



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 12 OF 2011

MAURICE ODUOR OKECH.....CLAIMANT

VS

THE CHEQUERED FLAG LIMITED.....RESPONDENT

AWARD

Introduction

1. On 6th January 2011, the Claimant filed a Memorandum of Claim, through which he sued the Respondent for unfair termination of employment. The Respondent filed a Memorandum of Response and Counterclaim on 20th May 2011 and the Claimant filed a Supplementary Memorandum of Claim on 8th October 2012. The case was heard on 11th July 2013 with Mr. Kandere appearing for the Claimant and Mr. Molenje appearing for the Respondent. The Claimant testified on his own behalf and the Respondent's Human Resource and Administration Manager, Lucy Kathambi Mwenda testified for the Respondent. Both parties filed written submissions.

The Claimant's Case

2. According to the Memorandum of Claim, the Claimant was, by oral agreement employed by the Respondent as a cushion maker effective 7th August 1998. He was paid at piece work rate ranging between Kshs. 25,000-30,000 payable at the end of each completed assignment. The Claimant worked as such until 27th October 2010 when the Respondent terminated his employment without lawful cause and without notice. He was not issued with a termination letter. It was the Claimant's case that prior to the termination of his employment he was not given an opportunity to be heard.

3. The Claimant claimed the following:

- a. 2 months' salary in lieu of notice
- b. 12 years' leave
- c. House allowance at 15% of basic salary
- d. Severance pay at 15 days for each completed year of service
- e. 12 months' pay in compensation for unfair termination
- f. Costs

The Respondent's Case

4. In its Memorandum of Response and Counterclaim, the Respondent stated that the Claimant was an independent contractor operating in the name and style of “Oketch' s U/Car Cushioning” and that he was contracted by the Respondent as such. He was paid per each completed job upon issuing the Respondent with a cash sales invoice.
5. According to the Respondent, the Claimant was first contracted to make cushions for the Respondent upon his request in 1999 after the person he was working under as a trainee who himself had been contracted by the Respondent passed away. At some point, the Claimant asked to be issued with a company employment card to avoid harassment by the Police while going home at night. The Claimant was issued with a card without an employment number for the purpose of identification only. On 16th June 2006, the Claimant asked to be allowed to operate from the Respondent's premises with an apprentice who was later absorbed into the Respondent's employment.
6. Sometime in 2010, the Respondent having noted that the Claimant had formed a habit of bringing unauthorised persons to the Respondent's premises, asked the Claimant to cease operating from the said premises. Thereafter, the Claimant and the Respondent entered into an arrangement through which the Claimant would operate from his own premises while continuing to offer specific service to the Respondent. On 13th October 2013, the Claimant was advanced Kshs. 11,500 to buy material for a customer which he failed to do. The Respondent therefore held on to the Claimant's sewing machine which was stored at the Respondent's premises. On 22nd October 2010, the Claimant stopped working for the Respondent.
7. It was the Respondent's case that the Claimant was not its employee but an independent contractor under a contract for services. By way of counterclaim, the Respondent claimed the sum of Kshs. 11,500 advanced to the Claimant.

Findings and Determination

8. The main issue for determination in this case is whether there was an employment relationship between the Claimant and the Respondent. 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”

9. The question then is whether the Claimant was an employee of the Respondent a defined in the Act. The Claimant's case was that he was employed by the Respondent on piece work basis while the Respondent maintained that the Claimant was an independent contractor under a contract for services.

10. In support of his declared status as an employee, the Claimant produced an employee identity card issued to him by the Respondent as well as pictures of himself in the Respondent's

staff uniform. He also produced payment receipts issued to him by the Respondent in which he was referred to as a staff debtor. The Respondent on the other hand produced cash sale invoices issued by the Claimant to the Respondent in the Claimant's trade name of "Oketch's U/Car Cushioning". The Respondent also produced local purchase orders and job contracts.

11. In his evidence in chief, the Claimant testified that in the course of his employment with the Respondent, he had operated under several diverse systems. From 1998 he was paid by voucher as per specific job cards. Then in 2004, a local purchase order (LPO) system where he would use the Respondent's funds to purchase materials was introduced and finally a contract system was effected.

12. In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 actually exists.

13. The Claimant based his case on an employee identity card and staff uniform issued to him by the Respondent and the Respondent offered an explanation for its action; that the identity card was to cushion the Claimant from harassment by the Police and the uniform was meant to maintain the Respondent's corporate image.

14. As held by Kimondo J in the case of *Everret Aviation Limited Vs the Kenya Revenue Authority [2013] eKLR*, in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.

15. In the case before me the relationship between the Claimant and the Respondent was evidenced by job cards, local purchase orders and job contracts. It was not in contest that the Claimant was paid per each completed job. This documentation and mode of payment are not ordinarily found in an employer/employee relationship and it is my finding therefore that the Claimant was not an employee of the Respondent but an independent contractor under a contract for services. Consequently, the Claimant's entire claim which was premised on an employment relationship fails and is dismissed.

16. With regard to the Respondent's counterclaim for Kshs. 11,500 advanced to the Claimant which the Claimant admitted having received, I find that this was a debt owed by the Claimant as an independent contractor and not an employee of the Respondent. Action for recovery would therefore lie under normal contract and not under employment. The counterclaim therefore also fails and is dismissed.

Each party will bear their own costs.

Orders Accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF NOVEMBER 2013

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JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**