



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.2499 OF 2012**

**VITALIS OLIEWO K'OMUDHO.....CLAIMANT**

**VERSUS**

**AAR HEALTH SERVICES LTD.....RESPONDENT**

**JUDGEMENT**

1. Issues in dispute are the unfair termination/dismissal and failure to pay terminal dues for unlawful and unfair termination/dismissal.
2. The Claimant was employed by the respondent, a limited liability company incorporated under the Companies Act, from the 1<sup>st</sup> November 2006 to December 2011 as the Business Development Manager. No written contract was issued to the claimant. The Claimant was paid monthly with increments until his termination of such employment. From 8<sup>th</sup> May 2012, the Respondent embarked on false, defamatory and spurious accusations against the claimant. As a result of such false accusations, on 9<sup>th</sup> May 2012, the Claimant was overtaken by stress and distress forcing him to take 3 days off duty from his leave days. On 10<sup>th</sup> May 2012 while the Claimant was on off day he was urgently summoned by his superiors back to the head office and coerced to immediately write a resignation letter or be summarily dismissed. Upon such forced resignation, the Claimant was not paid his terminal dues or his annual leave days accrued.
3. The claim is that the Respondent has adamantly refused to reconcile with the claimant. the claims are that the Claimant was an employee of the respondent; the wild and false allegations against him were with the purpose to force the Claimant to resign and this was in breach of his rights; the resignation was constructive dismissal; such constructive dismissal was unlawful and unfair as it was a breach of rules of natural justice, the employment contract/relationship and had no basis and therefore wrongful. The claim is also that the constructive dismissal of the Claimant was with malice and lacked natural justice a and was contrary to the Employment Act as he was never given a hearing; he was not given any explanations, grounds or reasons and it was without payment of his terminal dues.
4. The Claimant payers are a declaration that he was constructively dismissed; a declaration that the Claimant was a permanent and pensionable employee of the respondent; a declaration that the resignation of the clamant was constructive, unlawful and unfair dismissal. The Claimant is seeking general damages for breach of his fundamental rights; notice pay of 6 months; 12 months' salary in compensation; 10 days accrued leave; and costs of the suit.
5. The Claimant testified in support of his case that he was employed by the Respondent on 1<sup>st</sup> November 2006 as a Business Development Manager based on his insurance background having worked with other

insurance providers his last being Waumini Brokers who at the time were collaborating with the respondent. One manager of the Respondent approached the Claimant and convinced him to work for the respondent. He did not apply for the job and was issued with a letter of employment as Business Development Manager under Mavericks Agencies as the designation. This was not his agency as the Respondent allocated him work to do. He was issued with a business development contract which was annual. His performance was assessed and contract renewed. For 6 years he remained with the respondent. He retained staff, office and facilities of the respondent. He was not an independent contractor as alleged by the respondent. He was moved from the Respondent South C offices to the Westlands offices and never had his own staff. He had to report to work from 8am to 5pm and the human resource manual for all Respondent employees applied to him.

6. The claimant, as the business development manager was in charge of intermediaries selling for the Respondent all over the country. He reported to the Sales Manager as his supervisor. The last contract was signed in January 2011 and in 2012 he was not under any written contract until his dismissal. The last contract was specific in terms of work hours, time, targets and the terms of work. Clause 25.1.4 of the contract stipulated that the Claimant was not allowed to be engaged in similar work as the Respondent during his employment with the respondent, and even one (1) after he ceased employment with the respondent.

7. The Claimant also testified that on 8<sup>th</sup> May 2012 was a Tuesday and as always, the business unit of the Respondent had a meeting with the Sales Manager and all had to present reports at 2pm. The Claimant had a meeting with a client at the Grand Regency and as he was leaving his office to attend to the client he met David Gichuhi, Solomon Kasina and Edwin Gakonyo who said that they were coming to his office for a cup of teas. I told them to proceed to the office as he had a business meeting and would be back. The Claimant later found the same officers at the board room waiting for him, David Gichuhi said he had been sent to investigate the Claimant on allegations that he was printing money at the office but thi was not true of possible. The claimant was given 10 minutes to give an explanation and write a statement. He wrote an email to his supervisor. This was very traumatising meeting due to the shocking allegations and this caused him stress and distress. He asked for 3 days off. Solomon kasina who was the financial controller called the Claimant at night and advised him to be careful.

8. The Claimant also testified that on 9<sup>th</sup> August 2012 Gichuhi called him directing that he should report at the head office and he was shown a cheque of 2009 written to the Claimant from an intermediary. He asked that the Claimant to write a statement on why such a cheque had been done. On 10<sup>th</sup> august the human resource officer called the Claimant and asked him to resign which he refused to do as he had no reason(s) to do so. That management had directed that he should resign as he was going to take a political seat. The Claimant was therefore forced to resign with a mention that he had discussed the matter with mercy, the human resource officer of the Respondent as he had no other option and feared his name would be tainted in the insurance sector. The resignation was immediately accepted with a condition that there would be no terminal dues as the resignation was due to disciplinary reasons. Leave was not paid for. The resignation was a termination as this was not voluntary.

9. At the time of termination the Claimant was earning kshs.380, 614.00 a fixed salary of 1.35% of total income of the unit. He had an entertainment allowance, telephone expenses were covered each month. Based on his salary, the Claimant took a mortgage but lost the same upon termination. The capping of salary at 1.35% of unit costs was a motivation factor to make him work well with the intermediaries.

10. The Claimant also testified that As a result of the termination of employment, his family suffered, he lost his house, car and respect from friends and relative. He is seeking compensation.

11. In cross-examination, the witness testified upon employment with the Respondent he was called a consultant for maverick agencies. The only contract he got related to this agency. The contract terms were based on specific targets and he was earning a commission of 1.35% for Maverick Agencies. The argument by the Respondent was not the employer is not correct as the Claimant knew the employer was the employer. That the payments made were based on commission and contract had no leave or time off. It was non-pensionable and was allowed to join a pension scheme of his choice. He did not pay to the

NSSF and he paid 10% as withholding tax and no statutory dues were deducted. The salary was based on a percentage and the pay slips had no fixed amount. The contract was in terms of the Claimant being an agent and not employee. He was forced to resign on 10<sup>th</sup> may 2012 after being forced to write 2 statements.

12. The Claimant also testified that he had expressed his interest in politics but he did not carry out any political activity while at work. He had brochures with his photo in his office and his sister Rebecca was to collect these material from the office.

## **Defence**

13. In defence, the Respondent case is that the Court has no jurisdiction as the parties had an agency contract and not an employment contract. The Claimant was appointed as a consultant from Maverick Agency on a renewable contract and was entitled to monthly commissions of 1.35% based on his sales revenue. The terms of the agency were that the Claimant was not an employee of the Respondent and was independent; he was paid a commission and had no leave or allowances thereof; his medical scheme was voluntary; he was non-pensionable; and he was liable for his own statutory dues as the Respondent only withheld 10% tax for a consultant. On 8<sup>th</sup> may 2012 the Respondent was informed by its staff at the agency office of suspicious activities relating to the claimant; the Respondent officers confronted the Claimant and asked him to explain why he was conducting political activities unrelated with the business of the Respondent per the agency agreement; the Claimant admitted of his ambition to run for a political office and the Respondent then asked the Claimant to decide what he wanted to do and he pleaded for 3 days to consult with his supporters. On 10<sup>th</sup> May 2012, the Claimant resigned from his position.

14. The defence is also that the contents of the resignation letter from the Claimant was explicit. He stated his reasons for taking such action. Upon the resignation of the claimant, the Respondent accepted the same and discharged him and paid all accrued dues. The claim should be dismissed with costs.

15. In evidence, the Respondent witness was David Gichamba Gichuhi who testified that he was employed by the Respondent but has since left. However by 8<sup>th</sup> may 2012 he was working with the Respondent as the Group head of internal Audit at the head office. The Claimant was employed as the Business Development Manager as a consultant in Maverick Agency. Any agent selling insurance to the Respondent would be channelled through Maverick. The Claimant was paid a commission of his sales he brought to the respondent. Respondent staff were attached to Maverick agency.

16. On 8<sup>th</sup> May 2012 the witness got a tip off that there was money printing machine at the agency where the Claimant was working and together with Solomon Kasina and Edward Gakonyo they proceeded to the office as they thought the information shared was serious and wanted to establish if it was true. The accountant did a spot check on petty cash, he also found a bag stashed somewhere in a cabinet and when the witness went to find out the Claimant insisted that the bag was his personal property and refused to allow any checks on it. The bag was at a cabinet covered and was kept in a suspicious manner. When the witness went to the claimant's office, they met him driving away at 11am and insisted that he had a client to meet and he totally refused to meet with the 3 officers. They allowed the Claimant to drive off and waited at the boardroom.

17. Mr Gichuhi also testified that as they remained at the claimant's office, they interviewed the staff there who confirmed that the Claimant was running suspicious activities, late meeting and persons who had nothing to do with the business were frequent visitors. The staff felt threatened by all the suspicious persons visiting their office. There was apparent political activities around the office, unrelated to the Respondent business.

18. Later the Claimant came to the office and found the witness and 2 colleagues waiting for him to have a meeting. The Claimant requested to use the washroom but there was notice in the stationary store and the Claimant was running down the stairs carrying a bag that he placed in his car and he drove off. The witness followed him out but by the time he found the claimant, he was running towards a car with the

bag and it was driven off the gate. It was not clear who was driving the car as the Claimant quickly went back to the boardroom. The Claimant said that the bag had campaign materials and proceeded to give the witness a calendar and poster with his messages. It was apparent the Claimant was involved in political campaigns.

19. The witness also testified that when they questioned the staff in the office about the Claimant conduct, they shared a cheque issued to the Claimant at 50% payable to a brokerage that had been paid that had been paid by the Respondent – Manji Insurance broker – and the Claimant said that the chief officer of the brokerage was a friend and had a personal business of borrowing and lending. That the Respondent business commissions is not supposed to be shared with staff or a contractor or a consultant under payment by the respondent. The fact that the Claimant was responsible to allocate business to the brokerage, any payment back to him amounted to a conflict of interest. A cheque had been written tot eh Claimant from a client and he was in charge of allocating business and to do so from one entity against others was in clear breach of his contract. The payment to the Claimant was to ensure allocation of business and therefore a conflict of interest.

20. The witness also testified that the Claimant was under and consultancy agreement with the respondent. He had no salary but a commission for new business brought to the agency. Maverick had brokers and agents all through the agency. The pay slips issued to the Claimant used the general template for employees but his pay was not a constant and varied based on the payable commissions;

April 2012 kshs.96, 823.00;

May 2012 Kshs.380, 614.00;

June 2012 Kshs.228, 322.00.

21. `This was not basic pay but commission override of 1.35% because the payment system was the same to ease management and each had to be allocated a staff number. An ordinary pay slip has statutory deductions to NSSF and NHIF but the Claimant was only changed withholding tax at 10% as he was a consultant.

22. That the letter the wrote on 8<sup>th</sup> May 2012 was a statement explaining on the allegations of money printing in his office and confirmed the bag he had was holding campaign materials. The Claimant denied receiving kickbacks from Maji Insurance brokers but the chief officer admitted sending him cash. The Claimant asked for time off and requested for his assistant Amos Kiama to take over from him. On 10<sup>th</sup> May 2012, the human resource manager got a resignation letter from the Claimant on the grounds that he had political interest and was unable to do his work as an employee.

23. The claim for constructive dismissal does not apply to the Claimant as he was not an employee. Notice pay does not arise as the Claimant was not on a salary and had the option to leave.

24. The Respondent also called **Peter Gakinya** as their witness. He testified that he is the human resource Business Partner with the respondent. He joined the Respondent on 9<sup>th</sup> February 2015 and is familiar with the case from the human resource file. Angela Muthoni Wanyange was his predecessor and before was Mercy Nduku who have since left the Respondent employment. From the records, the Claimant was employed by the Respondent as a consultant in maverick agency and his last contract was 1<sup>st</sup> January 2012. The contract was open and had no time limit as it did not contain an exit clause. The Claimant was an agent paid a commission on the basis of medical insurance and covers sourced. The Claimant accepted the contract where he would recruit, supervise and train staff and the Claimant himself was not an employee of the respondent. Termination of the contract was by mutual agreement and notice of 30 days. The contract was to supersede any other contract between the parties. The pay slips issued to the Claimant had a staff number 808 as a standard practice in the sector to state the dues paid and for accounting purposes. The only deduction made against the Claimant was the 10% withholding tax.

25. That there was no constructive dismissal to warrant the claims set out by the claimant. Where the Claimant had any grievances against the respondent, such were never put into writing so as to be addressed. The resignation that followed was voluntary and with specific reasons which the Respondent accepted and paid the Claimant his dues.

### **Submissions**

26. The Claimant submit that on the question of jurisdiction, the Claimant admit that all the contracts signed between the parties referred the Claimant as 'consultant' and also declared him as not an employee. The same contract document also expressly indicate that the Claimant was an employee of the Respondent based on the evidence of the witnesses. The question of whether one was an employee or an independent contractor was addressed in the case of **Maurice odour Oketch versus Chequered Flag Limited [2013] eKLR** that the Court should go beyond terminologies employed by the parties in their pleadings so as to establish as to whether there was an employer/employee relationship. That the relationship between the parties was evidenced by job cards, local purchase orders and job contracts. In this case, the Claimant was issued with pay slips with an employee number and was designated as business development manager with monthly payments. Also the degree of control was of the nature that the Claimant was taken as an employee of the Respondent as held in the case of **Everret Aviation Limited versus Kenya Revenue Authority [2013] eKLR**. the court, in examining whether there is an employment relationship of consultancy must also be guided by the intention of the parties as held in **Kennedy kimani mburu & Another versus kibe Muigai Holding Limited [2014] eKLR**.

27. The Claimant submit that he worked for the Respondent for over 5 years on 12 months contract of engagement and such contracts determined on 31<sup>st</sup> December 2011 and the next contract had no time limit. For the period from January 2012 and until 10<sup>th</sup> may 2012 the Claimant had no contract designating him one way or the – as a consultant of employee. With an open-ended contract, the Claimant was an employee as the intention of the parties were such?

28. The Claimant also submit that clause 5 of his employment contract declared that he was not an employee of the Respondent but he was placed within the accountability structures of the respondent, he had supervisor with specific duties and responsibilities and this ranking within the Respondent made him under the control and direction as an employee. Clause 7 of the contract required the Claimant to operate within a structure and reporting lines as any employee would. He was not to serve any other employer for the duration of his contract and one (1) year after leaving the respondent. The probation period required of the Claimant is evidence of an employment relationship as this is addressed under section 42 of the Employment Act.

29. That unlike the contracts before 31<sup>st</sup> December 2011 which described him as a consultant, the last contract commencing January 2012 was replete with confirmations that the Claimant was an employee of the respondent. The Claimant was engaged as the Business development manger; he was responsible for sales unit; he was an agent of the respondent; he was to maintain the sales office; and was to exclusively operate from the assigned office. In the case of **Charles juma Oleng versus M/S Auto Garage Ltd & Another [2014] eKLR** the Court set out the tests to apply in assessing what was 'employment' and 'service' contracts. The test of control; integration; economic reality; and mutuality of obligation. That where these tests are applied on the claimant's case, he falls under an employee status with the Respondent as held in the case of **pam Golding Properties (PTY) Ltd versus Denise Erasmus & 2 Other, South Africa labour Court, Case No.C455 of 2007** where the dominant impression test was applied and the extent to which the employee was economically dependent upon the employer.

30. The Claimant also submit that he was constructively dismissed from his employment by the Respondent on the grounds that he was forced to resign from his position on 10<sup>th</sup> May 2012. The resignation was not voluntary and it was a culmination of 3 days intense pressure to resign. The Claimant was faced with wild allegations to which he responded to and had asked for time off to ease the pressure but this was not to be. Various officer keep on calling him to vacate office. Solomon Kasina called him and adviced him to take care. Such trauma led to his resignation. Such events leading to the resignation were confirmed by the respondents witness Mr Gichuhi. The resignation letter made reference to the

discussions held between the parties and though not set out, it is apparent, the resignation was in context of a meeting held with the human resource manager. The Respondent in accepting the resignation of the Claimant stated that the circumstances leading to the same was due to disciplinary nature. In that case therefore, the Claimant should have been subjected to the positions of section 41 and 43 of the Employment Act which was not the case. As held in the case of **Max Msoud Roshankar & Another versus Sky Aero Limited [2015] eKLR**, constructive termination is a concept appreciated and applied by the Court and occurs when an employee is placed under intolerable conditions and made to resign from his employment. The conduct of an employer may cause the employee to end the employment relationship and that is not voluntary an amount to a constructive dismissal.

31. The Claimant is therefore entitled to the remedies set out in his claim. Costs are also payable.

32. The Respondent submit that the service agreement between the parties was clear in that clause 2 was specific that the Claimant was on a consultancy agreement and not on employment with the respondent. The intentions of the parties were clear. It was also agreed that the Claimant would be paid a commission at 1.35% overriding commission which is not a salary and the employee number 808 was simple prudence in accounting for the payment. There was payment of withholding tax and not statutory deduction as required of an employee and the amounts paid were not constant and the commissions differed each month. Termination of the contract is by mutual agreement or where the Claimant was unable to perform and achieve his set targets. In **Maurice Oduor Oketch versus Chequered Flag Ltd, Cause No.12 of 2011** the Court held that to determine the intentions of the parties, one has to go beyond terminologies based on pleading and evidence. In this case the parties were clear in their intentions which were put into writing and it was agreed the Claimant was a consultant.

33. The Respondent also submit that the resignation of the Claimant was voluntary and cannot be inferred to be constructive dismissal. The Claimant wrote his own resignation letter noting that he intended to run for the Muhoroni parliamentary seat and thus resigned to be able to concentrate in his political campaigns. He admitted to these facts when faced by the audit team and even went ahead to share with them his campaign material as Mr Gichuhi testified. The elements for constructive dismissal set out in **Catherine Kinyany versus MCL Saachi & Saachi, Cause No.1795 of 2011** have not been satisfied. The breach to the contract of service was not by the Respondent but by the Claimant as held in **Civil Appeal No.20 of 2012, Coca Cola East Africa & Central Africa Ltd versus Maria Kagai Ligaga**.

34. In this case the Claimant lacks the capacity to claim for damages as he was not an employee and was paid all his terminal dues in accordance with his contract. There is no compensation as he voluntarily resigned. The case should be dismissed with costs.

## **DETERMINATION**

Whether the Court has jurisdiction

Whether the Claimant was an employee of the Respondent

Whether there are remedies due

35. the issue on jurisdiction of the Court and that of whether the Claimant was an employee or not are intertwined and will be addressed simultaneous and with that resolved, the other issues will have largely been addressed. The key issue here is the question of existence of employment or not. Section 2 of the Employment Act and the Labour Relations Act define who an employee is;

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

36. This is the basic definition of the ‘employee’ that parties, lay persons or entities not schooled in the law jargon may not articulate when entering into the intended relationship as correctly held by the Court in the case of **Kenneth Kimani Mburu**, noted above. The Court must go into the intentions of the parties

and look at the relationship between the parties and the true tenets of it. The object of control; whether there is payment of salary; eligibility to benefits at work; ability to hire and have own staff; and reference to the contract document.

37. In **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 ...*

38. In the case of **Frederick Byakika versus Mutiso Menezes International Unlimited, Cause No. 327 of 2014** the Court held that;

*Section 2 of the Employment Act define who an employee is. Such definition sets clarity with regard to the payment of salary or wage. An 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. ... 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 service ...*

39. The Claimant submitted annexure "VOK1", *Business Development Consultant Agreement* which agreement at clause 1.1.1 an *agent* is defined as;

*A person who has been contracted by AAR as a sales represented on commission basis to sell AAR medical insurance policies only and no other form of insurance.*

40. It was therefore understood by the parties thus at clause (2) (e);

*The company and the BDC have agreed to enter from the commencement date into an arrangement whereby the BDC will act as the Company's agent for the sale of medical insurance policies and provision of other related services as stated above subject to the terms and conditions hereafter appearing.*

41. The consideration for the service was also agreed at 1.35% override commission for both new and renewal business and the Claimant accepted the same as full and complete remuneration for the services rendered. The Claimant was not to claim any commission unless his name appeared on the application for assurance.

42. The findings by the Court in **Kenneth Kimani Mburu and Alfajiri Villas case**, above cited I find similarities with the claimant's case. Some of the defining characteristics of the claimant's case is that he was a consultant; he had no salary but a commission payable on an override commission at 1.35%; he was subject to withholding tax at 10% and did not pay statutory deduction; the benefits at work were not applicable as the Claimant was to pay for his own medical cover, had no leave days; and the parties had a written contract that recognise the Claimant as a Consultant.

43. Termination of the agreement was set out under clause 18. By mutual agreement and or notice of 30 days in writing; where the Claimant was unable to meet his performance targets; or the Claimant was incapacitated. I find, the Claimant invoked these provisions when he tendered his resignation on 10<sup>th</sup> May

2012 giving his reasons and intentions to vie for a political position in Muhoroni and this was confirmed when he shared campaign material with the audit team that visited him on 8<sup>th</sup> May 2012. The circumstances set out in the evidence of the claimant, I take it he applied for 3 days off to think through matters and had ample and sufficient time to consider his circumstances vis-a-vies his agency agreement with the Respondent and by tendering his resignation letter 3 days later, it was a voluntary act that has no bearing on any employment as I find no such relationship existed between the parties as the terms of the agreement are clear.

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

45. The non-existence of an employment relationship was noted in the defence. Without there being any employment relationship, the Claimant being a consultant, the suit herein cannot be sustained before this court.

46. I take special mention to both Counsels for the parties – **Mr Mbugua Mureithi** and **MK Mbichire** – the conduct of the hearing was exceptional and the detail given to the written submissions was most professional. Each party gave their best to this hearing. It is a best practice to be emulated. There will be no order to costs.

**The claim is dismissed. Each party shall bear their own cost.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 3<sup>RD</sup> DAY OF JUNE 2016.

**M. MBARU**

In the presence of

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