



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 229 OF 2013

KENYA HOTELS & ALLIED WORKERS UNION

CLAIMANT

v

ALFAJIRI VILLAS (MAGUFA LTD)

RESPONDENT

JUDGMENT

1. The Kenya Hotels & Allied Workers Union (Union) filed a claim against Alfajiri Villas (Magufa Ltd)(Respondent) on 26 July 2013 and the issue in dispute was stated as '*unfair/unlawful lock out of Mr. Thomas K. Nzai*'(Grievant).

Union's case

2. According the Union's pleadings, the Grievant was employed by the Respondent as a carpenter on 1 November 2003 until 4 September 2010 when he was locked out. The salary was Kshs 12,000/- per month.
3. Further, the Grievant was never granted annual leave or paid house allowance; did not receive any warning letter and was not accorded a chance to be heard and that a trade dispute was reported to the Minister for Labour and the Conciliator recommended reinstatement which the Respondent declined.
4. The Union also pleaded that the claim was based on the Regulation of Wages (Hotel and Catering Trades) Order and the Regulation of Wages (General) (Amendment) Order, 2011.
5. The Grievant gave sworn testimony and was cross examined. He stated that he was employed by the Respondent as a carpenter on 1 November 2003 and that one morning he reported to work but that he was dismissed, and he left and that he was not given any reasons after which he reported to the Union which in turn reported a trade dispute to the Minister for Labour. A Conciliator was appointed and he recommended his reinstatement but the Respondent did not accept the recommendation.
6. On the issue of remuneration, the Grievant testified that he was being paid at a daily rate of Kshs 400/- through petty cash and he would sign for it.
7. During cross examination, the Grievant stated that he was employed by a Mohamed Mkale in 2000 until 2001 when he joined the Respondent under a subcontractor called Karisa and that in 2002 the subcontractor was dismissed and the Respondent consequently engaged the ten employees who had served under the contractors.
8. He further stated the Respondent's security guards used to take attendance at the gate and that his supervisor was one Emmanuel Kalinga. He also named some of his colleagues.

9. He further stated he was a private member of the Union and was not issued with a receipt or membership card and confirmed, when shown an attendance register that his name was not recorded on it and that he did not work during the month of September 2010, and that he never went on leave
10. The Union therefore seeks on behalf of the Grievant, two months pay in lieu of notice, gratuity, accrued leave, four days worked in September 2010, accrued house allowance, compensation and damages all totalling Kshs 4,504,000/- and a certificate of service and costs.

Respondent's case

11. The Respondent filed a Reply to statement of Claim on 21 August 2013 and the thrust of its pleading was that the Grievant was initially employed as a subcontractor and later became an independent contractor or alternatively was employed as a casual labourer and was summarily dismissed on 10 October 2010 for breaching the terms of his employment as a casual labourer.
12. The Respondent in support of its case also filed extremely voluminous documents comprising of records of National Social Security Fund and National Hospital Insurance Fund for November 2003 to October 2010.
13. Three witnesses testified on behalf of the Respondent.
14. The first was Francis Ngata, an accountant with Protsabo Ltd, a sister company to the Respondent. He stated his duties included preparation of payroll and submission of statutory deductions. He also stated that according to the register kept by the security guards, the Grievant was absent in August and September 2010 and that he was told the Grievant had deserted duty because he had not filed any form seeking to be absent from duty.
15. He further testified that the Grievant's name did not appear in the National Social Security Fund and National Hospital Insurance Fund records for period 2003 to 2010 and therefore he was not an employee of the Respondent, and further that the Grievant did not have a good relationship with one of the Respondent's directors Marka Saratina.
16. In cross examination, the witness was categorical that the Grievant was not a casual employee but a private contractor and that he was being paid through petty cash. He also confirmed conciliation was attempted.
17. The Respondent's second witness was Joseph Makonge, a security officer with Probatso Ltd. He kept the register maintained at the gate for those coming in. He stated the Grievant's name was in the register and that the Grievant was absent for about ten days in August and September 2010.
18. The witness also stated that the Respondent's director asked for the Grievant on 4 October 2010, and he informed her he was absent. The Director then informed him not to allow the Grievant in when he reported but he forced himself in the next day when he reported and he was requested to bring a letter explaining his absence but he never saw him again.
19. The third witness was Mwatela Kalinga, a supervisor. He stated he had worked with Respondent from 1995 and knew the Grievant and that he had come as a carpenter working for an independent contractor called Mohamed Mkala and later under one Karisa until 2003, when he continued working with the Respondent. He also testified the Grievant would use his own tools and that he was not a permanent employee but a casual and therefore did not need to seek leave of absence and further that the Respondent at some point started paying them directly because the independent contractors were not paying wages promptly.

Questions arising

20. From the pleadings, testimony and submissions, the issues arising for determination are What was the nature of contractual relationship between Grievant and Respondent (whether the Grievant was a casual or a subcontractor/independent contractor); whether Grievant was unfairly terminated and if so, appropriate relief.

Nature of contractual relationship

Casual employment

21. The relationship between the Grievant and the Respondent traversed two different legal regimes. Both section 2 of the Employment Act, Cap. 226 (repealed) and Section 2 of the Employment Act, 2007 defines a 'casual employee' to mean a person whose terms of engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.
22. It is not in dispute that the relationship between the Grievant and Respondent started around 2002/3. It is the Respondent who pleaded in the alternative that the Grievant was a casual employee.
23. Section 14 of the Employment Act (repealed) provided that

14. (1) Every contract of service -

(a) for a period, or a number of working days which amount in the aggregate to the equivalent, of six months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of six months,

shall be in writing.

(2) For the purpose of signifying his consent to a written contract of service, an employee may either -

(a) sign his name thereon; or

(b) imprint thereon the impression of his thumb or one of his fingers, in the presence of a person other than his employer.

(3) Every employer who is a party to a written contract of service shall be the person responsible for causing the contract to be drawn up and consented to by the employee in accordance with subsection (2).

(4)

(5)

24. The Grievant served the Respondent for more than 6 months and in my view the Respondent had a duty to reduce the contract between it and the Grievant into writing once the six month period had expired. It did not.
25. Section 9 of the Employment Act, 2007 has replicated what was provided for in the repealed Act.
26. Further, section 37 of the Employment Act, 2007 makes it mandatory that where a casual employee works continuously for a period of working days amounting in the aggregate to the equivalent of not less than one month or performs work which cannot be completed within a number of working days amounting in the aggregate to three months, it shall be deemed converted to a term contract.
27. By operation of the law (repealed Employment Act and Employment Act, 2007), the Grievant was not a casual employee as urged in the alternative by the Respondent.
28. Further, the Respondent's own witness who was a supervisor in Maintenance under which the Grievant's duties fell was categorical that the Grievant was not a casual employee.

Subcontractor/independent contractor

29. The principal defence pleaded by the Respondent was that the Grievant was a subcontractor and later on an independent contractor. The evidence to support this plea came from the three

- witnesses called by the Respondent.
30. The Respondent's first witness Francis Ngata testified that the Respondent's payroll records did not have any details on the Grievant and further that the Grievant's name did not appear in the National Social Security Fund and National Hospital Insurance Fund returns for the period 2003 to 2010. He also testified that permanent employees were issued with letters of appointment which the Grievant did not have. This witness was categorical the Grievant was not a casual employee but a private contractor.
 31. The second witness kept a register of workshop staff to record details of employees coming in. The Grievant's name was in the register.
 32. The third witness was a supervisor in the Maintenance department and his evidence was that the Grievant initially came as a carpenter under a Mohamed Mkala and later a Mr. Karisa until around 2002 when he was later taken by the Respondent, which later on started paying him wages directly at the end of the week, and that the Grievant used his own tools.
 33. Drawing a distinction between an employee and an independent contractor depends on statute, and tests which have been set out case law. These tests include organisation/integration test conceived in context of the professional worker? see *Cassidy v Min.of Health* [1951] 2 KB 343 and multiple or mixed factor test which was initially formulated in *Ready Mixed Concrete v Min.of Pensions* [1968] 2 QB 497.
 34. An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th Cheque and so on.
 35. The Union asserted that the Grievant was an employee of the Respondent as a carpenter at a monthly salary of Kshs 12,000/- under certain terms.
 36. For the Respondent to successfully claim otherwise it was incumbent upon it to meet the threshold set by section 10(7) of the Employment Act.
 37. The evidence before the Court is that the Respondent was paying the Grievant wages and it was not suggested at all that he would work and send an invoice to the Respondent to settle, say like the plumber who is tasked to repair a broken wash basin pipe, quotes his price, does the job and is paid.

Whether the Grievant was unfairly terminated

38. The Respondent's contentions that the Grievant was either an independent contractor and or casual employee have fallen by the way side.
39. The determination therefore of whether his termination was unfair or not is not a difficult task. Section 41 of the Employment Act, 2007 was not complied with. The Director of the Respondent simply informed the Security Manager to tell the Grievant not to come to work and the next day he forced himself in.
40. The Respondent has not demonstrated that and how it complied with the procedural fairness requirements of the Act.
41. On substantive fairness, sections 43, 45 and 47(5) of the Act require an employer to prove the reasons for termination, that the reasons are valid and fair, and to justify the grounds.
42. There was evidence that the Grievant was absent for about 10 or so days in August and September 2010 and that he never sought for leave. Because of the conclusion I have reached that the termination was procedurally unfair, I need not consider whether the Respondent has met the statutory obligation placed upon it to prove the substantive reasons in a case of unfair termination.

Appropriate relief

Two months pay in lieu of notice

43. No contractual basis was laid before the Court for claiming two months pay in lieu of notice.

Having reached the conclusion that the Grievant was on term contract, I would award him the equivalent of two months wages in lieu of notice pursuant to regulation 20 of the Regulation of Wages (Hotel and Catering Trades) Order.

Gratuity

44.No contractual or statutory foundation for this head of relief was laid and it is dismissed.

Accrued leave

45.The Grievant sought Kshs 57,000/- as accrued leave. The number of days was not mentioned nor the formula used to arrive at the claimed figure. Sections 10 and 74 of the Employment Act oblige employers to keep records including entitlement to annual leave. The employer is further obligated to produce the prescribed particulars in legal proceedings.

46.In the circumstances, I would award the Grievant Kshs 57,000/- in lieu of outstanding/accrued leave.

4 days worked in September 2010

47.The Union sought Kshs 1600/- being wages for days worked in September 2010. This head of claim was not rebutted and is awarded.

Accrued house allowance

48.The Union did not suggest or argue that the wages of Kshs 12,000/- was not inclusive of house allowance or that it was below the minimum monthly wages. The same is dismissed.

Compensation

49.There are three primary remedies where the Court makes a finding of unfair termination or wrongful dismissal. One of the remedies is the equivalent of a number of months' gross wages not exceeding twelve months.

50.The remedy is discretionary, and where the Court decides to exercise its discretion in favour of a Claimant, the Court is enjoined to consider any, some or all the thirteen factors outlined in section 49(4) of the Employment Act. Towards this end, a Claimant should always strive to place the material of such a nature as may enable the Court exercise its discretion fairly.

51.When such material is placed before the Court, the Respondent will inevitable have the opportunity to also put in its side of what is fair since the Court will be balancing the statutory rights of employees and economic interests of employers.

52.The Grievant had served the Respondent for about 8 years. He is a carpenter and it cannot be said that securing alternative employment or business would be difficult. The Grievant did not controvert the evidence that he had an own workshop.

53.Considering the aforementioned, I would award the Grievant the equivalent of six months gross wages, which I assess as Kshs 72,000/-, as compensation.

Damages (29 years salary)

54.No contractual or statutory foundation for this head of relief was given. It is dismissed.

Certificate of Service

55.A Certificate of Service is a statutory right under section 51 of the Employment Act, and the Respondent is under an obligation to issue the Grievant with one.

Costs

56. Before addressing the question of costs, I wish to register my disappointment that the Respondent was directed by the Court to file its written submissions on or before 13 December 2013 but the directive was not complied with. The Respondent purported to file its submissions on 21 February 2014.
57. The Court notes that many practitioners before it have developed a consistent habit of not filing written submissions within the agreed/stipulated timelines thus interfering with the Courts management of its work.
58. In the circumstances the Court is of the view that it must start discouraging this practice and one of the ways is to make an appropriate costs order.
59. The Court would therefore award the Claimant costs of Kshs 15,000/-.

Conclusion and Orders

60. In conclusion, I do find and hold that the Grievant was not a casual employee or a subcontractor/independent contractor but that his employment was deemed as a term contract by operation of section 37 of the Employment Act, 2007, further that his dismissal was not in compliance with procedural fairness requirements of section 41 of the Employment Act and therefore unfair and he is awarded

a. Two months pay in lieu of Notice	Kshs 24,000/-
b. Accrued/outstanding leave	Kshs 57,000/-
c. 4 days worked in September 2010	Kshs 1,600/-
d. 6 months compensation	Kshs 72,000/-
e. Costs	Kshs 15,000/-

TOTAL

Kshs 169,600/-

61. The Claims for gratuity, accrued house allowance and damages for 29 years are dismissed.

Delivered, dated and signed in open Court in Mombasa on this 14th day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Abuta, Deputy Secretary General

Kenya Hotels & Allied Workers Union for Claimant/Grievant

Mr. Sitonik instructed Ndegwa Muthama Katisya

& Associates for Respondent

