



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1466 OF 2011

COLLINS N. ONEKO.....CLAIMANT

VERSUS

G4S SECURITY SERVICES (KENYA) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by the Claimant, Collins N. Oneko seeking relief for unlawful termination of employment and payment of terminal dues. The claim is contained in a Memorandum of Claim filed in Court on 29th August 2011. The Respondent, G4S Security Services (Kenya) Limited filed a Memorandum of Reply on 28th February 2012.

2. At the interlocutory stage, my sister **Onyango J** considered a preliminary objection raised by the Respondent on the ground that this Court lacks jurisdiction to entertain the Claimant's claim because there was no employment contract between the parties. The Judge concluded as follows:

“ I find that this is not a suitable case for a preliminary objection as the facts as set out in the pleadings and the submissions by the parties will require to be supported by other evidence for the Court to make a determination on whether or not the relationship between the Claimant and the Respondent constitutes an employment relationship or a contract for services.”

3. The matter eventually proceeded to full hearing before me with the Claimant testifying on his own behalf and Epimach Maritim for the Respondent.

The Claimant's Case

4. The Claimant states that he was engaged by the Respondent as a consultant for the period commencing on 15th October 2010 and terminating on 31st July 2011. The engagement was subject to renewal.

5. It was a term of the contract that the Respondent would pay the Claimant:

a) Kshs. 500,000 gross pay

b) 20% for the first Kshs. 1,000,000 additional gross revenue generated above the monthly targets inclusive of the 'back to basics' and 25% thereafter;

c) Kshs. 10,000 airtime per month.

6. It was a further term of the contract that it may be terminated by either party giving 14 days' written notice.

7. The Claimant states that on 29th October 2010, the Respondent, through its Human Resource and Change Director, Epimach Maritim and without any notice verbally terminated the consultancy agreement.

8. On 1st November 2010, the Respondent issued a letter to the Claimant purportedly to regularize the notice requirement. The letter was sent by mail to the Claimant on 5th November 2010.

9. The Claimant denies the allegations cited as reasons for termination in letter dated 1st November 2010. He now claims the following:

- a) 15 days worked in October.....Kshs. 250,000
- b) 3 months' and 15 days not worked as per contract.....1,750,000
- c) Airtime allowance for 4 months.....40,000
- d) Damages for wrongful and unfair termination of services
- e) Costs plus interest

The Respondent's Case

10. The Respondent's defence is contained in its Memorandum of Reply dated 28th February 2012 and filed in Court on even date.

11. The Respondent admits having engaged the Claimant as a sales consultant for a period of three and half months from 15th October 2010 to 31st January 2011. The consultancy agreement could be terminated by either party upon giving 14 days' notice.

12. The Respondent cites the terms of the consultancy agreement as follows:

- a) The key performance indicators upon which the consultancy was based were specified;
- b) The Claimant was to receive a consultancy fee in the sum of Kshs. 500,000 being a base fee for the period, and a flexible remuneration based on the attainment of set targets;
- c) The Claimant was required to submit a fee note for the payment of the consultancy fee at the end of each period;
- d) The contract expressly stipulated that the consultant was not an employee of the Respondent and that his only entitlement arising therefrom was the consultancy fee. The Claimant was responsible for his income tax liabilities and other statutory payments.

13. The Respondent states that the Claimant was notified of the Respondent's intention to terminate the contract upon which the letter giving notice of the termination was issued.

14. The Respondent denies that the letter dated 1st November 2010 giving notice of termination was illegal or an attempt to regularize a requirement for notice. The consultancy agreement provided for termination by 14 days' notice.

15. The Respondent further states that there was no requirement in the consultancy agreement for either party to give any reasons for termination. The agreement did not create a contract of employment and as

such the Employment Act does not apply in this case.

16. It is the Respondent's case that this Court lacks jurisdiction to hear the claim as this is not an employment matter.

17. In any event, even if the contract between the parties created an employment relationship, the Claimant has no right to make any claim for unfair termination by dint of Section 45(3) of the Employment Act which provides that only an employee who has worked continuously for a period of more than 13 months has the right to complain that they have been unfairly terminated. The Claimant was on a contract of less than four (4) months.

Findings and Determination

18. There are three (3) issues for determination in this case:

- a) Whether the contract between the Claimant and the Respondent created an employment relationship;
- b) Whether the Claimant has made out a case for unfair termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

19. The Respondent's line of defence is that there was no employment contract between the parties capable of enforcement by this Court.

20. The existence of an employment relationship in claims brought before this Court is an important jurisdictional issue. 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”

21. The same section defines an employer as:

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

22. A contract of service is defined as:

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”

23. So was there an employment relationship between the Claimant and the Respondent? Clause 4 of the contract dated 15th October 2010 which is referred to as a consultancy contract provides in part:

“During the period of this agreement the Consultant will avail himself during each working day of this agreement. The primary location of the operation will be G4S Head Office on Witu Road and the regular working hours will be 08.15Hrs to 17.15Hrs with one hour lunch break to be taken between the hours of 1300Hrs and 1400Hrs.”

24. Traditionally under common law, control of the employee under the employer's chain of command and integration of the work performed by the employee into the core business of the employer were used as a litmus test to determine the existence of an employment relationship.

25. Times have however changed and the work place has evolved meaning that these factors are no longer

conclusive (see **Kimondo J** in *Everret Aviation Limited Vs the Kenya Revenue Authority [2013] eKLR*).

26. This is in line with the holding by the Supreme Court of Canada in *Ontario Ltd v Sagaz Industries Inc. 2001 SCC 59* to the effect that in determining whether an employment relationship actually exists, the Court must examine the total relationship between the parties.

27. The Court must also examine the intention of the parties not only as expressed in the documents of engagement but as evidenced in the fundamental behaviour of the parties as well.

28. I have examined the contract dated 15th October 2010 and find that although the Claimant is referred to as a consultant he was, for the duration of the contract, to be under the total control of the Respondent.

29. He was assigned normal working hours with the possibility of working beyond these hours. There was therefore no chance that he could pick up any other assignment during the contract period. Additionally, the work he was to perform was fully integrated into the Respondent's core business.

30. I have therefore reached the conclusion that the aforesaid contract established and created an employment relationship between the Claimant and the Respondent.

31. Regarding the question whether the claimant has a remedy under the employment Act, 2007 in light of section 45 (3) of the Act, I am persuaded by the decision in *Samuel G. Momanyi v Attorney General [2012] eKLR* to the effect that any statutory provision that bars an employee from enjoying rights guaranteed under the constitution is unconstitutional.

The Termination

32. On 1st November 2010 the Respondent wrote to the Claimant as follows:

“Dear Collins,

RE: Termination of Contract

I refer to a meeting of the 29th October 2010 during which I informed you of the company's decision to terminate your contract.

As I informed you, this decision was necessitated by your failure to report on duty on the Monday 25th and Tuesday 26th without permission, contrary to employment regulations.

In addition on three occasions while in employment you engaged in behaviour inconsistent with your appointment, company values and regulations.

You will be paid the equivalent of 14 days based on the base pay agreed.

Kind regards

For G4S Security Services

Epimach Maritim

Human Resources and Change Director”

33. From this letter, the reason for termination of the Claimant's employment was failure to report on duty for two days and engagement in some unspecified behaviour which the Respondent considered as offensive.

34. In his testimony before the Court, the Claimant admitted being away from duty on 25th and 26th October 2010 adding that he had sent a short text message (sms) to the Human Resources and Change Director, Epimach Maritim.

35. On his part, Maritim told the Court that the Claimant did not communicate about this absence. On this account alone, it would appear that the Respondent had a valid reason for the termination as anticipated under Section 43 of the Employment Act, 2007.

36. There was however no evidence that the Claimant was subjected to the mandatory disciplinary procedure set out under Section 41 of the Act and this failure renders the termination procedurally unfair.

Remedies

37. Pursuant to the foregoing findings I award the Claimant one (1) month's salary in compensation for unfair termination. I also award him salary for 15 days' worked in October 2010.

38. Ultimately I enter judgment in favour of the Claimant as follows:

a) One month's salary in compensation.....Kshs. 500,000

b) Salary for 15 days worked in October 2010.....250,000

Total.....750,000

39. The judgment amount will attract interest at court rates from the date of the judgment until payment in full.

40. The Claimant will have the costs of this case.

41. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF NOVEMBER 2016

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JUDGE

Appearance:

Mr. Oduk for the Claimant

Mr. Makori for the Respondent