



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 558 OF 2011

GEORGE SUNGU ABIERO.....CLAIMANT

VS

KENVIBES INVESTMENTS LIMITED.....RESPONDENT

AWARD

Introduction

1. By a memorandum of Claim dated 5th April 2011, the Claimant sued the Respondent for unfair termination of employment and failure to pay terminal benefits. The Respondent filed a Reply on 4th May 2011 to which the Claimant responded on 20th May 2011. The Claimant testified on his own behalf and Kennedy Monga're Okong'o testified for the Respondent.

The Claimant's Case

2. The Claimant was employed by the Respondent as an Administrator cum Advisor on 9th March 2009 at a salary of Kshs. 30,000. According to the Memorandum of Claim, the Claimant was promoted to the position of Chief Executive Officer in April 2010. The Claimant however recanted this averment in cross examination.

The Claimant worked for the Respondent until 2nd March 2011 when his employment was terminated via a short text message (SMS). It is the Claimant's case that no reason was given for the termination and that prior to the termination he was not afforded an opportunity to be heard.

3. The Claimant's claim is as follows:

- a. Unremitted NSSF funds.....Kshs. 11,500
- b. 3 months' salary in lieu of notice.....45,000
- c. Salary underpayment.....375,000
- d. House allowance.....250,000
- e. Medical allowance.....18,000
- f. Transport allowance.....12,500
- g. Leave allowance for 2 years.....60,000
- h. Remedy under Section 49(c) of the Employment Act.....360,000
- i. Certificate of service
- j. Costs and interest
- k. Any other relief the Court may deem just to grant

The Respondent's Case

4. In its Reply, the Respondent denies having employed the Claimant either as Chief Executive Officer or in any other position. Kennedy Mong'are Okong'o testified that the Claimant was introduced to him by a friend in March 2009. The Claimant was in dire need of financial support and Okong'o agreed to use him to run errands in exchange for some pocket money. The Claimant only came into the Respondent's office when there was work for him to do and was free to do his own business. In April 2010 the Respondent's operations ceased.

Findings and Determination

5. The issues for determination in this case are as follows:-

- a. Whether the Claimant was an employee of the Respondent;
- b. If so, whether the termination of his employment was lawful;
- c. Whether the Claimant is entitled to the reliefs sought.

The Claimant's Status Vis-a-Vis the Respondent

6. The Claimant states that he was an employee of the Respondent, an allegation which the Respondent denies. Section 2 of the Employment Act, 2007 defines an employee as:

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

The same section defines an employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

A contract of service is defined as:

“an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”

7. The question then is whether the Claimant was an employee of the Respondent as defined in the Act. It is not in contest that the Claimant did some work for the Respondent in exchange for some form of payment. However, payment for work done does not of itself create an employment relationship. A claimant who comes before the Industrial Court in their own right must demonstrate that they are properly before the Court by virtue of an employment relationship that can be discerned from evidence.

8. In his Memorandum of Claim the Claimant states that he rose to the position of Chief Executive Officer but during cross examination he told the Court that he never held this position. No explanation was offered for this material contradiction and the Court therefore arrived at the conclusion that the Claimant was outrightly untruthful and rejected his evidence. Consequently, the Court finds that no employment relationship between the Claimant and the Respondent was established as a basis for this claim. The entire claim therefore fails and is dismissed with no order for costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Osoro for the Claimant

Miss Mogusu for the Respondent