



REPUBLIC OF KENYA



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**Omonya v Trnasmal International Limited (Cause 816 of 2017)
[2017] KEELRC 224 (KLR) (17 November 2017) (Judgment)**

Peter Omonya v Trnasmal International Limited [2017] eKLR

Neutral citation: [2017] KEELRC 224 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 816 OF 2017
ON MAKAU, J
NOVEMBER 17, 2017**

BETWEEN

PETER OMONYA CLAIMANT

AND

TRNASMAIL INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

1. The claimant brought this suit on 13/10/2017 claiming
 - (a) A declaration that the respondent has the obligation to settle his medical bills for injuries suffered while in the course of employment.
 - (b) An order compelling the respondent to pay ksh.694,460 being medical expenses incurred at Farooq Hospital plus any future accrued medical expenses.
 - (c) General damages for injuries suffered at work
 - (d) Costs.
2. The respondent has denied that she employed the claimant to drive motor vehicle registration number KBF 627H or at all. She further denies that the clamant was injured while in the course of his employment and consequently denied liability to pay the medical expenses sought by the suit. The claimant is detained in the hospital due to the outstanding medical bill and as such the court was forced to conduct the hearing at the hospital. Before the hearing the claimant withdrew the prayer for damages and sought the medical expenses.



Claimant's Case

3. The claimant testified that he was employed by the respondent from July 2013 as a driver. He stated that the respondent's office is situated at the TSS Building and some of his fellow employees includes Fara Abdulahi Sharif, Farah Dhayou and Abdirizaq. His duties included transportation of cargo from the portside CFS to Godowns at Bimahalim and Shimanzi using KBF 267H truck which was assigned to drive by the respondent's transport officer Mr. Abdirizaq.
4. On 7/6/2017 he was send by Farah Dhayou and Abdirizaq to Boss Freight Cargo using KBF 267H. He collected the authority documents from the respondent's office at TSS Building. While at the Boss Freight adjusting Twist lock of the KBF 267H so as to firm the container, he was hit and run over by another truck KWH 537 and sustained serious injuries. He was rushed to the Makadara Coast General Hospital for treatment. On 8/6/017 Mr. Abdirizaq and Farah Dhayou transferred him to Alfarooq Hospital and left him there after paying a deposit of ksh.30000. He was discharged on 20/6/2017 but he was detained due to the hospital bill of ksh.694,460 continues to increase due to the continued stay at the hospital.
5. He produced NHIF and NSSF statements to prove that he was employed by the respondent who remitted NSSF and NHIF upto August 2017. He denied any knowledge that the truck he was driving did not belong to the respondent. On being shown copy of the log book, he admitted that the lorry was indeed registered in favour of Farah Dhayou. He further admitted that it was Farah Dhayou who was paying his salary as at the time he got injured in the accident.
6. He denied knowledge of Daniel Keli Wambua, the owner of the respondent company but maintained that both Farah Dhayou and Abdirizaq work for the respondent. He explained that all his NHIF was remitted by the respondent save for two months in 2015 when his former church apparently remitted the same for reasons unknown to him. He concluded by stating that on the fateful day he was sent to deliver cargo at Bimahalim a Godown managed by Abdirizaq and Farah Dhayou and the fuel invoices for the truck were addressed to Bimahalim.

Defence Case

7. Mr. Daniel Keli Wambua testified as RW1. He stated that he is one of the two directors of the respondent, the other one being Jeremiah Mutinda Wambua. He explained that the company only deals with clearing and forwarding at the port of Mombasa and denied that she does transport the cargo. He clarified that his business is paperwork of clearing of taxes and thereafter the importer or exporter provides transport for the cargo. He further clarified that he has employed only 4 employees mainly port clerks and office assistants. He denied ever meeting the claimant and further denied owning any truck for transport.
8. He however explained that in July 2015 after getting clearance certificate from Kenya Revenue Authority (KRA) Mr. Abdulahi Sharif Mohammed joined him as the Operation Manager. RW1 explained further that Mr. Abdulahi had a personal truck registration number KBF 267H and driver that is the claimant herein. That Mr. Abdulahi requested that the claimant be registered for NHIF and NSSF contribution through the respondent and he agreed to Mr. Abdlahi's request by signing an agreement dated 20/8/2015 on condition that the money remitted for NHIF and NSSF would be reimbursed to the company by Mr. Abdulahi.
9. RW1 explained further that on 27/2/2016 Mr. Abdulahi sold the truck to Farah Hassan Dhayuo due to financial problem and as a result the agreement between him and Abdulahi for remittances of NHIF



and NSSF in favour of the claimant ended. That Mr. Farah took over the truck and started paying claimant's salary. He denied that Farah and Abdulahi are his employees.

10. On cross examination RW1 produced no proof that he was director of the respondent. He confirmed that the registered office for the respondent is at Multiple Solutions, first floor but she also has another office at TSS Building. He admitted that the respondent remitted NHIF and NSSF for the claimant until June 2017. He further admitted that he was not a party to the agreement for the sale of KBF 267H between Abdulahi and Farah Dhayuo. He however admitted that he knew Farah Dhayuo as an importer and his client. He confirmed that Farah Dhayuo has an office at TSS Towers and his company is Dhayuo Commodities. He confirmed that Abdulahi Sharif was his Operations Manager from August 2015 to February 2016 but he had his personal transport business but it ended in February 2016 after he sold his truck to Farah Dhayuo. He did not produce evidence of reimbursement of NHIF and NSSF remitted on behalf of the claimant.

Analysis And Determination

11. There is no dispute that in August 2015, the respondent started remitting the NHIF and NSSF in favour of the claimant and continued upto June and August 2017 respectively. There is also no dispute that the claimant was employed to drive truck registration number KBF 267H until 7/6/2017 when he was involved in an accident while in the course of duty at the Boss Freight where he had been sent to collect cargo to deliver at Bimahalim Godown. The issues for determination are:
 - (a) Whether the claimant was injured while in the course of employment by respondent.
 - (b) Whether the claimant is entitled to the reliefs sought.

Injury in the course of employment

12. The claimant alleges that he was employed by the respondent because he is the one who was remitting his NHIF and NSSF contribution from August 2015 to August 2017. He however admitted that he was employed to drive KBF 267H, Truck registered in favour of Farah Hassan Dhayuo and who was paying his salary, that he never knew Daniel Keli Wambua who was the owner of the respondent company; that he used to get instructions from Abbulahi Sharif and farah Dhayuo to transport cargo from portside to Godown; that on the fateful date, the claimant was instructed by Abdirizaq and Farah Dhayuo to collect cargo from Boss Freight and deliver it at Bimahalim Godown Shimanzi which belonged to Abdirizaq.
13. Rw1 denied ever employing the claimant and maintained that his business does not involve transportation of goods. He however admitted that on 20/8/2015, he agreed to a request by his operations officer Mr. Abdulahi Sharif to have the claimant, his personal lorry driver, to be remitting NSSF and NHIF through the respondent. He maintained that on 27/2/2016, Mr. Abdulahi sold the truck to Mr. Farah Hassan Dhayuo and the agreement for the remittance of NHIF and NSSF ended. He however admitted that the company continued to remit the NHIF and NSSF for the claimant until June 2017 and August 2017 respectively. He however denied ever paying the claimant any salary or ever meeting him but maintained that he had agreed with Abdulahi that all NHIF and NSSF remittances made for the claimant were to be reimbursed by Abdulahi to the respondent.
14. After considering the evidence and submissions made by both parties, I find that the claimant was not employed by the respondent. He was driving a truck owned by a third party and worked outside the control of the respondent. Section 2 of the Employment Act defines employee as a person employed for wages or salary. His salary was paid by the owner of the truck and not the respondent. In my view the foregoing considerations far outweigh the evidence of remittance of NHIF and NSSF as the proof



of employment relationship between the parties herein. It is trite law that an employee under a contract of service is evidenced by payment of salary or wages, control by the employer and provision of working tools and workplace by the employer. In this case, the claimant was paid salary by Mr. Farah Dhayou who also provided a truck KBF 267H and who exercised control over him by giving him instructions. He cannot therefore lose that status by the mere fact that the employer failed to remit NSSF and NHIF contribution for him. Likewise he could not become the respondent's employee merely because she had agreed to remit NHIF and NSSF contributions for him on request by his employer. In the upshot, it is my holding that the parties herein were not related as employer and employee when the claimant was injured on 7/6/2017 or at all.

Reliefs

15. In view of the foregoing finding that the claimant was not employed by the respondent at any time including 7/6/2017, this suit must fail as against the respondent. Section 34 of the Act upon which this suit is anchored only applies to parties who are related as employer and employee. It is therefore not applicable to this case.
16. Even if the claimant was indeed employed by the respondent on 7/6/2017, which is not the case, the said Section 34 of the Act would still not apply because on the material day, the claimant would be deemed to have gone outside the normal course of employment by the respondent to drive other peoples trucks outside respondent's instructions and for personal reward or pay. Consequently, it is my holding that the declaratory order and special damages sought must fail as they are not founded on any law or contract.

Disposition

17. For the reasons that the claimant was not employed by the respondent, the claim for payment of medical expenses under Section 34 of the Employment Act is dismissed. Each party to bear his costs.

DATED, SIGNED AND DELIVERED THIS 17TH NOVEMBER 2017

O. N. MAKAU

JUDGE

