



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1237 OF 2014

CASMIR NYANKURU NYABERI.....CLAIMANT

VS

MWAKIKAR AGENCIES LIMITED.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 8th July and filed in Court on 24th July 2014, the Claimant has sued the Respondent for unfair termination and failure to pay terminal dues. The Respondent filed a Statement of Defence on 25th September 2014. At the hearing, the Claimant testified on his own behalf and the Respondent called its Director, Albert Mwangi. Both parties filed written submissions.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent as a general worker from February 2009 until 31st April 2013 when he was notified by the Respondent's Director, Albert Mwangi that his employment had been terminated. The Claimant was not given any reason for the termination nor was he subjected to any disciplinary procedure. He pleads his monthly salary as at the time of leaving employment as Kshs. 6,000.

3. The Claimant's claim is as follows:

- a. A declaration that he was unfairly dismissed
- b. Underpayment of basic salary (9,780.95-6,000).....Kshs. 45,371.40
- c. Basic salary for the month of April..... 9,780.95
- d. 1 month's salary in lieu of notice.....9,780.95
- e. Leave pay for 4 years.....31,599.99
- f. Service pay for 4 years.....22,571.42
- g. 12 months' salary in compensation for unfair dismissal.....117,371.40

The Respondent's Case

4. In its Statement of Defence filed on 25th September 2014, the Respondent denies having employed the Claimant and/or instructing him not to report for duty. The Respondent states that it is a rent collecting agency on behalf of various landlords and its role does not require it to employ any support staff to carry out its duties. The Respondent avers that its clients' tenants deposit their rent in the Respondent's account and thereafter present the deposit slips at the Respondent's office

for receipting.

5. The Respondent further states that any employment relationship would have been between the Claimant and the respective landlords. The Respondent denies the existence of any employment relationship between itself and the Claimant.

Findings and Determination

6. There are three issues for determination in this case:

- a. Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by the Court;
- b. Whether the Claimant has proved a case for unlawful and unfair termination;
- c. Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

7. The first issue for determination is whether there was an employment relationship between the parties capable of enforcement by this Court. The Respondent denies the existence of any such relationship. In his Memorandum of Claim, the Claimant states that he was employed by the Respondent as a general worker. However, he testified in Court that he was employed as a field officer. No explanation was offered for this inconsistency. Additionally, the Claimant gave 31st April 2013, a non-existent date, as the date of his termination.

8. The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further.

9. Section 2 of the Employment Act, 2007 defines an employee as:

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

An employer is defined in the same section as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

10. I have stated elsewhere that an employment relationship is not the same as a work relationship. The mere fact that parties work together does not necessarily give rise to an employment relationship (see ***John Kamau Mburu v Program for Appropriate Technology in Health & Another [2015] eKLR***).

11. This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or *viva voce* to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.

12. In the instant case, the Claimant told the Court that he had been issued with an employment card but he did not produce it. He also testified that he used to sign for his salary in a book which was retained by the Respondent but he did not ask for its production. This, coupled with the inconsistencies in the Claimant's evidence which I have already pointed out leads the Court to

reach the conclusion that there was in fact no employment relationship between the Claimant and the Respondent capable of enforcement by this Court.

13. That being the case, the Claimant's entire claim fails and is dismissed. Each party will bear their own costs.

14. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF APRIL 2016

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JUDGE

Appearance:

Miss Munyange for the Claimant

Mr. Kakai for the Respondent