



**Thome v Katuma & another (Cause 2285 of 2016)
[2024] KEELRC 1110 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1110 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2285 OF 2016
MA ONYANGO, J
MAY 3, 2024**

BETWEEN

PATRICK NGUMBAO THOME CLAIMANT

AND

JULIUS SAMMY KATUMA 1ST RESPONDENT

KILILIMBI LINE INVESTMENT LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant herein avers that his employment was unlawfully and or unfairly terminated by the respondents who failed to pay terminal benefits due to him. He averred that pursuant to an oral contract, the respondents employed him as a conductor for public transport motor vehicle(s) owned by the respondents on or about January 3, 2001, at a consolidated salary of Kes 3,000/= per month which he earned throughout the years that he served. He avers that the respondents refused to reduce the contract into writing despite his requests. He further avers that the respondents were legally required to pay him salary in compliance with the wages guidelines but did not.
2. The claimant avers that he served the respondents until October 10, 2013 when they unlawfully and un-procedurally terminated his services without giving any justifiable reasons or any notice or salary in lieu of notice. He asserted that he reported the matter to the Union and subsequently to the labour officer but the Respondent completely refused to make the payments thus necessitating the filing of this suit. The terminal dues claimed included one month's notice pay, unpaid salary for October 2013, unpaid safari allowance, outstanding annual leave, off duties and public holidays, overtime, underpayments, gratuity (service pay), and 12 months' salary as compensation. He prayed for judgment against the Respondents for a declaration that the termination and/or dismissal was unfair and unlawful, an order compelling the Respondents to pay the Claimant his terminal benefits, compensation as tabulated and costs and interests of this claim.



3. He asserted in his witness statement that he used to report to work at 5.00 am and work up to 11.00 pm every day for 7 days a week. That on 1st October 2013, the 1st Respondent told him not to report to work the next day and refused to give him the reason for the same. That the 1st Respondent refused to respond to letters from his Union and also refused to attend a meeting called by the Machakos County Labour Officer.
4. In their statement of defence, the respondents denied having employed the claimant as alleged and stated that the 2nd respondent having come into existence in 2009, could not have employed the Claimant in 2001. They averred that the Claimant was a regular tout/casual labourer at the Machakos Bus Park who loaded goods onto public service vehicles for a fee for willing passengers. They prayed that the claimant's claim be dismissed with costs.
5. The 1st respondent, who is a director of the 2nd respondent asserted in his witness statement that he was not privy to any arrangements with the Claimant. His stance was that drivers and conductors started being recruited to work for the 2nd respondent after registration of the company in 2009. He stated that the issue of termination of the Claimant's services or alleged terminal benefits did not thus arise at all.

Evidence

6. At the hearing of the claim the claimant testified on his own behalf and was cross examined by counsel for the Respondents. He adopted his Witness Statement and documents filed in support of his claim. Under cross examination he stated that his salary was paid in cash.
7. For the Respondents Julius Sammy Katuma testified as RW1 and adopted his witness statement dated December 6, 2016 as his evidence in chief. He also adopted the documents filed on behalf of the Respondents. He testified that in the matatu business the driver picks the vehicle in the morning then goes to work and brings the money made in the day at the end of the day after paying the conductor.
8. He stated that he did not pay the conductor as it is the driver who engages the conductor. That he had an agreement with the driver to give him bring him a specific amount and keep anything above the agreed amount. That he received his money daily and the conductor was also paid daily.
9. He testified that the badge is issued by the Matatu SACCO and not the owner of the vehicle. That he did not recruit or employ the Claimant. That the 2nd Respondent was incorporated in 2009 as per documents filed in court dated December 1, 2009.
10. Under cross examination RW1 stated that he started the business in 2009 and had an arrangement with the driver on how to receive his money. He could not recall when he joined the SACCO. He stated he did not issue the badge in the Claimant's bundle to him and did not know where the Claimant got it from as the budes are issued by the SACCO.
11. He admitted that the Claimant worked in his vehicle and was paid by the driver. That he did not know how much the Claimant was paid or how much the vehicle earned daily. That he was not aware when the Claimant left work because he did not recruit the Claimant. He stated the Claimant is not entitled to any of his prayers.

Claimant's Submissions

12. It was the claimant's submission that he was an employee of the Respondents as defined in section 2 of the *Employment Act*. That he had been issued with a badge on March 1, 2012 describing his employer as the 1st Respondent herein. He asserted that he had proved to this Court that he was a Conductor of a matatu owned by the respondents that plied the Nairobi – Kalawa route and



that he worked continuously and was paid in cash. The claimant argued that in any event, section 10(7) of the *Employment Act* provides that if in any legal proceedings an employer fails to produce a written contract or the prescribed written particulars, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. That even if he started as a casual, having worked continuously for a period of over three months, his employment converted to a permanent employee by operation of the law under section 37 of the *Employment Act*.

13. The claimant submitted that section 43 of the *Employment Act* provides for proof of reason for termination by the employer. That in the instant case, the Respondents failed to appear at the hearing and did not give or prove the reasons for terminating his services in their statement of defence. He prayed that the court finds the termination unfair under section 43(1) of the *Act* and that the Respondents did not discharge their burden of justifying the grounds for the termination as was held in the case of *Charles Wanjala Watima v Nyalii Golf & Country Club Ltd* [2013] eKLR. The claimant further submitted that the termination was unfair under section 41 of the *Act* which requires that the Respondents take him through a disciplinary process and allow him to be heard among other procedures as observed in the case of *Sylvester Oduor Oyile v Prime Fuels (Kenya) Limited* [2013] eKLR.
14. With regard to the prayers sought, the claimant submitted that the correct figure should have been Kshs.6,933.35 and not Kshs.13,614.44 as appearing in his memorandum of claim. He submitted that having proved he was on term contract and was unfairly terminated, he is entitled to one month's salary in lieu of notice and maximum compensation pursuant to section 49(1) (a) of the *Employment Act*. That he is entitled to outstanding annual leave at 21 days for each year of employment since he was not allowed to go on leave or paid in lieu of leave. That having not been a member of any pension scheme and the employer having not deducted and remitted NSSF payments, he was entitled to service pay for the 12 years that he worked for the respondent. He reiterated his entitlement to the rest of the terminal dues claimed. He relied on the decision in *George Sungu Abiero v Kenvibes Investments Limited* [2014] eKLR in support of this assertion.
15. The Respondent did not file any submissions.

Determination

16. I have considered the pleadings and evidence on record and the submissions of the Claimant. In my considered opinion the issues arising for determination are the following:
 - a. Whether the Claimant was an employee of the Respondents;
 - b. Whether the Claimant's employment was unfairly terminated; and,
 - c. If the Claimant is entitled to the prayers sought in his claim.

Whether there was proof of employment relationship

17. In a claim where there is no admission of employment relationship by the Respondent the Claimant is required to prove the same as a preliminary point as the rest of the claim is anchored on the employment relationship.
18. In the instant case the Claimant avers he was employed by the Respondents as a bus conductor. That the contract was oral. It is however not clear when exactly the Claimant was employed. At paragraph 3 of the Memorandum of Claim he pleads that he was employed 3rd January 2004 to 10th October, 2013. At paragraph 4 of the same Memorandum he pleads that he was employed on 3rd January, 2001. In



- the witness statement filed with the Memorandum of Claim he states that he was employed in April, 2001. While testifying in court he stated that he was employed on 3rd January, 2001.
19. During cross examination the Claimant stated that he was paid monthly in cash, that he had no evidence of payment, that the Respondents did not pay NSSF or NHIF for him. He testified that he was issued with a badge by the 1st Respondent in 2004.
 20. The only other evidence produced by the Claimant were copies of the 1st Respondent's KRA Pin Number Certificate, copy of national identity card of the 1st Respondent and a photograph of a mini bus/bus.
 21. The 1st Respondent's testimony was that the Claimant was a tout at Machakos bus park and was engaged by the 1st Respondent's driver on piece rate and paid daily. He testified that he had an agreement with the driver to submit to him a specific amount of money daily. That whatever money was made over and above the agreed sum was split between the driver and the conductor. That there was no employment relationship between the Respondents and the Claimant.
 22. The 1st Respondent further testified that the 2nd Respondent was incorporated in 2009 and could not have employed the Claimant in 2001 as alleged. He submitted registration documents that confirmed this fact.
 23. The burden of proof of existence of an employment relationship is on the Claimant. From the evidence on record it is not clear whether or not the Claimant was employed by the Respondent.
 24. As stated by the Claimant the contract between him and the Respondents was oral. However, the Claimant ought to have looked for other evidence to corroborate his oral evidence in the face of denial of existence of any employment relationship. Such evidence could a witness he used to work with or who knew about the relationship, a bus receipt or any other acceptable evidence that would have supported his averments.
 25. In the absence of credible evidence, the court finds that the Claimant has not proved the existence of an employment relationship between him and the Respondents. The result is that the entire Claim falls and is accordingly dismissed.
 26. There shall be no order for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 3RD DAY OF MAY, 2024

MAUREEN ONYANGO

JUDGE

