the Respondent's narrative that the Claimant was not employed. Reliance was placed on the case of **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** where Ongaya J. held that there is no universal formulae for determining the existence of a contract for service. The Claimant submitted that he was required to dispense his duties under the supervision of his superiors and that he had fixed working hours when he was expected to arrive at work and leave at a prescribed time. The Claimant submitted that he was clearly an employee of the Respondent within the Employment Act and therefore entitled to the benefits thereunder. The Claimant submitted that he tendered a resignation letter on medical grounds and before the resignation letter took effect the Respondent terminated the Claimant's services on 15th November without any notice. The Claimant submitted that he was not subjected to a hearing contrary to section 41 of the Employment Act. The Claimant relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers SACCO Ltd [2013] eKLR** where the Court held that even where the employer has every right to terminate the services of an employee the employee has a right to be accorded a hearing accompanied by a fellow employee of his choice or a union representative during the hearing. The Claimant submitted that this was a sacrosanct right and that failure to do this results in a flawed process resulting in bad labour practices. The Claimant submitted that failure to accord him this safeguard amounted to unfair, unlawful and unprocedural termination. The Claimant submitted that he was therefore entitled to the terminal dues being one month's salary in lieu of notice, payment for house allowance not paid, payment for leave not taken, payment for unpaid overtime worked as well 12 months compensation as in the case of **Alphonse Maghanga Mwachanya v Operations 680 Limited [2013] eKLR** where Radido J. gave the factors to be considered for grant of this relief under Section 49(4) of the Employment Act. The Claimant relied on the tenor of Article 41 of the Constitution which called for fair labour practices and thus sought that judgment be entered in favour of the Claimant as prayed for in the Memorandum of Claim.

9. The Respondent's submissions filed on 15th September 2016 were to the effect that the Claimant's dispute could be crystalized into two issues:-

1. Whether the Claimant was employed by the Respondent and if in the affirmative, the nature of the employment/engagement
2. Whether the Claimant is entitled to the reliefs sought.

The Respondent submitted that the Claimant had in his statement of claim pleaded that he was employed as a hydraulic tester from September 2009 to 15th December 2012 whereas he resigned from his employment on 26th November 2012. The Respondent asserted that the Claimant was engaged as a sub-contractor under contracts of service for specified days at an agreed salary. The Respondent submitted that the payslips indicate that no PAYE was paid indicating some level of independence. The Respondent submitted that the Claimant was attempting to rewrite the terms of his engagement with the Respondent. The Respondent stated that the Court was bound to give effect to

Section 10 of the Employment Act and cited the case of **Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR** for the proposition that the court will seek to give meaning to the written contract in determining any issues that may arise after dispute. The Respondent thus submitted that the Claimant's contract of service was one for service or an independent contract. The Respondent submitted that the Claimant as such sub-contractor, he was not entitled to any of the reliefs sought in the statement of claim. In the alternative and without prejudice to the foregoing, the Respondent submitted that even if the Claimant ought to be paid, the house allowance was in the nature of special damages hence they must be strictly proved. The Respondent relied on the case of **Narcol Aluminium Rolling Mills Limited v Stephen Apondi Ochieng [2009] eKLR** where Azangalala J. (as he then was) held that such damages must not only be specifically pleaded but also must be strictly proved. The Respondent submitted that the provisions of Section 31(2)(b) of the Employment Act are instructive and stated that the Claimant did not table any evidence of the calculation of payments of house allowance. The Respondent placed reliance on the case of **Samson Mwangi Gaita v Kensalt Limited [2013] eKLR** where the court dismissed the claim for house allowance arrears because the salary paid was consolidated. The Respondent submitted that the issue of overtime pay was not strictly proved and that the Claimant did not adduce any evidence that he worked overtime. The Respondent submitted that if at all the Claimant had worked overtime then he would have at least claimed it in his resignation letter rather than wait for the trial to claim it. It was submitted that this was an afterthought and the Respondent cited the case of **Josephine Mogaka Paul v Pride Inn Hotels & Investments Limited [2014] eKLR** where the court held that the Claimant in that case had failed to prove she worked overtime. The Respondent submitted that as the Claimant was an independent contractor, he was not entitled to leave days and assuming the court were to find otherwise, the Respondent submitted that the Claimant had not strictly proved his entitlement. On the payment of 12 months' salary compensation as damages, the Respondent submitted that these were only available where the termination is unlawful and is commissioned by the employer. It was submitted that the claim was preposterous as the Claimant had voluntarily resigned from employment on 26th November 2012 and thus terminated his own services. It was submitted that even if the Claimant was terminated, he was entitled to the remedy that was given by the Labour Officer which was leave pay for the 3 years as final settlement of the matter.

10. The Claimant's case is that he was unfairly dismissed from service by the Respondent. From the pleadings he filed, he averred that he was unlawfully terminated on 15th December 2012 without any reasons being assigned. The Respondent on its part asserts that the Claimant voluntarily resigned and was therefore not dismissed and is not entitled to any of the reliefs sought in his claim. The Claimant and the Respondent each availed a witness who gave oral testimony. The issues that lend themselves for determination in my view are two. Firstly, was the Claimant employed by the Respondent or was he a contractor and secondly, was the Claimant dismissed by the Respondent or not. These will resolve the matter as to whether the Claimant is entitled to the reliefs he seeks. The Employment Act defines an employee in broad terms. Section 2 sets it out as follows:-

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner.

The Claimant had contracts which were exhibited as evidence of his employment with the Respondent. The contracts were for work undertaken for some days and the payment indicated to be a daily rate for general work. He therefore was paid per the number of days worked and despite the assertions that he was a general contractor and therefore not an employee, the Claimant was indeed an employee of the Respondent in terms of the Employment Act. He was however one to whom the benefits of Section 28(1) would not apply as no evidence of 12 consecutive months of service was displayed. The Claimant would have had to bring himself within the ambit of Section 28(1) of the Act to enable him properly recover on the issue of leave. He wrote a resignation letter on 6th November 2012. In the letter he indicated that he was resigning due to a medical condition as per the advice of the doctor that he take rest. He gave the last day of service was to be 26th November 2012. He therefore had resigned by the time he is purported to have been dismissed by the Respondent. In my view the contract was terminated at the instance of the Claimant and therefore he was not dismissed. The claim therefore collapses as there is no remedy against the employer available due to the resignation which was voluntary. The claim is dismissed but each party will bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 27th day of November 2017

Nzioki wa Makau

JUDGE