



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1445 OF 2013

DAVID BARASA CLAIMANT

VERSUS

BRITISH PEACE SUPPORT TEAM (E.A) 1ST RESPONDENT

COLONEL J.R CUNLIFFE2ND RESPONDENT

JUDGEMENT

1. The issue in dispute is the unfair termination and non-payment of terminal benefits.
2. The Claimant served summons upon the Respondents through the 1st respondent. Appearance was entered for the 1st Respondent under protest. The 2nd Respondent never entered appearance.

Claim

3. The Claimant was on 8th March 2008 offered employment by the 1st Respondent as a gardener at the military camp at a salary of Kshs.11, 000.00 and was given accommodation. The 1st Respondent seconded the Claimant to work with its various officers. The 1st Respondent paid the claimant's salary, NHIF, and NSSF. The Claimant was placed at 2nd Respondent compound. The Claimant was on 15th March 2013 unlawfully terminated from his employment, he was not issued with any letter or given reasons. This was contrary to the provisions of section 41 of the Employment Act.

4. The Claimant is seeking;

- a. *One month's salary in lieu of notice Kshs.11, 000.00;*
- b. *Leave for 4 years Kshs.44, 000.00;*
- c. *One day worked Kshs.423.00;*
- d. *Service gratuity Kshs.27, 500.00;*
- e. *House allowance Kshs.8, 250.00; and*
- f. *12 months compensation Kshs.132, 000.*

5. The Claimant testified in support of his case. His evidence was that upon employment by the Respondents he worked diligently without taking leave. In 2013 the Respondent told him to go home for National Elections. On 14th March 2013 when he reported back to work, he worked all day and at 4pm he was terminated. No reasons were given. He was paid Kshs.10, 000.00 but refused to take it as no reasons were given.

6. In cross-examination, the Claimant testified that his employer was Mason who left in May 2008 and he was given a new employer. In July 2009 a new contract was issued by Cunliffe and at clause 3 it was agreed that he would employ the Claimant until his posting was complete. Another contract was issued by Brundle. The Claimant was working at the private residence of the officers. The 1st Respondent had their own staff. He was offered accommodation at the private residence and it was agreed that he should not bring visitors to his work residence. He was terminated by Brundle an officer of the 1st respondent.

Defence

7. The defence is that the 1st Respondent is not a persona capable of suing or being sued. The 2nd Respondent is not resident in Kenya as he left years ago and service through the 1st Respondent is not proper. The 1st Respondent never employed the Cat any time as they do not employ domestic staff for its officers. All officers are on short attachment in Kenya and spend long periods out of Nairobi on duty and in order to safeguard any domestic staff payments, such officer make arrangements with the 1st Respondent for payments of such salaries, PAYE, NSSF and NHIF. Such is deducted from the officer's pay. The claim should be dismissed with costs.

8. In evidence, the 1st Respondent witnesses were Nelson Mutuku and Major Christopher Rimmer. Mr Mutuku testified that he is the Accountant the Claimant was never employed by 1st Respondent as he had contracts with individual officers of the 1st respondent. All the contracts submitted are with Col. Mason, Cunliffe, and Brundle and not the 1st respondent. These officers had a fixed term posting and were resident in Nairobi. The officers posted have a challenge with registration of Kenya Revenue Authority (KRA) for purposes of PAYE, NSSF and NHIF and it was agreed that in order to comply with local law, the 1st Respondent would use its system and recover from individual officer. Debit vouchers were sent to each officer. the first Respondent has a memorandum of understanding with the government of Kenya and the government of the United kingdom under the Ministry of Defence to undertake projects and is an entity that cannot be sued or sue.

9. On cross-examination, the witness testified that the role of the 1st Respondent was to ensure its officers complied with local law and therefore paid all statutory dues and recovered from these officers. Such did not confer employment status to the claimant. There is a debit to each officer to repay what had been remitted by the 1st respondent. This was done as the officers would be away most of the time and had no registration with KRA to be able to make the necessary submissions.

10. The 2nd witness Major Rimmer testified that he is a Major, British army and currently a support officer with the 1st Respondent on short term posting. Similar officers are posted for period of between 6 months and 2 years and the process of registering such officers for tax purposes in Kenya for them to effect KRA deductions and other statutory obligations would be cumbersome. In order to ensure compliance, the 1st Respondent has over time been effecting these statutory deductions and undertaking remittances and then bill the domestic employees. The 2nd Respondent has since returned to the UK upon his term expiring and is not aware of the current proceedings.

Submissions

11. The Claimant submit that he had an employment relationship with the 1st respondent. The contracts issued related to officers of the 1st respondent. He was therefore seconded to the officers of the 1st Respondent who continued to deduct and pay statutory dues. There was no valid reason for termination as required under section 43 of the Employment Act. Fair procedure was not applied are required under section 41 of the Employment Act. The claims should be paid with costs.

12. The Respondent on their part submit that there was no employment relationship between the Claimant and the 1st Respondent which is a department of the Ministry of Defence of the United

Kingdom with an MOU with the Government of Kenya. The 1st Respondent therefore has no legal persona to be sued. The contracts of employment were between the Claimant and the various officers of the 1st respondent. The 2nd Respondent completed his duties and has since left Kenya and did not enter appearance as he was never served with summons. The claim should be dismissed with costs to the respondent.

13. The basis of the claim is that the Claimant was *employed by the 1st Respondent and seconded* to work with its various officers. A *Secondment* in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so placed.

14. In the case of **Rev. John Mugania versus Kenya Methodist university & Prof. Mutuma Mugambi, Cause No.133 of 2013** the court held that;

... secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment.

15. The principal employer who seconds the employee remains the employer at all material times and not the agency to which the employee is seconded. The primary employer here was the 2nd respondent. The 1st Respondent did not enter into an employment relationship with the claimant. See **Mary Ratemo and others versus Kenya Police Staff SACCO Limited and Another, Cause No. 225 of 2011.**

16. Therefore, where the claim is premised on any employment between the Claimant and the 1st respondent, as of essence there must be a contract of employment with the 1st Respondent so as to give rise to any secondment with any other party. The Claimant attached his 3 contracts with Colonel JR Cunliffe, A. Mason and Colonel CJ Brundle. He testified that these were his employers as a gardener in their private residence. The contracts of employment entered into were between the Claimant and the 3 listed officers/persons. No contract has been attached with the 1st Respondent to create any relationship of employment between the Claimant and the 1st Respondent for the 1st Respondent to have capacity to second him with any other employer or agency.

17. Even where the persona of the 1st Respondent is challenged, I find no employment relationship between the Claimant and the 1st respondent. where the intention of the parties were a secondment, the evidence before court and with the 3 employment contracts issued to the claimant, I find no such secondment as the employment contracts are clear in their primary meaning. Nothing can be inferred to link the 1st Respondent to the employment relationship.

18. The payment of statutory dues for any person by any given entity cannot confer employment. even in the best case of application of section 2 of the Employment Act that defines who an employer and an employee is, statutory dues, deduction and remittance to the appropriate bodies is not tantamount to allocation of employment. Where the 1st Respondent paid such statutory dues, the employment of the Claimant was secured with the 2nd respondent. Such employment commenced on 1st July 2009. Such a contract is not stated when it lapsed, but on 1st November 2011 the Claimant took up new employment

with a third party, Colonel CJ Brundle. I take it that at this time, the contract with the 2nd Respondent had lapsed for the Claimant to engage with another employer. I will take it that such lapse took effect on 1st November 2011.

19. With the lapse of the employment contract on 1st November 2011, the claim herein was filed on 6th September 2013. Since, the 2nd Respondent has not been served with summons. Such service is to the 2nd Respondent and cannot be effected through the 1st Respondent as each is a different persona in law and with the challenge by the 1st Respondent on its legal standing, the Claimant has done nothing to address this obvious lapse.

20. To thus sustain the suit as it stands will not achieve any useful purpose known in law or in the practice of the court. No remedy can arise out of the 1st respondent.

The claim is hereby dismissed in its entirety. Each party shall bear their own costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF APRIL 2016.

M. MBARU

JUDGE

Present

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