



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 208 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 26th November, 2014)

ERASTUS KANDIRA CLAIMANT

-VERSUS-

CATHOLIC ARCHDIOCESE OF KISUMU

(REGISTERED TRUSTEES) RESPONDENTS

JUDGMENT

The claimant herein Erastus Kandira filed his memo of claim on 18.7.2013 through the firm of Bruce Odeny & Co. Advocates. He gave evidence in court and stated that he was employed by the respondents in 2005 and earning a salary of Kshs 22,000/= per month plus further 5% commission of all rent collected annually. He exhibited his appointment letter as *App-1* dated 1.1.2008. He had been employed previously from 2005 on contract. He used to be manager Sifa House which has 3 floors – office block shops and kiosks and he used to collect rents and sign leases. He worked for respondents for 8 years upto March 2013. He was then asked to hand over the management of the premises to Tysons Ltd vide a letter dated 21.1.2013. He handed over the management as advised and also notified the respondents of the same in his letter dated 30.1.2013. He now seeks to be paid his dues which he has tabulated amounting to over 2 million. He told court that he used to submit documentary evidence of rent collected and he submitted for 4 years to court and estimated for the rest of the period.

He has submitted documents for years 2009, 2010, 2011 and 2012 as part of his further list of documents. In that period he collected Kshs 5,511,526, 4,090,586, 414,414 and 4,368,270 respectively. For the other 4 years of 2008, 2007, 2006 and 2005 he has not submitted the documents but he estimated rent collected as 4,528,200, 4,528,200, 4,528,200 and 3,018,800 respectively with commission earned being 226,490, 22,640, 22,640 and 150,940. He is also claiming for his unpaid leave as he never went on leave for the period he worked. He further claims payment of fuel refund for the motor vehicle KWB973 which he was using and used to be refunded fuel used and he claims Kshs 140,326 as the amount not refunded as per receipts he submitted – copies of which he didn't submit. He also pray for gratuity and costs of this suit.

In cross examination the claimant told court that he was initially on a 2 year contract which was renewed orally as he was paid and he was not to engage in any other businesses. He states that he was allowed to run other enterprises, Tumsifu Agencies which he and one Nicholas Obuya are the proprietors and Nyawita Kolping Builders. On fuel receipt refunds, he didn't submit any receipts. The 5% commission was paid to the claimant as per the letter from the Arch Bishop. He states that even in 2009, he was proprietor of Tumsifu Agency and the contract ended and was renewed and respondents kept paying him his salaries.

The respondents on the other hand filed their memo of defence on 27.9.2013 through the firm of Wasuna & Co. Advocates. It is the respondents case that they appointed the claimant as manager for 2 years from January 2008 to 31st December 2009 and the claimant served in that capacity until expiry of the contract which was not renewed. They aver that when claimant served as above, he was fully paid all his emoluments as provided in his contract of employment. The respondents also aver that they provided the claimant with office space from 2010 to 2013 and they reserve their right to demand for rent or/and *mesne* profits. It is also their position that issue of commission demanded is neither a wage nor salary and is not recoverable under the Employment Act and so this court has no jurisdiction to entertain the same. They also state that the claim is time barred by virtue of S. 90 of Employment Act 2007.

RW1 when cross examined, told court that the claimant continued working as an agency from 2009 to 2013 when he left. He also admitted that the claimant was earning a salary and at pg 26 is salary voucher for July 2012, and at pg 27 is for December 2012 and at pg 31 is for January 2013 for which he earned and signed for. He stated that he didn't know if claimant went on leave while working for respondents. He also admitted that claimant was entitled to 5% commission on rent collected. He stated that claimant was paid gratuity.

Having heard the parties and upon consideration of the submissions filed, the issues for determination by the court are as follows:-

1. **Whether this court has jurisdiction to entertain this matter**
2. **Whether the claimant was an employee of the respondents and if so**
3. **What were the terms of the contract**
4. **Whether the claimant is entitled to prayers sought.**

On 1st issue, this court derives its jurisdiction from Article 162(2) of the Constitution and S.12 of the Industrial Court Act 2011 which grants it jurisdiction to handle employment and labour relations matters. There is proof that the claimant was employed by respondents and this is as per letter of contract produced in court. There was an employer – employee relationship. Out of this relation, issues of commission on rent were developed. *App-1* is clear on the same. To allege that the issue of commission for rent should not be handled by this court is to miss the point as this court has jurisdiction under S.12 of Industrial Court Act to handle:-

“disputes relating to or arising out of employment between an employer and employee.”

as is the case in this case. I therefore find that I have jurisdiction to handle this matter.

On 2nd issue, the claimant exhibited his appointment letter with the respondents *Exh 1* which was a contract of appointment for 2 years commencing 1st January 2008 and expiring on 31st December 2009. However beyond this contract period are salary vouchers of the periods 2012 and 2013 in the claimant's further list of documents at page 25 to 35 of the list. This is an indication that there was an employment relationship between the respondents and the claimants beyond 2009 and which details should have been reduced in writing as envisaged under S.9(2) of Employment Act which states that:-

“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection(3).

Without any written contract, S.10(7) of Employment Act states that:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

It is this court's finding therefore that there was an employment contract and the burden of proving or disproving the contents of this contract lie on respondents. As part of the terms of this contract is *Exh 7*

on claimant's list of documents dated 28th February 2006 where Tumsifu Agency was to be paid 5% commission on all rent collected. On page 22 of the claimant's further list of documents is a letter from the 2nd respondents handing over management of Sifa house rental to Tysons Ltd which was previously in the hands of the claimant. The salary vouchers are indication of the amounts payable to claimant.

It is therefore this court's finding that the claimant has established his case as required and I find for him as follows:-

1. **Gratuity at 15 days for each year worked = 8 years**

= 8 X 15/30 X 22,000 = Kshs 88,000.00

2. **5% Commission on rent collected = Kshs 1,711,948.80**

TOTAL = KSHS 1,799,948/=

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On fuel refunds and administration costs. No proof was adduced in court and I do not award anything on this limb. Respondents will pay costs of this suit.

HELLEN S. WASILWA

JUDGE

26/11/2014

Appearances:-

Miss Onyango h/b Odeny for claimant present

Miss Olango h/b Wasuna for Respondent present

CC. Wamache