



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1154 OF 2011

ZACHARIAH KERAUNI MAOSA.....CLAIMANT

VS

BRITISH AMERICAN INSURANCE CO (K) LTD.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 7th July and filed in Court on 14th July 2011, the Claimant seeks payment of terminal dues. The Respondent's defence is contained in a Memorandum of Response dated 2nd August and filed in Court on 4th August 2011. In reply to the Respondent's Response, the Claimant filed a supplementary Memorandum of Claim on 24th October 2011. At the hearing, the Claimant testified on his own behalf and the Respondent did not call any witnesses. Both parties filed written submissions.

The Claimant's Case

2. The Claimant states that he worked both as an employee and an agent of the Respondent from August 1976 until April 1997 when he was retired without notice. The Claimant further states that the Respondent has failed to pay him his terminal dues.

3. He claims the following:

a. Pay in lieu of notice

b. Pension

c. Security bond

d. Commissions

e. Retirement benefits

f. Service for 21 years.....Kshs. 355,488.00

g. Leave allowance for 21 years.....355,488.00

h. House allowance for 21 years.....710,976.00

i. Costs and interest

The Respondent's Case

4. In its Memorandum of Response filed on 4th August 2011, the Respondent states that the Claimant's claim is statute barred. The Respondent further states that the Claimant was its agent up to the year 1997 when he resigned on his own volition. It is the Respondent's case that the Claimant was not an employee but an agent paid on commission basis and is therefore not entitled to the remedies sought.

5. The Respondent goes on to state that the claim for pension can only lie against the Pension Scheme. At any rate, the claim could only arise in 1997 when the Claimant retired and it is therefore statute barred.

Findings and Determination

6. The issues for determination before the Court are as follows:

- a. Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by this Court ;
- b. Whether the Claimant's claim is statute barred;
- c. Whether the Claimant is entitled to the remedies sought

The Claimant's Employment Status

7. The question as to whether the Claimant was an employee of the Respondent is central to the claim now before the Court. On his part, the Claimant states that he was both an employee and an agent of the Respondent. The Respondent on other hand denies the Claimant's averment in this regard, stating that the Claimant was always a commission agent.

8. If indeed the Claimant was an employee, his employment would have been governed by the repealed Employment Act (Cap 226). Section 2 of this Act defines an employee as:

“an individual employed for wages or salary and includes an apprentice and an indentured learner”

9. The same section defines an employer as:

“any person, or public body or any firm, corporation or company, who or which has entered into a contract of service to employ any individual, and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”

10. The question then is whether the Claimant was an employee of the Respondent as defined in the applicable law.

11. In ***Ontario Ltd v Sagaz Industries Inc. 2001 SCC 59***, the Supreme Court of Canada held that in determining the existence of an employment relationship, courts must examine the relationship between the parties in its entirety.

12. Traditionally under common law, the tests of control of a person under an employer's chain of command and integration of the work performed by that person into the core business of the employer were applied to determine the existence of an employment relationship.

13. Jurisprudence has however grown to accommodate changes at the work place and as held by **Kimondo J** in *Everret Aviation Limited v the Kenya Revenue Authority [2013]eKLR*), the two tests of control and integration are no longer conclusive. The Court must go further and examine the intention of the parties as expressed in the documents of engagement and evidenced in the fundamental behaviour of the parties.

14. In support of his position that he was an employee, the Claimant produced a payslip for the month of February 1997. An examination of this payslip reveals that the Claimant was paid total earnings of Kshs.16,927.55. made up of several categories of commissions. Further, the deduction side shows that a withholding tax of Kshs.1,692.75 was recovered from the Claimant's earnings.

15. In the normal scheme of things, an employee would earn a basic monthly salary which remains constant barring adjustment in annual increment or periodic salary review. Additionally, the salary of an employee would ordinarily be subjected to Pay As You Earn (PAYE) and not withholding tax. In *John Kawa Ilume v Gemina Insurance Co. Ltd [2014] eKLR O.N Makau J* held that a monthly retainer fee paid to a claimant does not confer an employment relationship as defined in law.

16. With regard to the instant case my conclusion is that although there was a work relationship between the Claimant and the Respondent, there was no employment relationship as defined in the applicable law. In this regard, I affirm the decision of this Court in *John Kamau Mburu v Program for Appropriate Technology in Health (PATH) & Another [2015] eKLR* that an employment relationship is not the same as a work relationship and the mere fact that parties work together does not necessarily give rise to an employment relationship.

17. That said, the Court must ask whether it has jurisdiction to entertain the Claimant's claim at all. The jurisdiction of this Court is anchored in Article 162(2)(a) of the Constitution which provides as follows:

(162)(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations and

(b).....

18. Pursuant to this constitutional provision, Section 12 (1) (a) the Employment and Labour Relations Court Act provides that:

12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b);

19. My understanding of these provisions is that the jurisdiction of the Employment and Labour Relations Court in as far as employment matters are concerned is premised on the existence of an employment relationship as defined in law. It follows therefore that this jurisdiction is limited and the Court has no leeway to entertain claims arising from any work relationship that is not an employment relationship. Such claims would fall within the province of regular civil courts. I need to add that as far as pension claims are concerned, original jurisdiction lies with the Retirement Benefits Authority.

20. In light of the finding on jurisdiction, this Court has no more business in this case and I will not therefore rule on the other issues raised for determination. The result is that the Claimant's claim as filed before this Court fails and is dismissed with no order for costs.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF
NOVEMBER 2015**

LINNET NDOLO

JUDGE

Appearance:

Mr. Babu for the Claimant

Miss Kageni for the Respondent