



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 708 OF 2016**

**KUDHEIHA WORKERS.....CLAIMANT**

**VERSUS**

**ESTHER NIOROGE.....RESPONDENT**

**JUDGMENT**

1. The Claimant has instituted these proceedings against the Respondent on behalf of the grievant (CW1) seeking reinstatement of CW1 to her alleged position as an employee of the Respondent or alternatively that the court orders that CW1 be paid compensation for wrongful termination. The Respondent denies liability in the matter. Her position is that CW1 has never been her employee. As a result, the claim by the Claimant against her is without legal basis and ought to be dismissed with costs.

2. The Claimant filed a Memorandum of Claim on 25<sup>th</sup> April 2016. In the statement, the Claimant asserts that CW1 was engaged by the Respondent on 20<sup>th</sup> February 2012 as a domestic worker. That the arrangement was premised on an oral agreement between the parties.

3. The Claimant asserts that CW1 was earning Ksh. 6,500/= per month. In the Claimant's estimation, this constituted underpayment.

4. The Claimant asserts that on 23<sup>rd</sup> December 2014, the Respondent terminated CW1's services. CW1 has thereafter tried to have the dispute amicably resolved to no avail. The Claimant therefore prays, on behalf of CW1, for the orders set out in the Memorandum of Claim.

5. The Respondent entered appearance and filed a response to the claim. In her response, she denies that there was ever an employer-employee relation between her and the CW1. As a consequence, she takes the position that the claim is without basis and should be dismissed.

6. During the trial, the Respondent and CW1 gave oral testimony. They also filed submissions.

7. In the court's view the critical issues for determination are as follows:-

- a) Whether CW1 was employed by the Respondent.
- b) Whether the contract of service between CW1 and the Respondent, if at all, was unfairly terminated.
- c) Whether CW1 is entitled to the remedies sought.

8. In relation to the first issue, CW1 gave oral testimony that she was an employee of the Respondent. She said that the Respondent employed her in 2012 as a house help. It was her testimony that the contract was concluded orally.

9. CW1 asserted that after the Respondent hired her, CW1 moved in to stay with the Respondent. That she worked for the Respondent for about three years before she was terminated.

10. When asked whether she had evidence of working for the Respondent, CW1 alluded to the fact that she had photographs of the Respondent's family as her evidence. She also said that she had asked two neighbors to write confirming that she was an employee of the Respondent.

11. CW1 further testified that the Respondent terminated her after she asked for salary increment.

12. The Respondent denies ever employing CW1. The Respondent stated that as a matter of fact, she had never met CW1 until the two met at the local labour office regarding the dispute.

13. In *Allied Wharfage Limited v Ganja Mavumba Nyawa [2020] eKLR* the court stated that the onus of proving employment under a contract of service lies with the person who alleges that he was so employed. This is a position that I agree with.

14. In this case, it is CW1 who asserts that she was an employee of the Respondent. Has she furnished the court with sufficient evidence to enable the court find in her favour?

15. In order to discharge this burden, CW1 had to provide evidence on a balance of probabilities to demonstrate that she met one or more of the tests that point to the existence of a contract of service.

16. In my view, it was not enough for CW1, in this regard, to simply provide write-ups by persons who were not called as witnesses to suggest that she was an employee of the Respondent. It is not possible for the court to vouch for the reliability of such evidence without the makers of the documents testifying and being subjected to cross examination on the issues alluded to in the said documents.

17. But importantly, such evidence may only go to show that there has been a labour contract between the disputants. However, this may not prove employment for not all labour contracts are employment contracts. Some may as well be independent contracts. This point is made in *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR when the court said as follows:-*

***“ I have stated elsewhere that an employment relationship is not the same as a work relationship. The mere fact that parties work together does not necessarily give rise to an employment relationship.”***

18. One of the tests that have historically been relied on to establish employment is the degree of control the alleged master exercises over the alleged employee. By this, there must be evidence that the alleged master was in control of most of the aspects relating to execution by the alleged employee of his/her functions under the labour contract. For instance, it should be clear that the alleged employer: controlled the time the alleged employee had to work; gave instructions on how the work should be done; and provided tools for execution of the work.

19. Alternately and where applicable, the party alleging employment must be able to demonstrate that the nature of the service he/she was engaged in on behalf of the hirer was an integral component of the hirer's business to the extent that it will disable the hirer's smooth functioning if the service was withdrawn.

20. In my view, CW1 did not provide sufficient evidence in this respect. This is particularly so when it is considered that this was the main point that the Respondent relied on to advance her defense. To dislodge the defense, it was necessary for CW1 to have placed before the court sufficient material to prove employment in terms of the usual tests of establishing the presence of a contract of service.

21. Evidence of photographs of the Respondent's family is not proof of employment of CW1 by the Respondent. The photographs do not add value to establishing any of the tests that are relied on to prove existence of an employer-employee relation. I respectfully disagree with the Claimant's submissions in this respect.

22. I am alive to the obligations laid on an employer under sections 9 (2) and 10 (6) and (7) to prepare and keep records of employment and furnish them to court in the event of a dispute in relation to the contract. However, this obligation only arises where it is sufficiently demonstrated that an employer-employee relation exists.

23. This position has already been expressed in *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR* when the court stated as follows:-

***“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word.”***

24. In my view, the decision by Mbaru J in *Lawi Wekesa Wasike v Mattan Contractors Limited [2016] eKLR* ought to be understood in the above context. I do not understand the learned Judge as saying that the burden of proof to disprove the fact of employment lies on the party alleged to be the employer in a dispute. Rather, the court was restating the accepted position that where it is undisputed that such contract exists, the employer must produce records of it to assist the court reach a just decision on the contested terms of the contract.

25. I also hold the view that it is in this context that the decisions quoted by the Claimant (*Jonathan Zacharia and 24 others v Bulk Warehouse Management and 2 others, Josephine M Akinyi v Farhiyo Mohamed and Joseph Towett v Kalee Limited*) ought to be conceptualized.

#### **Determination:-**

26. I do not think that CW1 has provided evidence of employment to the accepted standard of a balance of probabilities. On the material before me, I am unable to say that it is more probable than not that CW1 was an employee of the Respondent. I will therefore dismiss this claim with costs to the Respondent.

27. Having so decided, there would be no reason to address the other two issues I had framed above.

DATED, SIGNED AND DELIVERED ON THE 10TH DAY OF SEPTEMBER 2021

B O M MANANI

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

B O M MANANI

**JUDGE**