



**Lwanga v Nation Media Group Limited (Appeal E017 of 2023)
[2024] KEELRC 1412 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E017 OF 2023**

**M MBARÚ, J
MAY 16, 2024**

BETWEEN

CHARLES LWANGA APPELLANT

AND

NATION MEDIA GROUP LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. J. Kituku delivered
on 8 September 2023 in Kilifi CM ELRC No. E023 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 8 September 2023 in Kilifi Cm ELRC No. E23 of 2022. The appellant is seeking that judgment be set aside and his claims in the Memorandum of Claim be allowed with costs.
2. The background to the appeal is a claim filed by the appellant before the lower on the basis that he was employed by the respondent on 1st January 2015 as a correspondent until 24 May 2021. He would be paid a retainer of Ksh.15, 000 per month together with fees which was varied for each article submitted. He worked until sometime on 24 May 2021 when he was dismissed. At the time the retainer paid was Ksh.18, 136 together with other fees making a total of Ksh. 43, 661. There was no notice or reasons for the termination of employment which was unlawful and unfair. The appellant claimed the following dues;
 - a. One notice pay ksh.43,661;
 - b. Service pay for 6 years worked ksh,130,983;
 - c. 12 months Compensation for unfair termination of employment Ksh.532,932;
 - d. Leave for 2 years worked Ksh.87,324;



- e. Costs of the suit.
3. In response, the respondent denied the employment relationship and that the claimant was at all material times a correspondent engaged to research, write, and present to those articles for publication as detailed in his job description under clause 1 of the contract dated 1st January 2020. The contract was not intended to create an employment relationship and the parties agreed that the claimant would remain an independent contractor and not an employee of the respondent. The intention was for the claimant to contribute articles to any platform and was never under the control and supervision of the respondent. He was paid a retainer of Ksh.15, 000 together with variable fees based on the number of articles published in any given month as agreed under clause 3.1 of the contract dated 1st January 2020. The respondent terminated the contract in adherence to clause 6.1 of the contract and the claim for notice pay is not justified, Service pay is not due as the claimant was a member of the NSSF and only due to an employee. Without the employment relationship, the claimant for unlawful and unfair termination of employment does not arise or payment for annual leave.
 4. The learned magistrate in the judgment held that the parties had an agreement dated 1st January 2020 where the claimant was a correspondent and hence, an independent contract and not an employee. The court distinguished a contractor of service and a contract of service and that the claimant was an independent contractor. He was not under the control of the respondent and hence not protected under the *Employment Act*.
 5. In the final analysis, the trial court analyzed the claims and awarded the following;
 - a. Notice pay at ksh.15,000;
 - b. 2 years leave pay at ksh.30,000;
 - c. Costs and interests from the date of judgment.
 6. Aggrieved, the appellant filed five (5) main grounds of appeal;
 1. The learned magistrate erred in law and fact in finding that the appellant was an independent contractor and not an employee.
 2. The learned magistrate erred in law and fact by failing to appreciate the definition of an employee under the *Employment Act*, 2007.
 3. The learned magistrate erred in law and fact by failing to appreciate that the appellant was accorded the benefits only due to an employee and not an independent contractor.
 4. The learned magistrate erred in law and fact by failing to appreciate that the contract between the parties was disguised as a contract for service yet the conduct of the parties was a contract of service.
 5. The learned magistrate erred in law and fact by failing to analyze the appellant's evidence and submissions on record.
 7. Both parties attended and agreed to address the appeal through written submissions.
 8. The appellant submitted that he was an employee of the respondent and he filed his pay slip and contract to confirm such fact. These records confirm that he had a PAYE deduction, a benefit that only applies to an employee and not a contractor. The finding that there was no contract of service was in error since his retainer contract was an employment contract under such disguise.



9. Section 2 of the *Employment Act*, 2007 (the Act) defines a contract of service as an agreement that is oral or in writing and whether expressed or implied to employ or to serve an employee for a while. In the case of Benjamin Joseph Omusamia v Underhill Spring Restaurant [2021] eKLR the court evaluated the factors to be considered in determining whether a person is an employee or not. In the case of Ready Mixed Concrete (South East) Limited v Minister of Pension and National Insurance the court clarified the principles under a contract of service;
 - a. The person agrees to provide his work and skill by providing services for consideration;
 - b. The person agrees that in the performance of that service, he will be subject to the control of the employer which includes the power to decide what is to be done;
 - c. The contract of service complies with the terms of an employment agreement.
10. The appellant had an employment contract with the respondent and would be paid wages and issued a pay slip. He remained under the control of the respondent for the allocation of duties. The respondent's witness admitted that the appellant had an office to offload meaning there was a specific workplace. The deduction and remittance of PAYE relates to an employee.
11. The appellant submitted that in the case of Paul Ochieng Agola v Gateway Maine Services Limited [2018] eKLR the court held that an independent contractor is a registered taxpayer who works on his hours and runs his business free from the control of any person. Payment of PAYE is key within the employment relationship.
12. In the case of Edward Gacheru v Nation Media Group Limited [2019] eKLR the court considered similar circumstances as herein and awarded the employee accordingly. Within the employment relationship, the claimant's employment was terminated unfairly contrary to the provisions of Sections 41, 43, and 45 of the Act, and the claims for notice pay should be awarded at ksh.43,661, leave pay at ksh.87,324; service pay for 6 years at ksh.130,983 and compensation for unfair termination of employment.
13. The respondent submitted that the appellant was under a retainer contract with a termination clause which the respondent invoked. The appellant was an independent contractor and not an employee. In the case of Omusamia v Upperhill Springs Restaurant [2021] eKLR the court held that a service contract can be a contract by which a person, contractor or service provider commits another person, the client, to carry out material or intellectual work or to provide a service for a price or fee. The court relied on the case of Fredrick Byakika v Mutiso Menezes International Unlimited [2016] eKLR that under the *Employment Act*, an employee is defined under Section 2 while an independent contractor is not under the control of any person.
14. The respondent also submitted that in the case of Kenya Hotel & Allied Workers Union v Alfajiri Villas [2014] eKLR the court held that an independent contractor is that contractor registered as a taxpayer, working his hours, runs his business, and is free to carry out work for more than one employer at the same time. The contractor is not subject to PAYE and does not have annual leave or sick leave. The appellant was under an agreement dated 1st January 2020 with his terms and conditions of engagement as a contractor. In the case of National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 the court held that the court cannot rewrite a contract between parties. Unless there is alleged fraud or coercion, the contract stands. In the case of John Wango Oduge v Nation Media Group Limited, Cause No.667 of 2010 the court dismissed a claim on the basis that there was no employer/employee relationship as defined under Section 12 of the *Employment and Labour Relations Court Act*, 2011. Without an employment relationship, the claim should have been dismissed with costs.



15. This is a first appeal. The court's mandate is to re-evaluate and re-assess the record and make conclusions. However, take into account that the trial court had the opportunity to hear the witnesses in evidence.
16. The issue herein is whether there was an employment or independent contractor relationship.
17. An employment relationship is defined under Section 2 of the [Employment Act](#), 2007 (the Act) as a person employed for wages or a salary and includes an apprentice and indentured learner.
18. Under the Act, A contract of service is defined as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies whether one is an employee under a contract of service or an independent contractor for a contract for service, the court in the case of *Christine Adot Lopeyio v Wycliffe Mwathi Pere* [2013] eKLR, held that;

The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also noting that most contracts for service are not written, the facts of each case are paramount and worth consideration as to the intentions of the parties to such a contract. This is more so due to the fact that in law a contract of service is well outlined with fundamental protections as this is clearly defined under the [Employment Act](#), 2007 unlike the other contract for service. This is more so in view of the definitions of employee, employer and contract of service under the [Employment Act](#), 2007 and the Industrial Court Act, 2011.

This differentiation relates to very fundamental issues noting that under a contract of service it customarily relates to an employee who is subordinate or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner. ...

19. The appellant filed his AGREEMENT FOR A CORRESPONDENT dated 1st January 2020. The terms of engagement as a correspondent were that he would be trained as a correspondent to research where required, write, and present to the respondent articles for publication.
20. Under clause 1.2 of the agreement, parties outlined the terms and conditions regulating the relationship. It was noted that the correspondent shall be required to perform the following tasks. ...
21. Under clause 3 on fees and reimbursements, the appellant, upon completion of the allocated duties would be paid Ksh.15,000 referred to as a retainer, and would also be paid such variable fees for each article submitted by him to the respondent and accepted by the company as publishable at a fixed rate set by the respondent. Such fees would be paid monthly in arrears.
22. Of importance in this case are clauses 3.4 and 3.6 of the agreement;

The Publisher shall be entitled to deduct and submit to the Tax and Revenue Authorities any sum required by law to be deducted and or withheld from the fees (if any) payable to the Correspondent under the agreement.
23. Under clause 3.6, the parties agreed that;

The correspondent shall be entitled to twenty-five (25) days of relief from performing the services and takes during the term of this agreement during which period of relief the



Company will pay the correspondent the Retainer notwithstanding the Correspondent's absence or non-performance of the tasks.

24. Beyond payment of a monthly wage and allocation of 25 leave (relief) days, the respondent also placed the appellant under a medical insurance cover for the duration of the contract. There was a remittance of tax deductions to the Tax Authority.
25. The appellant was issued with a payment statement under the banner of an employee under the payroll. What is noted in the payment statement is; A gross wage; Taxable wage; Tax deduction.
26. The entirety of the agreement assessed, the payment statement addressed, this relates to an employment relationship as defined under Section 2 of the Act read together with Section 12 of the *Employment and Labour Relations Court Act*, 2011. Further, the payment statement issued to the appellant is a direct replica of the record to be issued to the employer under Section 20 of the Act.
27. This position is aptly captured in the case of *In the case of Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR*, that;

A distinction between an employee and an independent contractor depends on statute, and tests which have been set out case law. These tests include organization/integration test conceived in context of the professional worker... and multiple or mixed factor test which was initially formulated in *Ready Mixed Concrete v Min. of Pensions [1968] 2 QB 497*.

An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th Cheque and so on. [Underline added]
28. The appellant cannot by any standard be defined as an independent contractor paying his taxes or working and running his business outside the respondent's control. He had set work conditions and terms. The response that he was free to write in other forums cannot be discerned from the agreement between the parties.
29. The appellant was paid a month's wage under the guise of a retainer. He enjoyed 25 leave days under the guise of relief. There is a tax deduction at the source of the wage as required under Sections 49(2) and 20 of the Act. Such matters do not relate to an independent contractor but to an employee as held in the case of *Leonard Musitsa Endoli v Odds and Ends Limited [2022] eKLR*.
30. The court finds there existed an employment relationship between the parties.
31. Despite the trial court finding there was no employment, the learned magistrate went ahead to analyze the award notice pay and leave pay. There is no counter-appeal to challenge such allocation. The entire claim should and ought to have been analyzed on the merits.
32. A termination of notice was issued to the appellant dated 24 May 2021 under the mistaken belief that there was no employment relationship. On the finding above, such was in error. Within the employment relationship, termination of employment must be lawful and fair. Under Section 35 of the Act, notice must be issued, and beyond the notice, the employer must give a valid reason leading to termination of employment.



33. Sections 35, 41, 43, 44, 45, and 47(5) of the Act provide the statutory framework for the termination of contracts of employment including dismissal.
34. 52. Section 45 of the Act is the bedrock of fair termination. It provides that –
- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove —
 - (a) That the reason for the termination is valid;
 - (b) That the reason for the termination is a fair reason—
 - (i) Related to the employee’s conduct, capacity or compatibility; or
 - (ii) Based on the operational requirements of the employer; and
 - (c) That the employment was terminated in accordance with fair procedure.
35. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal held that;
- The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.
36. In this case, no reason was assigned for the termination of employment. This was unlawful and unfair.
37. Under the termination notice dated 24 May 2021, the respondent indicated that the appellant would be paid one (1) month in lieu of notice for the month of May 2021. Such was for work done. This cannot translate for notice pay.
38. Based on the last payment statement submitted by the appellant, his last gross wage/taxable pay was Ksh.43, 661. Under Section 49(2) this is the last gross wage to be applied in assessing his claims.
- Notice pay is awarded at ksh.43, 661.
39. The learned magistrate had allocated a 6 months award in compensation in the event the claim was successful. Taking into account that the trial court had occasion to hear the witnesses, this allocation is applied save the basis is the last due gross wage of ksh.43, 661 x 6 = 261,966.
40. On the claim for 6 years of service pay, the last agreement submitted relates to the period of 1st January 2020, and notice of termination of employment was issued on 24 May 2021. This is 17 months and not 6 years as alleged. As outlined above, the appellant as an employee had a medical cover and benefit for the duration of his employment with the respondent. The respondent hence complied with the provisions of Section 35(5) and (6) of the Act and service pay is not due.
41. The benefit of 25 days leave (relief) was already allocated under the agreement. The respondent did not submit any records of how such a benefit was applied. For a total of 17 months, the appellant accrued 30 days of annual leave.
42. At a gross wage of ksh.43, 661 without setting out the basic wage, the total due in annual leave pay is ksh.43, 661.
43. The appeal analyzed above is successful and has merit. Costs are awarded.



44. Accordingly, judgment in Kilifi CM ELRC No. E23 of 2022 is hereby set aside. The following orders are hereby issued;

- a. The appellant was an employee of the respondent;
- b. A declaration that employment was terminated unlawfully and unfairly;
- c. Compensation awarded at ksh.261,966;
- d. notice pay ksh.43,661;
- e. leave pay Ksh.43,661;
- f. Costs of the appeal.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

