



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1541 of 2011

DANIEL INYANGU DUNGANI.....CLAIMANT

VS

MARY KHAGALI LUMULA.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 7th September and filed in Court on 9th September 2011, the Claimant sued the Respondent for wrongful termination of employment as well as failure to pay salary arrears and terminal benefits
2. The Respondent filed her Statement of Defence and the matter proceeded for hearing on 7th December 2012. At the hearing, Mr. Mageto, instructed by M'Njau and Mageto Advocates appeared for the Claimant while the Respondent appeared in person.
3. Both parties gave sworn evidence and the Respondent filed her written submissions on 30th January 2013 while Counsel for the Claimant filed the Claimant's submissions on 8th February 2013.
4. The Claimant stated that he was employed by the Respondent by oral agreement in 2008. According to the Memorandum of Claim, he was employed on or about 1st February 2008, while in his sworn evidence he testified that he was employed in July 2008 as a Caretaker at the Respondent's premises situated at Kiambiu Estate in Eastleigh South Location, Nairobi.
5. The Claimant's job included taking care of the Respondent's 14 rental houses, cleaning the plot and its surrounding, maintaining and repairing the property, collection of rent and related duties.
6. The Claimant claimed that the agreed monthly salary was Kshs. 12,000 but that he was being paid only Kshs. 2,000 which was paid in cash. According to the Claimant, it was agreed that he would be paid the outstanding salary arrears once construction of the property he was taking care of was complete, an agreement the Respondent failed to keep.
7. The Claimant worked for the Respondent until 28th August 2011 when his employment was terminated, without notice and without lawful cause. He was not issued with a termination letter.
8. The Claimant averred that for the entire period of his employment with the Respondent he never went on leave nor did he take a rest day. He was not paid house allowance and was not registered with the National Social Security Fund (NSSF) and the National Hospital Insurance Fund (NHIF).

9. Counsel for the Claimant submitted in written submissions that the Claimant's salary of Kshs. 2,000 was way below the minimum wage obtaining at the time of employment being Kshs. 12,000 and Kshs. 15,732 (inclusive of house allowance) at the time of termination.

10. The Claimant therefore claimed the following:

- a) One month's salary in lieu of notice.....Kshs. 15,732.00
 - b) Accrued leave days for 3.6 years.....56,635.20
 - c) Severance pay for 3 years.....27,227.25
 - d) Unremitted NSSF dues for 42 months.....100,800.00
 - e) Unremitted NHIF dues for 42 months.....6,720.00
 - f) Accrued house allowance for 42 months.....99,111.60
 - g) Salary arrears for 42 months.....561,600.00
 - h) 9 Public holidays per year @ double rate.....10,378.80
 - i) Full compensation for loss of employment188,784.00
- (or reinstatement in the alternative)
- j) Certificate of service
 - k) Costs of the suit

The Respondent's Case

11. In her Statement of Defence, the Respondent admitted that she had employed the Claimant at a monthly salary of Kshs. 2,000. However, in her sworn evidence, the Claimant testified that the property did not belong to her but to her husband, one Dickson Lumumba.

12. In her written submissions the Claimant attached a letter of allotment dated 21st September 2001, showing allocation of plot number 337 to Dickson Lumumba Shem. She claimed to have been an agent rather than an owner of the property in issue.

13. The Respondent also told the Court that her property was not the only one that the Claimant took care of, that he was a caretaker of other properties within the vicinity of the subject property.

14. The Respondent admitted having terminated the Claimant's employment in mid 2011 following loss of rent money amounting to Kshs. 16,000 collected by the Claimant on behalf of the Respondent in December 2010. The Claimant had reported to the Respondent that he had been robbed of the money and promised to pay it back which he failed to do. The Respondent further testified that the Claimant had failed to remit unspecified rent deposits he had collected from new tenants. The Respondent stated that prior to this loss, the Claimant had discharged his duties with diligence. With regard to leave, the Respondent stated that the Claimant did not go on leave as there was no one to relieve him.

15. It was the Respondent's case that the Claimant was summarily dismissed for gross misconduct and was therefore not entitled to notice. With regard to the unremitted NSSF and NHIF dues the Respondent stated that the Claimant had failed to register and could not therefore claim the unremitted dues. The Respondent admitted that she did not provide housing to the Claimant.

16. In her submissions the Respondent stated that the Claimant had accepted a salary of Kshs. 2,000 and

had not complained of underpayment. She further submitted that the Claimant was engaged by more than seven landlords at the same time.

Findings and Determination

17. The key issue for determination in this case is whether the Claimant was the Respondent's employee within the meaning of the Employment Act, 2007. Section 2 of the Act 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

18. The question then is whether the Claimant was an employee of the Respondent as defined in the Act. The Respondent, in her Statement of Defence, sworn evidence as well as written submissions referred to the Claimant as her employee.

19. However, she also testified that the Claimant was not her caretaker exclusively. Rather he was a common caretaker for many landlords including the Respondent. The Claimant did not controvert the Respondent's evidence in this regard.

20. In administering justice, the Court is expected to go beyond mere terminologies employed by parties in their pleadings or live testimony. In this case, although the parties used the terms employer/employee, the facts and circumstances did not disclose an employer/employee relationship as defined by the Employment Act, 2007.

21. A person who is engaged by multiple persons to do similar work for each of these persons is not an employee but an independent contractor. Having believed the Respondent's testimony that the Claimant took care of the Respondent's property alongside other properties, I find that the Claimant was an independent contractor and not an employee within the meaning of the Act.

22. In the case of **John Charo Vs Christopher Njao [2005] eKLR** Maraga J (as he then was) held that an independent contractor is not entitled to benefits ordinarily available to employees.

23. In view of my finding that the Claimant was an independent contractor, his entire claim against the Respondent fails and is hereby dismissed.

24. Each party will bear their own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF FEBRUARY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**