**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 395 OF 2013**

**WALTER WANYAMA …..... CLAIMANT**

**=VERSUS=**

**MICHAEL OSINO**

**T/A PAMBAZUKO GROUP SERVICES …..... RESPONDENT**

**J U D G M E N T**

## INTRODUCTION

The Claimant has hereby sued the Respondent claiming Kshs.318000 as employment benefits plus compensation for unfair termination of employment.

The Respondent has denied his employment relationship with the Claimant. According to the Respondent the Claimant and him were members of a gang of labourers operating under the umbrella of Pambazuko Group.

The suit was heard on 21.5.2014 when the Claimant testified as CW1 and the Respondent as the RW1.

## CLAIMANT'S CASE

CW1 alleged that he was employed by the Respondent from September 2009 to April 2012. The employment contract was not in writing. His job title was gang leader and after one year he was promoted to a supervisor. The work involved loading and offloading sacks.

CW1 started with a salary of Kshs.500 per day but after promotion he was paid Kshs.1000 per day. CW1 was also the Treasurer of Pambazuko, a welfare group for raising funds to help one another in case of sickness. Previously he mistook ITA marine for his employer until he sued her and realized that his true employer was the Respondent. CW1 produced an Agreement for Services signed between ITA Marine and the Respondent.

CW1 was allegedly dismissed in April 2012 without warning or notice. CW1 contended that during his service the Respondent was deducting Kshs.50 per day and after promotion the deduction was increased to Kshs.100 every day. CW1 also worked for over time and he never went for any leave. He prayed for compensation for unfair termination.

On cross-examination CW1 alleged that he learned that his employer was the Respondent in 2013. CW1 admitted that Pambazuko was their Welfare Group. He contended that he found the Respondent working for ITA Marine when CW1 went to work there. He further contended that all the daily deductions from workers' pay was banked by the Respondent while CW1 banked only the contribution for the welfare which was collected weekly. He confirmed that Pambazuko has an account with Equity Bank. CW1 explained that he worked continuously and the pay depended on the amount of work. He contended that the Respondent was in charge of the gang as its Director while CW1 was the supervisor. The payment was done daily.

**DEFENCE CASE**

RW1 told the court that he is the chairman of Pambazuko Welfare Group while CW1 is the treasurer for the group. That they formed the group in order to secure work from employers who outsource labour like SECO and ITA Marine. The group does not however employ anyone because all the workers are its members including CW1.

The group earned money depending on the amount of work done. RW1 receive the payment from the client and share out the money equally to all members of the group who do the work.

RW1 denied that there was any daily deduction from the members' payment. According to him all members pay Ksh.50 to their trade union. The other money collected from the members was banked by the Claimant in the group's account for welfare needs of the group members especially when they did not secure work for a long time.

If a member leaves the group he is not refunded any of his contributions. According to RW1, CW1 ran away from the group for no good reason. The group needs him back because as the Treasurer he was a signatory to the account. He explained that the group cannot access any money from the bank account without CW1's signature. RW1 denied the existence of a group called Pambazuko Group Services.

On cross-examination, RW1 stated that he signed the contract with ITA Marine on behalf of the Pambazuko as the group chairman. He denied ever appointing CW1 as the supervisor. RW1 denied that he was the employer of the Claimant and contended that the employer was the Pambazuko Group. RW1 maintained that deductions were done once per month towards union dues but the rest went to the welfare needs. He alleged that the group was a member of Kenya Shipping Union. He reiterated that the group money in the bank cannot be withdrawn without CW1's signature. In conclusion RW1 denied any daily deduction of Kshs.50 or at all from members.

After the hearing, both parties filed written submissions.

**ANALYSIS AND DETERMINATION**

After perusing the pleading and upon carefully considering the evidence and the submissions the following issues arose for determination.

1. **Whether the Claimant was employed by the Respondent.**
2. **Whether the Claimant's employment was unfairly terminated by the Respondent.**
3. **Whether the reliefs sought ought to issue.**

**Employment relationship**

The Claimant believes he was employed by the Respondent because he found him working at ITA Marine when he went to work there. He initially believed that his employer was ITA Marine until 2013 when he sued ITA Marine in a similar suit to this one. He was always paid his salary by the Respondent who also promoted him from a Gang Leader to be the Supervisor. In addition CW1 believes that the Respondent was his employer trading as Pambazuko Group Services because he is the one who signed a contract with ITA Marine.

The Respondent has denied that he was the employer of the Claimant. According to him the employer was Pambazuko Group to which the Claimant was a member and her Treasurer. He maintained that he signed the contract with ITA Marine on behalf of the Pambazuko Group in his capacity as the chairman and not on a personal capacity. He further maintained that as the chairman he was the one receiving the payment on behalf of the group and give it to the Claimant who was the Treasurer to pay to the respective members.

The court has observed that both parties are in agreement that they all belong to a welfare group called Pambazuko in which the Claimant is the Treasurer and the Respondent is the Chairman. It is also not denied that the members of Pambazuko Group were providing gang labour to various warehouses in Mombasa which required outsourced manual labour. It is also common knowledge that apart from the offices the two parties held in the group, they also played the role of supervising the work and managing the group's finances.

In view of the foregoing observations, and for lack of any other credible evidence to the contrary, the court finds on a balance of probability that there never existed any employment relationship between the parties herein as alleged by the Claimant. The Claimant was a self employed person who operated through the Pambazuko Group otherwise called “Pambazuko Gang” which provided outsourced manual labour to warehouses in Mombasa.

This suit is therefore an afterthought being brought after an earlier suit by the Claimant against ITA Marine was dismissed by this court. The Claimant is only a busy body and a vexatious litigant who is ready to sue each and everyone he assumes to be his employer when indeed he was self employed. Judicial time will be better spent if parties and their counsel investigated disputes to get the facts right before bringing frivolous proceedings. That due diligence was not done in this case and the earlier case brought against ITA marine which was dismissed.

As a consequence of the finding that there was no employment relationship between the parties herein, the court needs not tire itself in determining the issue of unfair termination and quantum of damages.

**DISPOSITION**

The suit is dismissed with costs to the Respondent.

**Dated Signed and delivered this 25th July 2014.**

**O.N. MAKAU**

**JUDGE**