



**Tonui v Agricultural Development Corporation (Cause 64 of 2017)
[2024] KEELRC 2236 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 64 OF 2017
DN NDERITU, J
SEPTEMBER 18, 2024**

BETWEEN

ALFRED K TONU I CLAIMANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a statement of claim dated 14th February, 2017 filed in court on 20th February, 2017 through Konosi & Company Advocates. As it is the procedure, the statement of claim is accompanied with a verifying affidavit sworn by the claimant, a list of witnesses, a witness statement, a list of documents, and a bundle of copies of the listed documents. The claimant through his advocates filed another witness statement by Nzuve K. Mutio on 1st February, 2022.
2. The claimant is seeking for the following reliefs-
 - a. A declaration that the claimant was a regular employee of the respondent.
 - b. Kshs6,278.80/= being one month's salary in lieu of notice.
 - c. Ksh4,320.60/= being salary underpayment from August 2016 to the time of termination.
 - d. Kshs1,861/= being pro-rata leave earned.
 - e. Kshs20,673.12/= being pay for overtime worked.
 - f. Kshs1,063.60/= being pay for public holidays worked.
 - g. Kshs8,508.80/= being pay for rest days worked.
 - h. Kshs1,329.50/= being pro-rated gratuity.



- i. Kshs75,345/= being compensation for wrongful termination at the rate of 12 months gross salary in terms of Section 49(1)(c) of the Employment Act laws of Kenya.
 - j. Certificate of service.
 - k. Costs of this suit and interest.
 - l. Any such further reliefs as this Honourable Court may deem fit.
3. The respondent entered appearance through A. Ademba, Advocate on 5th April, 2017. The respondent filed a notice of change of advocates on 1st July, 2021 changing its advocates to Rodgers Karumpu, Advocate and filed a response to the statement of claim on 25th October, 2021. In the response the respondent prays that the claimant's claim be dismissed with costs for want of merits.
 4. On 1st February, 2022 the claimant filed a reply to the response to the statement of claim dismissing the response and reiterating that judgment be entered against the respondent as prayed in the statement of claim.
 5. The respondent filed a witness statement by Jane Mugaruro (RW1) on 16th February, 2022 and a list of documents dated 18th August, 2022, with a bundle of copies of the listed documents.
 6. The cause came up for hearing on 19th July, 2023 when the claimant (CW1) and Nzuve K. Mutio (CW2) testified. However, the claimant's case was reopened on 1st February, 2023 when CW1 testified again and closed his case. The defence was heard on 1st February, 2023 when RW1, the human resources manager, testified and the respondent closed its case.
 7. Counsel for both parties addressed the court by way of written submissions. Miss Ekesa for the claimant filed her submissions on 3rd May, 2023 while Miss Koskey for the respondent filed on 5th July, 2023.

II. The Claimant's Case

8. The claimant's case is expressed in the statement of claim, oral and documentary evidence adduced through CW1 and CW2, and the written submissions by his counsel.
9. In the statement of claim the claimant avers that he was employed by the respondent as a night watchman on or about August, 2016 at an agreed pay of Kshs228/= per day. It is alleged that the claimant worked continuously for the respondent until 10th December, 2016 when he was terminated without any reasonable or lawful justification. The claimant avers that he worked from 6pm and 6am daily yet the respondent did not pay for the overtime.
10. The claimant avers that his termination was unfair and unlawful as the respondent failed to give valid reasons and follow the procedure set out in Section 41(2) of the Employment Act (the Act).
11. In the reply to the response to the statement of claim, the claimant dismissed the response and reiterated the contents of the statement of claim and the reliefs sought as recited above.
12. In his testimony in court the claimant reiterated the contents of the foregoing pleadings and his filed written statement dated 14th February, 2017 as his evidence-in-chief. He adopted and produced his listed documents as exhibits 1 and 2.
13. The claimant stated that he was an employee of the respondent as pleaded and that his wage was paid in cash. He stated that he signed the payroll each time he was paid. He stated that he reported to a supervisor each day upon arrival at work at the respondent's farm in Lanet, Nakuru County, wherein



- he was based. He stated that he worked from 6pm to 6am each day without off-duty or leave days for the entire period of time that he served the respondent.
14. He stated that he was not paid his salary for the month of December, 2016 which was payable at the end of the month at the rate of Kshs228/= per day.
 15. He stated that he was not issued with a notice of termination and that he was dismissed by the supervisor simply and casually telling him to leave the farm. He stated that he worked for the respondent for five months between August and December, 2016 but no terminal benefits were paid to him. He stated that he worked all days including public holidays. He further stated that he was not issued with a certificate of service upon dismissal.
 16. In cross-examination, CW1 stated that he was a month to month employee and that he applied for the job when the vacancy was advertised. However, he neither produced the advert for the vacancy nor his application for the same. He stated that he signed the payroll whenever he was paid. He stated that he did not pay for NHIF and NSSF. He stated that he did not know the name of the manager who was managing the farm and he did not have any documentation for his alleged employment.
 17. CW2 who allegedly also worked with the respondent as a night guard relied on his filed written statement dated 15th December, 2021 as his evidence-in-chief. He testified that he worked alongside the claimant from August, 2016 at the respondent's farm in Lanet area of Nakuru County. He stated that himself and the claimant used to take care of the property on the respondent's farm. He stated that the claimant was attached to him for training and that he was the claimant's supervisor.
 18. He stated that the claimant worked for approximately five months and used to sign the attendance roll. However, after August, 2016 they allegedly did not sign the attendance roll anymore for reasons that were not explained to them.
 19. In cross-examination, CW2 stated that he also filed a cause against the respondent for compensation for unlawful dismissal. He stated that he worked for the respondent from 2011 to 2016. He stated that he could not recall the name of the farm manager who dismissed him and the claimant without due process.
 20. In re-examination, he stated that the attendance roll was signed for a short period of time and then it was stopped. He stated that he was not responsible for managing the guards at the farm and that he could not grant or deny leave as he did not handle any records.
 21. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim.

III. The Respondent's Case

22. The respondent's case is contained in the statement of response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its counsel.
23. In the response to the statement of claim the respondent vehemently denies the averments in the statement of claim. The respondent avers that it never engaged nor employed the claimant in any form or manner. It is pleaded that the claim lacks merits and amounts to abuse of the court process and hence due for dismissal with costs.
24. In her testimony in court RW1, the respondent's human resources manager, reiterated the contents of her written statement dated 16th October, 2022 as her evidence-in-chief. She produced copies of the filed documents as exhibits 1 and 2. She stated that the claimant was not an employee of the respondent



either on permanent and pensionable basis, term contract, as a casual employee, or in any other manner whatsoever.

25. She stated that casual employees were paid through the guidance of the Ministry of Labour under the wage orders and regulations as pronounced from time to time by the said Ministry. She stated that every regular employee was always issued with a written contract through a letter of offer and she confirmed that there is no letter of offer for the claimant or any other record of employment for the claimant during the alleged period or any other time or at all.
26. She stated that the casual work was seasonal and the casual employees were paid bi-weekly as per the payroll. She stated that the muster roll was the payroll for the casual employees as well. She stated that the claimant's name is not in the payroll for the months of August to December, 2016 or those of any other time or at all.
27. In cross-examination, RW1 stated that the respondent issued no written contracts for seasonal or casual employees but that evidence of employment should be traced from the muster roll which was also the payroll confirming work attendance and payment of wages. She was categorical that the claimant's name does not feature anywhere in the records in custody and possession of the respondent.
28. It is the basis on the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs.

IV. Submissions by Counsel

29. On the one hand, the claimant's counsel identified four issues for determination- Whether the claimant was gainfully employed by the respondent; Whether the claimant was summarily dismissed; Whether the claimant is entitled to the reliefs sought; and, Who should bear the costs of the cause.
30. On the first issue, it is submitted that the respondent as the employer had a duty to issue the claimant with a contract of employment as provided for in Section 10(7) of the Act. Counsel cited *Martin Ileri Ndwiwa V Olerai Management Company* [2017] eKLR and *Lawi Wasike V Mattan Contractors Limited* [2016] eKLR in support of that proposition. It is further submitted that the claimant was employed as a night watchman from August 2016 to 10th December, 2016. It is submitted that the muster roll availed and produced as an exhibit by the respondent is not genuine as it did not contain the name of the claimant who is asserted to have been an employee of the respondent during the material period.
31. On the second issue, it is submitted that lawful procedure was not followed in terminating the claimant in accordance with Sections 41,43, 45 of the Act. Counsel cited *Henry Abuga Bosire Ongwae V Ming Tribe International Group Ltd* [2019] eKLR wherein it was held that an employer should have lawful reason(s) and apply due process before terminating an employee. Counsel also cited *Kenfreight (E.A) V Benson K. Nguti* [2019] eKLR in laying emphasis on substantive and procedural fairness in termination or dismissal. It is submitted that the respondent did not give any reason(s) to the claimant for his termination and as such the court is urged to find that the claimant was unfairly terminated.
32. On the third issue, the court is urged to allow all the reliefs sought.
33. On the fourth issue, the court is urged to allow the entire claim with costs.
34. On the other hand, counsel for the respondent identified three issues for determination- Whether the claimant was gainfully employed by the respondent; Whether the claimant is entitled to the reliefs sought; and, Who should bear the costs of the cause.



35. On the first issue, it is submitted that the respondent did not engage the claimant as an employee in whatever manner whatsoever during the alleged period of time or any other time or at all. It is submitted that the claimant did not avail any evidence of employment and that the records held by the respondent, including the muster roll that was produced in court did not contain the name of the claimant as an employee. Counsel argues that the cardinal rule of evidence is that he who alleges must prove and cited *Martin Juma Kundu V Kemu Salt Packers Production Limited* [2016] eKLR in support of that proposition. Counsel also relied on *Philip Omukule V Trapoz Contractors Ltd* (2016) eKLR wherein the court dismissed the claimant's case for lack of evidence in prove of employment.
36. Counsel argued that the muster roll that was availed and produced as an exhibit by the respondent did not contain the claimant's name for the period alleged by the claimant that he was in the employment of the respondent. It is submitted that Section 107 of the *Evidence Act* provides that whoever desires any court to give a judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.
37. Counsel cited Section 10(7) of the Act that provides that an employer shall keep records of its employees and that in this case the respondent availed the required records in support of its case. It is submitted that in *Casmir Nyankuru Nyaberi V Mwakikar Agencies Limited* [2016] eKLR the court held that where an employee believes that the employer has in its possession some documents that would support the case of the employee, the employee is obligated to serve on the employer a notice to produce such documents. Counsel further cited Section 69 of the *Evidence Act* which provided an opportunity for the claimant to take out a notice requiring the respondent to produce any document that he believed to be in the respondent's possession to prove that the respondent failed to keep the employee's records or produce the same.
38. On the second issue, it is submitted that the claimant is not entitled to any reliefs sought nor compensation as he was neither an employee of the respondent nor was he unfairly terminated.
39. On the third issue, it is submitted that the claimant should bear the costs of the suit.
40. In conclusion, counsel urged the court to find that the claim against the respondent is unmerited and the same be dismissed in its entirety with costs.

V. Issues for Determination

41. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for the parties. The following issues commend themselves to the court for determination-
 - a. Was the claimant an employee of the respondent?
 - b. If (a) is in the affirmative, what was the nature of the employment relationship?
 - c. Is the claimant entitled to the reliefs sought for?
 - d. Who bears the costs of the cause?



VI. Employment

42. It is rather obvious that upon employment an employee is offered a contract of service as stipulated under Section 7 of the Act which provides as follows -

“No person shall be employed under a contract of service except in accordance with the provisions of this Act.”

43. Further, Section 8 of the Act provides that -

“The provisions of this Act shall apply to oral and written contracts.”

44. The claimant alleges that he was employed by the respondent as a night guard on casual basis for the period from August to December, 2016. However, during the hearing of the cause the claimant did not provide any document(s) in support of that allegation. On the other hand, the respondent availed and presented the muster roll for the material time which did not contain the claimant’s name or that of his witness, CW2, as employees of the respondent. Section 107 of the *Evidence Act* places the burden of proof on he who alleges to prove such allegations as facts for the court to believe, admit, and apply them as such in deciding the matter and issues before it.

45. The respondent is a public corporate body financed by the taxpayer. The process of recruitment, all the way from declaration of vacancies, advertisement, interviewing, and hiring, should be and must be overboard, fair, competitive, and transparent in accordance with *the Constitution* and all the other applicable laws. It is neither plausible nor believable for the claimant to allege to not be in possession of any of the documents that were used to engage him. Even if the claimant was a casual employee, there should be some evidence of such engagement and the claimant should be in possession of some document for prove of such engagement.

46. When challenged to avail evidence or records of employment, the respondent availed and produced the muster roll for the material time which according to RW1 also served as the payroll for casuals. The claimant’s name is not in that roll. How else can the court believe or conclude that the claimant was an employee of the respondent without such evidence in support of that allegation? For the umpteenth time, the court has to reiterate that it is not enough for a party to make allegations without support or substantiation, and more so without evidence in support, and yet expect the court to rule in his/her/its favour. It was the legal and evidential burden of the claimant to prove that indeed he was an employee of the respondent as alleged and that he was unfairly and unlawfully terminated. The claimant failed in both counts hence failing to meet his obligation under Section 47(5) of the Act.

47. Having failed to prove employment or engagement of whatever form, the claimant cannot allege unfair and unlawful termination or dismissal as to call the respondent to justify the reason for dismissal under Section 43 of the Act.

48. The court comes to the inevitable conclusion that the claimant failed to prove that he was an employee of the respondent as alleged or at all.

VII. Reliefs

49. Having found and held that the claimant did not prove that he was an employee of the respondent, it follows that no relief is awardable to the claimant whatsoever.



VIII. Costs

50. The court makes no order as to costs.

IX. Orders

51. For all the foregoing reasons, the claimant's cause is hereby dismissed with no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 18TH DAY OF SEPTEMBER, 2024.

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DAVID NDERITU

JUDGE

