



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1013 OF 2013

JULIUS WAFULA CHEBI..... CLAIMANT

VERSUS

GIBON AKIFUMA1ST RESPONDENT

EGAP SOLUTIONS LIMITED.....2ND RESPONDENT

JUDGMENT

By a memorandum of claim dated 4th July 2013 and filed in court on the same date, the claimant seeks the following orders: -

1. Kshs. 138,090/-
2. Certificate of Service
3. Costs of the Claim plus interest
4. General damages for injured sustained while on duty.

The Case was heard on 28th January 2014 in the absence of the Respondent. I allowed the case to proceed after confirming that the Respondent had failed to attend court on 25th November 2013 to fix hearing date when invited by letter dated 18th November 2013 and served upon them on 19th November 2013, and had further failed to attend court for hearing after being properly served with hearing notice on 27th November 2013 as clearly shown on the rubberstamp on the copy filed in court and in the affidavit of service.

The Claimant who was represented by Ms Betty Rashid testified that he was employed by the Respondent as a mason on 13th February 2011. On 23rd April 2013 while working at the Respondent's construction site in Karen, the claimant fell and sustained a fracture in one leg. He has rushed to Kenyatta National Hospital by ambulance while unconscious. He was treated and discharged. After two days the Respondent took him to Kikuyu Hospital where he was treated and taken back home. When he got well he called Akifuma the 1st Respondent who promised to call him for assistance but never called. He was terminated because of the accident. The accident was caused by negligence of the Respondents who failed to provide adequate safety measures.

He prayed that the court finds the termination of his employment unfair, that the court orders the Respondents to pay him notice, leave for 3 years, service pay for 3 years and general damages for injury. He further prayed for overtime and work performed during public holidays. He further prayed for underpayments. He denied that he worked as an independent contractor.

I have considered the pleadings, the testimony of the Claimant and the witness statements filed by the Claimant I have also considered the witness statements filed by the 1st Respondent.

In the defence the Respondent's deny that the Claimant was an employee and allege that he was an independent contractor. The Respondent further deny that they were negligent and allege that the claimant failed to comply with safety requirements at the site. They plead *volenti non fit injuria*. The Respondents urge the court to dismiss the claim with costs.

In the witness statement of the 1st Respondent GIBBON AKIFUMA he states that he employed the Claimant on 14th February 2010 as a mason at a daily wage of Shs. 650/ per day which was paid weekly at Shs. 3700/- . That they agreed he will not issue a letter of appointment as Claimant would be working as a mason and therefore an independent contractor. He confirms that the Claimant was injured while at work on 23rd April 2013 when the scaffolding mounted at the site " had unfortunately given way". That the Claimant fell on the cemented floor and sustained severe injuries. He directed the people at site to take the claimant to hospital and took care of claimant's medical expensed at both Kenyatta National Hospital and Kikuyu Hospital. He gave claimant Shs. 15,000/- for further medical assistance. That since the Claimant was unable to work after the injury he recruited alternative contractors to finish the masonry work to avoid defaulting on the deadlines.

From the foregoing the issues for determination are the following:-

1. Whether the Claimant was an independent contractor or employee.
2. Whether the Claimant's injury was caused by his negligence .
3. Whether the Claimant's employment was unfairly terminated.
4. Whether the Claimant is entitled to the prayers sought.

1. **Was the Claimant's an Employee of the Respondents or an Independent Contractor.**

An Independent Contractor is defined in Black's Law Dictionary 9th Edition as :

"One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it".

In the present case the Claimant was a mason on a daily wage. He was therefore not independent contractor but an employee.

2. **Whether the Claimant's injury was due to his negligence on the Respondent's negligence.**

The claimant alleges that he fell due to Respondents failure to provide adequate safety measures. This is confirmed in the witness statement of the 1st Respondent when he stated "the scaffold had unfortunately given way and he (the claimant) had fallen onto a cemented floor thereby sustaining severe injuries".

This is an admission by the Respondents that the Claimant was not at fault.

In any event both the Work Injury Benefits Act and Occupational Safety and Health Act treat injuries sustained in the course of employment under strict liability due to the fact that the employer or occupier of premises is under obligation to ensure safety within their premises and supervise the premises to ensure safety measures are complied with at all times.

For these reasons I find that the Respondents were negligent and they are liable for Claimants injuries sustained while at work.

3. Whether the Claimants Employment was unfairly terminated

In his witness statement the 1st Respondent admits that he sought alternative contractors for masonry work as the Claimant was unable to work.

Under the Work Injury Benefits Act an employee is entitled to sick leave with fully pay for the duration of ill-health following an injury at Work up to a maximum of 12 months. Again under the Employment Act, the work Injury Benefits Act and the Occupational Safety and Health Act, termination of an employee's services on account of injury is unfair termination.

I therefore find that the Claimant's employment was unfairly terminated.

4. Is the Claimant entitled to the prayers sought?

I will consider each of the claimant's prayers below:-

a. 3 months' salary in lieu of notice

According to the Employment Act, unless longer notice is agreed upon, an employee is entitled to 28 day notice or pay in lieu thereof.

I therefore award the Claimant the sum of Shs. 18,200/- being 28 days' pay in lieu of notice at the rate Shs. 650/- per day.

b. Leave

The 1st Respondent stated in the witness statement that the Claimant was employed on 14th February 2010 and left employment after his injury. There is no denial either in the witness statement or in the defence that the Claimant did not take leave. He is therefore entitled to 1.75 days leave for each completed month of service. Having worked for 39 months he is entitled to Shs. 44,362.50 in lieu of leave and I award him the same.

c. Service Pay

The Respondent has not denied that the Claimant is entitled to Service in accordance with Section 35 (5) of the Employment Act. I award him service pay for the 3 years' service at 15 days per year work based on his daily wage of Shs. 650/-

I award him Shs. 29,250/-.

d. General Damages for unlawful termination

Taking into account the fact that the Claimant terminated due to injuries sustained and the fact that he has permanent incapacity that would interfere with his future ability to access work and taking into account the nature of his occupation as a mason which he cannot do properly with an injury, I find that this is a suitable case for maximum compensation of 12 months' salary.

I therefore award the Claimant the sum of Shs . 234,000/- being 12 months' salary at the rate of Shs. 650/- per day for 30 days every month.

e. General Damages for injuries sustained din the course of employment.

f. Under payments

g. Overtime

No evidence was submitted in support of these grounds of claim.

I therefore dismiss them for want of proof.

h. Certificate of service

I direct that the Respondents issue the Claimant with a certificate of service in terms of Section 51 of the Employment Act within 30 days.

5. Costs

The Respondents shall pay Claimants Costs for this case.

6. Interest

I order that interest be paid on the claim and costs at court rates from date of judgment of the decretal sum is not period within 30 days from today

Orders accordingly.

READ IN OPEN COURT THIS 14TH DAY OF MARCH, 2014.

HON. LADY JUSTICE M. ONYANGO

JUDGE

In the presence of

Julius Wafula Chebii present in person Claimant

Ilako holding brief for Mr. Wagambu for Defendants