



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.327 OF 2014

FREDRICK BYAKIKA CLAIMANT

VERSUS

MUTISO MENEZES INTERNATIONAL UNLIMITEDRESPONDENT

JUDGEMENT

1. By a contract dated 9th July 2013, the Claimant was employed by the Respondent as resident engineer for a project in Kampala Uganda in the construction of the National Records and Archives Building. The contract was for 12 months. the terms of the contract were that the Claimant would be paid \$5,200 monthly salary; provision of a furnished office; upon termination either party would give one (1) month notice or payment in lieu thereof.

2. The claim is that the Claimant took up his employment and delivered on his part but the Respondent in breach of the contract failed to pay due salaries and also failed to give a site office with a computer. The Claimant was underpaid and thus unable to secure accommodation and was forced to seek accommodation with relatives which impacted on his work. On 22nd August 2013 to 10th September 2013 the Claimant was taken ill and was unable to perform his duties. Such information was given to the Respondent but by letter dated 19th September 2013 the Respondent terminated the employment contract on the reason of absenteeism.

3. The Claimant was paid kshs.240, 000.00 as terminal. That the summary dismissal was wrongful. Section 31 of the Employment Act required the Respondent to provide the Claimant with accommodation which they failed to do; there was no hearing before termination in accordance with section 41 of the Employment Act and this resulted in unfair termination per section 45 of the Employment Act. The termination was also without justice or fairness as there were not reasons given for the termination.

4. The Claimant is seeking;

a. *A declaration that the decision to terminate was wrongful and unfair;*

b. *The sum of \$76,053 comprising;*

i. *Balance of salary July and August 2013 \$10,520;*

ii. *20 days salary for September 2013 \$3,506;*

iii. *Notice pay \$5,260;*

iv. *Damages for wrongful termination \$63,120;*

Less \$6,353 paid to the claimant.

5. The Claimant also testified that upon employment by the Respondent he was issued with a contract of employment which was discussed with the Respondent officer in Nairobi as the work was to be undertaken in Uganda. He remained in Nairobi for a month's so as to agree on all the modalities of the job and the project he was to undertake for the respondent. At the Resident Engineer he required a site office and a computer to be able to communicate progress on the ground to the respondent.

6. Under the contract of employment, the Claimant was to organise his own housing and transport and the Respondent was to provide a computer and telephone for the site office in Kampala. In July and August 2013 he was paid kshs.150, 000.00 which was only 1/3 of the due salary. The balance was not paid. The salary was not sufficient to get accommodation or report while in Kampala. The Claimant was forced to stay in Mbale with a relative which was over 120 kilometres away from Kampala. He moved using public transport and hence got late to attend to work in Kampala. He got sick and was admitted in a clinic with malaria and was unable to attend work. Since he had no office or computer, he could not communicate with the respondent. He was diabetic and the condition deteriorated forcing him to be away from work. That due to non-provision of basic facilities at work he was unable to undertake his duties and hence the termination was wrongful and he is seeking dues set out in the claim.

Defence

7. In defence, the Respondent admit that they appointed the Claimant as Resident Engineer – consultant and not employed as Resident Engineer. Such appointment was for the project duration vide letter of appointment dated 9th July 2013. The Claimant was not underpaid and it was his duty to organise his accommodation and transport so as to undertake his duties. As the Resident Engineer the Claimant was to start by setting up his own office on site which he failed to do as he was absent. On 22nd august 2013 to 10th September 2013 the Claimant was taken ill and unable to perform his duties but did not inform the Respondent and such contravened his contract. For being absent from work and being unable to undertake duties assigned, the Claimant was lawfully terminated from his employment. Section 31, 41 and 45 are not applicable to the claimant.

8. The claim should be dismissed with costs.

9 In evidence, the Respondent filed witness statement of Alan Simu. He was also called in evidence and testified that he is an Architect and the Managing partner of the respondent. That by letter of appointment dated 9th July 2013 the Respondent appointed the Claimant as Resident Engineer as a Consultant. He was to bill the Respondent with kshs.150, 000.00 every month in advance payment and balance was to be paid when the client for the project paid all consultant fees.

10. On 26th July 2013 the Claimant accepted his appointment and invoiced the Respondent for kshs.150, 000.00 for July and August 2013 which were paid. The monthly gross remuneration of \$5,260 was only payable upon issuance of invoices accompanied by timesheets records of his work at site on day-to-day basis to justify the payments. Such details were not supplied. The Claimant absented himself from work without justifiable cause which affected the project; he did not seek leave due to illness and thus due to absconding duty he was summarily dismissed.

11. The Respondent paid salary for July 2013 at kshs.150, 000.00 and upon termination Kshs.240, 000.00 was paid. The balance of July and August 2013 was to be paid upon the client in Uganda paying. The other dues have not been paid as the Claimant has not submitted timesheets and work records. The Respondent is willing to pay the due salaries claimed for July, august and 20 days for September 2013. Notice pay is not due as the Claimant grossly misconducted himself and thus not justified. Damages are not due as this was not a case of unfair termination and the circumstances leading to the termination were justified.

12. Upon termination of the claimant, the Respondent was forced to hire another Resident Engineer who

was paid, the project since closed. To keep the Claimant on the project was not going to help but make things worse hence termination was necessary to avoid making losses for the respondent.

Submissions

13. The Claimant submit that the Claimant was an employee of the Respondent employed under a contract of service. That the evidence of the Respondent stating that the Claimant was a consultant for the project is negated by the nature of contract issued to the Claimant where his terms and conditions of employment as an 'employee' are set out. The Claimant was issued with a letter of appointment following his application, interview and employment. Such letter of appointment was dated 9th July 2015 for the post of Project Engineer with clause 9 setting out the duration of the employment contract. The test to apply as to whether an employee is under a *contract of service* or under a *contract for services* has been addressed by the court in **Christine Adot Lopeyio versus Wycliffe Pere, Cause No.1688 of 2012** and the finding that the tests and principles to apply in such a determining are the control test; integration test, economic and business reality test; and mutuality of obligation. That in this case the Claimant met the test of an employee under a contract of employment/service.

14. The Claimant also submit that clause 8 of the contract of employment set out his employment duties and responsibilities and he remained the Respondent project representative on the project site meaning he was under the control of the respondent. The Claimant had a schedule he was required to follow and therefore was integrated within the work of the respondent. The Claimant had to undertake his work as directed by the Respondent with great and direct control from the employer as held in **Everett Aviation Limited versus Kenya Revenue Authority [2013] elk.**

15. The Claimant also submit that his monthly salary was agreed upon with the Respondent at the time of employment all being \$5,260. The Claimant was paid an advance of kshs.150, 000.00 but the balance of salary due was never paid as such an advance was not part of the contract of employment and the full pay is due.

16. The termination of employment was not lawful and section 43 of the Employment Act was not adhered to. Before termination, the Respondent had the burden to proof the reasons for termination which they failed resulting in unfair termination. Fair procedure was not applied in this case as the Claimant was not given a hearing or a chance to argue his defence before he was terminated. The Claimant was sent to work in Uganda without provision of his salaries, he was required to get his own accommodation and transport but without payment of salary he could not afford to do so. Despite repeated reminders seeking to be paid, the Respondent failed to do so. The termination on the basis that he was absent from work was therefore not justified as held in the case of **Kenya Shoe and Leather Workers union versus Fast-rack Management Consultants Ltd [2015] eklr.**

17. The Claimant is entitled to remedies sought in his claim as his termination was unfair. He should be paid balance of his due salaries; notice pay equivalent to one month's salary; compensation for 12 months' salary; all dues be paid with interest and costs of the suit.

18. The Respondent submit that the Claimant was under a *consultancy* appointment as Resident Engineer for the Respondent project in Uganda. He was taken on board as an expert engaged for 12 months. He was dismissed for non-performance of his duties and for being absent from duty. There was no *employment* as an *employee* to warrant the remedies sought as he was not under an employment contract rather it was an appointment of employment as a consultant. The Claimant was to be paid upon submission of an invoice and timesheets and work records. Part payment was on the basis that the Claimant would be paid after the project client paid after being satisfied that the project works were ongoing per schedule. The Claimant was therefore an *independent contractor*.

19. The Respondent also submit that the relationship between the parties was the letter of appointment as resident engineer and not an employment contract. The Respondent is not obligate to nay house or transport allowances and all salaries were payable upon the project client paying to the respondent. The relationship was not that of employer-employee and the features of the letter of appointment were that?

The Claimant would be paid upon submitting an invoice;

The dues payable were subject to withholding tax at 5%;

Third party was to provide the office on site;

Hours of work were based on the job demands; and

The Claimant remained as a consultant.

20. An employee is defined in law under section 2 of the Employment Act and the Claimant was not such an employee as held in **George Kamau ndiritu versus Intercontinental Hotel, Cause No.2347 of 2012**. That the Claimant was under a contract for works and the relationship was not covered by the Employment Act.

21. The Respondent also submit that on the finding that the Claimant was an employee, he absented himself from work and did not notify the Respondent leading to his dismissal being justified and not entitled to the claims set out. The Claimant also failed to perform his duties and blamed it on the non-payment of his salaries but such was regulated under his letter of appointment and was subject to submission of invoices. The Claimant did not undertake his duties well and failed to invoice the respondent. He remained away from work on diverse period which affected the project forcing the Respondent to hire another resident engineer. No dues are payable.

Determination

Whether the Claimant was an employee of the respondent

Whether there was wrongful termination;

Whether there are remedies due.

22. Before delving into the analysis herein, the Respondent witness Mr Simu, the managing director of the Respondent admitted that the Respondent is willing to pay balance of salaries due for July, August and 20 days for September 2014.

23. The witness thus acknowledges what is due is *salary* payable to the claimant.

24. There is contest as to whether the Claimant was an employee of the Respondent or an independent contract/consultant. The Claimant submitted letter dated 9th march 2013 issued by the Respondent for *proposed national records and archives building* in Kampala. The latter was *Appointment of Resident Engineer – As a Consultant* issued to the claimant. Such letter was an appointment of the Claimant for the post of Resident engineer from 1st July 2013 and such was subject to *terms and conditions of Employment*. The gross monthly salary was agreed at \$5,260.00 subject to 5% withholding taxes.

25. On the question whether the Claimant was an employee, the Employment Act section 2 define who an employee is. Such definition sets clarity with regard to the payment of salary or wage. Any employee is thus paid a wage or salary. However, even where a salary or wage is paid, where parties have reduced the terms and conditions regulating the relationship into writing, such is to be given importance with reference as such form the basis and intentions of such parties. In this case, the letter of appointment issued to the claimant, he accepted it on 26th July 2014. Such letter spelt out the terms and conditions of engagement between the parties. The Claimant was appointment as a Resident Engineer for a project in Uganda, he was appointed as a Consultant and was required to be part of the Project Consultancy Team. Further, the work hours were to be in accordance with the project programme Schedule but would go beyond such scheduled time at no extra remuneration. Of paramount importance was the mode of payment – monthly gross remuneration was \$5,260.00 upon issuance of an invoice and subject to withholding tax at 5%.

26. As such, the control of the Claimant and remuneration payable was on consultancy terms upon submission of invoices and hours of work were not in accordance with what an employee under the Employment Act is regulated. I find the parties agreed on the nature of relationship between them, that of a consultant. Under such consultancy, the terms and conditions were agreed upon and the Claimant accepted the same on 26th July 2014 and proceeded to undertake the duties assigned. The use of the terms such as *salary, employment terms and conditions, summary dismissal* - such though referred do not confer an employment relationship. In the employment contract there were deliverable, terms and conditions, but the Claimant was largely left on his own to undertake his duties and the element of control was his contract of employment and I find no provisions inconsistent with the contract of service as held in **Ready Mixed Concrete (South East) Ltd versus Ministry of Pensions and National Insurance [1968] 2 QB 497.**

27. I have gone through the cited cases by both parties, I make reference to the case of **Kenya Hotel & Allied Workers union versus Alfajiri Villas [2014] eKLR.** The Court analysis the difference between an employee under the Employment Act and an independent consultant thus;

... a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own businesses, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his services and will be paid accordingly and will not be subject to usual 'employment' matters such as the deduction of PAYE, will not get annual leave, sick leave ...

28. Such I find to be just some of the defending characteristics of a consultant/independent contractor. The Claimant was under such a contract. His hours of work were not fixed and were subject to the work to be undertaken; was required to invoice his dues to the Respondent so as to be paid each month which he did so in July and August 2014; he was subject to withholding tax at 5%; when he got sick he did not apply for sick leave/time off and does not claim for a refund of costs for treatment he underwent while he suffered malaria and diabetes; and the contract between the parties recognise the Claimant as a Consultant.

29. Noting the above, I find the Claimant was not an employee subject to the remedies sought.

30. The existence of an employment relationship was noted in the defence. The Claimant did not take the cure and has urged the suit on. As such, without the Court finding any employment relationship, the Claimant being a consultant and noting the admitted claims, the suit herein cannot be sustained before this court.

Save for the admitted salaries due, the claim fails and is hereby dismissed. Each party shall bear their own costs.

Orders accordingly.

DELIVERED. IN OPEN COURT AT NAIROBI THIS 5TH DAY OF APRIL 2016'

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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