



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2012 OF 2012

(Before Hon. Justice Maureen Onyango on 26.1.2015)

GERALD OWINO OYUBO CLAIMANT

-VERSUS-

VISION AFRICA-GIVE A CHILD A FUTURE RESPONDENT

JUDGMENT

This case was commenced by a Memorandum of Claim dated 3rd October 2012 and filed in court on 5th October 2012. The claimant Gerald Owino Oyubo alleges that the respondent Vision Africa-Give a Child a Future, illegally deducted his salary, unfairly terminated/dismissed him and failed to pay his terminal benefits and compensatory damages.

The claimant pleaded in the Memorandum of Claim that the respondent is a non-governmental organization registered under the Non-Governmental Organizations and Co-ordination Act. That sometime in November 2001 the claimant teamed up with other officials to form the respondent's organization. Upon registration he was employed as project Co-ordinator and Secretary. The claimant alleges that in 2002 he was promoted to the position of Assistant Administrator, housed at Karen Murishu Road, granted a medical cover and a salary of Kshs 113,300/=. In April 2010 his salary was reduced to Kshs 100,000/= unilaterally and without notice or explanation. When he complained the respondent promised to pay the balance when funds became available.

In June 2010 his salary was further reduced to Kshs 72,000/= and in February 2011 the salary was again reduced further to Kshs 36,000/= per month. The claimant alleged that his salary was finally stopped on 3rd December 2011. When he inquired from the respondent's officers why the salary was stopped, he was informed that he had been dismissed from employment. He alleges that the reduction of salary was intended to frustrate him into resigning from his job. The claimant alleges the dismissal was unfair as he was never notified of the intention to dismiss him or the reasons for dismissal, he was never given a hearing and due process was not followed. He claims the following:-

- a. **A declaration that the unilateral reduction of the claimant's salary from April, 2010 to December, 2011 was illegal and unfair and that the claimant is entitled to payment by the respondent the total of the amounts unlawfully deducted from this salary as pleaded.**
- b. **A declaration that the respondent's dismissal or termination of the claimant from employment was illegal and unlawful and that the claimant is entitled to payment of his**

- terminal dues and compensatory damages as pleaded.**
- c. **An order for payment of the claimant's terminal dues and compensatory damages totaling to Kshs 3,292,020/=.**
 - d. **An order for the respondent to pay cost of this suit plus interest thereon.**

The claimant filed Supplementary List of Documents on 12th April 2013 and a Further List of Supplementary Documents on 31st March 2014.

The respondent filed a Memorandum of Response dated 20th December 2012. It admitted that the claimant was registered as Secretary of the respondent but in an honorary capacity upon registration of the respondent in November 2001. The respondent denied ever employing the claimant as Project Co-ordinator or in any other capacity. The respondent averred that the claimant was the proprietor of St. John's Children's Centre in Riruta, Nairobi which operated as a fee paying primary school program. Sometimes in 2003 the respondent entered into an arrangement to support some children at the claimant's school whose parents could not afford to pay tuition fees by catering for food for the children, rent for the school premises, contribution to staff salaries and tuition. The respondent further averred that the assistance was sourced from donations from well wishers in the United Kingdom.

The respondent further averred that some time in 2009 it became evident that the claimant was not able to sustain the running of the school, a situation that persisted until January 2012 when the claimant was forced to close down the school.

The respondent further averred that the Kshs 113,550/= deposited in the claimant's account was not his salary but the donations to the school made up as follows; salaries contributions Kshs 23,000/=; food for children Kshs 28,350/=; rent for school premises Kshs 19,000/=; and tuition Kshs 43,200/=. The respondent denied that the claimant is entitled to the sums of Kshs 3,292,020/= as claimed in the Memorandum of Claim and prayed that the claim be dismissed with costs.

The case was heard on 2nd and 4th April and 8th July 2014. Parties thereafter filed written submissions. The claimant was represented by Mr. Namada instructed by Namada & Co. Advocates while the respondent was represented by Ms. Ouma instructed by B. A. Ouma & Associates Advocates.

The claimant testified on his behalf while the respondent called 2 witnesses, AGNES VERONICA PACKARD, RW1 and DEBORAH RUTH KIMATHI, RW2.

The claimant testified that he was an employee of the respondent from 29th November 2001. On that date he met with Rev. John Robert Packard and Mrs. Vera Agnes Packard at New Day Coffee Cafe where they discussed about his employment and agreed on a salary of Kshs 113,300/= per month. The respondent was not registered at the time in Kenya. It had just been registered in UK as a charity. It was registered in Kenya in 2004 and the claimant facilitated its registration. He was assigned duties of secretary.

The claimant testified that the respondent runs educational programs in children's centres and public primary schools. Some of its projects are Riruta Children's Home which was called St. Johns, Seed of Hope in Langata, Kibera Feeding Program and Educational Centre where it sponsored books, pencils and feeding programs at St. Juliet, School of Hope, St. Charles, Kibera Lutheran, Kibera Girls Soccer Academy and Kibera Mpira Mtaani. Other projects were at Miwahi in Lwanda called Tete Project, a community nursery school, Nyamwanga and Busire Primary Schools in Butula District in Busia County where the respondent sponsored feeding programs, and constructed classrooms. There was also an outreach medical clinic at Busire and a fee paying program at Nangima Girls Primary School and Nambogot Secondary School. Other projects were in Kandara in Muranga County, Embu, Gucha and Kisii.

The claimant was involved in most of the projects. He set up and managed Riruta Education Centre for Children between age 4 and 14.

The claimant testified that he was dismissed without reason. His employment was terminated verbally by Debra Ross at the beginning of 2012. The respondent closed down the school in Riruta and asked him to look for other schools to absorb the children and the respondent paid their fees.

Claimant further testified that originally he was paid through money transfer to his account at K-Rep Bank. In 2008 he was advised to open an account with Equity Bank and did so at Kawangware branch. After that the mode of payment of salary changed to cheque.

The claimant prayed for payment as set out in the Memorandum of Claim. The claimant denied that Riruta School was his own personal project and the money paid to him was donations for the project.

RW1 for the respondent testified that she was a founder of the respondent and Field Director. That the respondent is a charitable organization established to facilitate needy and destitute children in Kenya. It was first founded as a charity in the UK. The UK Charity Commission gave it a licence to raise funds and the respondent has to account for the funds.

RW1 testified that she knew the claimant when her husband was working at Thomas Banado Children's Home in Nairobi as Chief Administrator. She stumbled on the claimant who was a teacher at an informal school called School of Hope when she went to donate food to some destitute children in Kibera near the school in 2000. The claimant was the head teacher. The claimant's pupils did not have school books and RW1 offered to supply them with books and pencils. She also supplied the pupils with food on daily basis.

On one of the occasions while she was there two Parent Teachers Association (PTA) members persuaded her to assist the claimant to set up his own school as he was a good teacher but was being frustrated by the proprietor of School of Hope. RW1 made the request to the Board of Vision Africa who agreed to sponsor one in every 8 fee paying students enrolled at the claimant's school. The charity also agreed to contribute Kshs 8,000/= towards rent, help with buying desks and supplement the claimant's salary with Kshs 5,000/=. The claimant ran the school as his own.

In 2002 the government enacted legislation requiring all schools to be registered. RW1 gave the claimant the registration fees but he was unable to register as he did not meet the qualifications and other requirements. She sought sponsorship in UK for 70 children at \$5 per month which she used to pay tuition and provide uniforms. She also provided a feeding program for all the children in the school.

RW1 denied ever paying the claimant a salary. She testified that all staff with the charity were volunteers who were only paid an allowance. The claimant was paid by the school.

RW1 left Vision Africa in January 2011 when her husband fell sick and required to be relocated to the UK. Her role was taken over by Deborah RW2.

The claimant was secretary to Vision Africa, a position that was not salaried, but was a requirement of the NGO Law.

RW2 Deborah Rita Kimathi (Ross) testified that she works for the respondent as Field Director. She testified that she had worked for the respondent from 2002. She testified that the claimant was never an employee of the respondent. He was only a secretary, which is a voluntary position. She testified that St. John's Riruta belonged to the claimant and the respondent partnered with him and a number of other projects for disadvantaged children where the respondent helped in different ways such as feeding programs or paying fees.

I have considered the pleadings and documents attached thereto including additional documents filed in court. I have also considered the oral evidence adduced in court and the submissions filed as well as the authorities cited.

The issues arising for determination are the following:-

- i. **Whether the claimant was employed by the respondent.**
- ii. **Whether the claimant's employment was unfairly terminated.**
- iii. **Whether the claimant is entitled to the prayers sought.**

On the first issue, the claimant has alleged that he was employed by the respondent in 2001. In support of his claim the claimant has relied on a letter dated 18th March 2009 addressed "To whom it may concern" by Deborah Kimanthi, the respondent's Field Director where she states that the claimant had worked with the respondent since 2001 as Project Co-ordinator. The claimant also relied on an organizational structure attached to some minutes in the memorandum of claim, a job card, pay deposit advises for the bank and several letters addressed to the Executive Director of the Non-Governmental Organization describing the claimant variously as co-ordinator and Secretary. The claimant further relied on minutes in which the claimant acted as secretary. The claimant also relied on documents filed with the Non-Governmental Organization Board annual returns and change of officials forms in which he is described as secretary.

The claimant produced his bank statement and several bank transfer forms to show that he received a salary from the respondent.

On its part the respondent states that the claimant was never an employee of the respondent but was the owner of one of the projects sponsored by the respondent St. John's Children Centre Riruta, which the claimant referred to himself variously as head teacher, principal and managing director of the Project. The respondent also produced various minutes and reports of projects it sponsored in which the claimant is referred to as proprietor of St. John's Children Centre Riruta. They also produced letters from the claimant seeking financial assistance from the respondent for the school and reports discussing assistance to the school.

I find that there are too many unanswered questions about the status of the claimant. In some of the deposit slips, the project is named as St. John's Riruta and the payee as G. Oyubo. The amount paid is defined as project support or monthly support. Where there is reference to salary it is referred to as salaries and expenses.

There is nowhere in the evidence before the court where there is reference to the claimant's terms and conditions of employment. The claimant did not explain why he would be seeking financial assistance for the school from the respondent if he was an employee of the respondent and running the project on behalf of the respondent. In the Non-Governmental Organization Board Annual Report Draft Form 14 submitted by the claimant in his Further Supplementary List of Documents filed in court on 31st March 2014, the claimant names himself as the secretary and contact person for the respondent. Under personnel emoluments at paragraph 10 he states that there are none for local staff and none for international staff. At paragraph 16 the form he states there are no local staff, but there are 3 international staff who are volunteers. The claimant's name is given as one of the directors.

From all the documents on record, I am not convinced that the claimant was employed by the respondent.

It is trite law that he who alleges must prove. I find that the claimant has not proved that he was an employee of the respondent. All he has proved is that he had a relationship with the respondent one that, the respondent has explained was as a proprietor of one of the projects it assisted.

For this reason the claim by the claimant must fail as all the other prayers are hinged on his being an employee of the respondent.

The case is dismissed with no orders for costs.

Dated and delivered in Nairobi this 26th day of January 2015.

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)