



Maina v Lynk Jobs Limited & another; Lynk Jobs Limited (Claimant); Maina & 2 others (Respondent) (Cause E091 of 2022) [2025] KEELRC 2791 (KLR) (16 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2791 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E091 OF 2022
JW KELI, J
OCTOBER 16, 2025**

BETWEEN

MEM EPHANTUS MURANGU MAINA CLAIMANT

AND

LYNK JOBS LIMITED 1ST RESPONDENT

ADAM GRUNEWALD 2ND RESPONDENT

AND

LYNK JOBS LIMITED CLAIMANT

AND

MEM EPHANTUS MURANGU MAINA RESPONDENT

RED SHERMAN INTERNATIONAL LIMITED RESPONDENT

BROOKHILL PROJECTS LIMITED RESPONDENT

JUDGMENT

1. Vide a statement of claim dated the 10th of February 2022, the Claimant sued the Respondents and sought the following Orders:-
 - a. His terminal benefits and dues as calculated hereunder:
 - i. Untaken leave days Kshs. 130,434.78
 - ii. Unpaid leave dues for 3 months in 2021 Kshs. 179,347.02
 - iii. Severance pay at the rate of half month salary for each year worked Kshs.1,083,333.00
- TOTAL Kshs.1,393,114.80



- b. A declaration that the redundancy amounted to unfair and unlawful termination and compensation amounting to 12 months' salary as damages Kshs. 6,000,000.00
 - c. General damages for violation of his Constitutional rights as enshrined under Article 2, 5,6 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination, and Articles 2,3,4,5 and 6 of the Discrimination (Employment and Occupation) Convention 1958 as read with Articles 10 (1), (2) (b) and 27v (1), (4) and (5) of *the Constitution* of Kenya 2010 by the Respondents during the Claimant's employment, and payment of Kshs. 10,000,000.00 as damages.
 - d. A declaration that the Respondents engaged in unfair labour practices contrary to Article 41 of *the Constitution* of Kenya and payment of general damages as a consequence thereof.
 - e. An order for the 2nd Respondent to make amends to the immigration department by correcting the information given in respect to the Claimant.
 - f. A declaration that the 2nd Respondent violated the Claimant's right to privacy as protected under Article 31 of *the Constitution* and general damages.
2. The Claimant, in support of the claim, filed his list of witnesses dated 10th February 2022, a witness statement of the same date, and a list of documents of the same date with the bundle of documents attached. The Claimant later filed a supplementary witness statement dated 20th May 2022; a supplementary list and bundle of documents of even date; and a further supplementary list and bundle of documents dated 26th May 2022. In response to the counterclaim set out herein below, the Claimant filed a further supplementary list and bundle of documents dated 15th November 2022; a further supplementary witness statement of even date; and a further supplementary list of witnesses also of even date.
3. Both Respondents entered an appearance through the law firm of CSA Advocates LLP and filed a statement of response and counterclaim dated 9th June 2022. In the counterclaim, the Respondents sought the following orders:-
- a. The court to find and declare that the termination of employment of the 1st Respondent in the counterclaim was done lawfully and procedurally.
 - b. A declaration that between 2016 to December 2019, the relationship between the Claimant in the counterclaim and the 1st and 2nd Respondents in the counterclaim was that of a contract of services and not an employment contract.
 - c. An order of indemnity directed at the 1st and 2nd Respondents in the counterclaim to indemnify the Claimant in the counterclaim on a full indemnity basis against any claims regarding the Claimant in the counterclaim performing its obligations under the agreement between parties.
 - d. A declaration that the 1st Respondent in the counterclaim breached his employment agreement that commenced in 2020 by soliciting employees and engaging in a competing business.
 - e. A declaration that all the profits made by the 3rd Respondent in the counterclaim during the term of the 1st Respondent in the counterclaim's employment to the Claimant in the counterclaim inures it for the benefit of the Claimant in the counterclaim.
 - f. An order directed at the 1st and 3rd Respondents in the counterclaim to provide the Claimant in the counterclaim with all its books of account and bank statements for purposes of ascertaining (d) above.



- g. Judgment be entered in favour of the Claimant in the counterclaim against the Respondents in the counterclaim jointly and severally for the sum of Kshs. 6,441,416/- being the value of the Claimant in the counterclaim's property they converted.
 - h. Judgment be entered in favour of the Claimant in the counterclaim against the 1st and 3rd Respondents jointly and severally for Kshs.5,702,775/- for compensation of salary paid while engaging in a competing business.
 - i. General damages assessed by the court jointly and severally against the 1st and 3rd Respondents in the counterclaim for breach of contract and fiduciary duty.
 - j. Costs of this suit.
 - k. Interests on (e), (g), (h) and (i) at the court rate from the date of filing suit until payment in full.
 - l. Any other reliefs the court may deem fit.
4. In support of the said statement of response and counterclaim, the counter-claimant filed a witness statement of ADAM GRUNEWALD dated 9th June 2022; list of witnesses of even date; and list and bundle of documents with the bundle of documents attached, also of even date.
 5. The Claimant filed a Reply to statement of response and statement of response to counterclaim dated 15th November 2022.

Hearing and evidence

6. The claimant's case was heard on the 26th April 2023 before Justice Ocharo Kebira where the claimant testified as CW1 and the 1st respondent to the counterclaim. He adopted his evidence in chief his 2 witness statements filed in the case dated 10th February 2022 and 15th November 2022 respectively. He further produced documents filed with the claim and further supplementary list of documents filed in court on the 20th May 2022 and 15th November 2022. He was cross-examined by counsel for the respondents, Mr. Madowo and re-examined.
7. The response and counterclaim were heard 26th September 2023 and 23rd October 2023 before Justice Ocharo Kebira where the 2nd respondent testified as RW1 . He adopted his witness statement dated 9th June 2022 as his evidence in chief and produced respondents' documents under list dated 9th June 2022 as R-exhibits 1-14. He was cross-examined by counsel for the claimant, Mr. Magee but the cross-examination was not completed as the witness had difficulties in finding the documents files by the claimant. The Judge adjourned the case and thereafter 2 more times.
8. On the 19th March 2025 having taken over the docket and by consent of the parties the matter was fixed for defence hearing on the 12th June 2025. On the 12th June 2025 the court was informed that RW1 was not available due to sickness. The court granted conditional adjournment, being that the respondent was to produce medical evidence of the illness of RW1 or payment of costs. There was no compliance when the matter was fixed for further defence hearing on the 1st July 2025 and consequently the court marked the respondent's case as closed. The court then issued directions for the submissions and only the claimant complied.

The Claimant's case in summary

9. The Claimant's case is that he was an employee of the 1st Respondent having entered into an implied contract of employment via email correspondence. The Claimant avers that he was never furnished with an executed formal contract of employment. He only saw a draft. The Claimant later learnt that



the 2nd respondent fraudulently forged his signature and forwarded the purported contract to the immigration department. The purported contract provided that the Claimant was offered the position of Chief Operations Officer (COO) from 1st January 2019, a fact which is blatantly untrue since the 1st Respondent had an existing COO, one CHRIS MCCLAY. Further, the salary indicated therein was Kshs. 500,000/- from 1st January 2019 which was not accurate, since the Claimant's salary then was Kshs 285,000/-. The Claimant was not made aware of the said agreement. The Claimant states that the 2nd Respondent, is liable in his personal capacity for the following reasons: he is the chief executive officer of the 1st Respondent who made decisions on employing staff whereby he subjected the Claimant to racial discrimination; and he violated the Claimant's constitutional rights as protected under Article 27(4) and 27(5) of *the constitution* of Kenya. The Claimant is adamant that the 2nd Respondent cannot hide himself behind the 1st Respondent, which is also responsible for its own acts, to shield himself from liability for his illegal and unconstitutional acts.

10. The Claimant denies the Respondents argument that the Claimant was not an employee of the 1st respondent but an independent contractor, and states that this was only brought forward after he issued a demand letter dated 11th January 2022 to the Respondents.
11. On the termination, the Claimant was issued, on 5th June 2021 via email, with a notice of termination dated 29th January 2021 titled "Termination of employment on account of mutual agreement.", a fact which is admitted by the Respondents, while still claiming that the claimant was an independent contractor and not an employee. The notice of termination was founded on the false information that the 1st Respondent did not have money but would pay the sum due once the sum due to it from PAIX was paid. However, at the time, the 1st Respondent's bank account had more than 16 Million shillings. The notice was issued after the Claimant sent the 2nd Respondent an email on 17th March, 2021 requesting a termination letter, after he had been verbally declared redundant. The 2nd Respondent prepared and shared a termination letter on 6th April 2021 through google documents, and emailed the Claimant on 23rd April 2021 asking for the Claimant's comments on the same. The Claimant annexed his comments to the termination notice on the google document email. In response, the 2nd Respondent alleged that he would not know how many leave days the Claimant was owed and he tasked the Human Resource Manager, Daisy Nyaronge to liaise with him. The Claimant engaged with the said Daisy Nyaronge via slack on 27th April 2021. On 12th May 2021, the Claimant was served with a termination notice by the said Daisy Nyaronge for her to sign. He protested against the termination notice on the same day at 9.40 pm by challenging a clause that was ambiguous as to when the Claimant's severance pay would be paid. The final termination notice was sent to the Claimant on 5th June 2021. The Claimant denies hampering the operations of the Respondents in any way after termination.
12. It is the Claimant's case that he worked diligently for the 1st Respondent without receiving a salary between 1st March 2021 and 30th October 2021. During this period, and even after the termination of his employment, the Claimant worked on and exchanged email communication with the 2nd Respondent regarding ongoing projects up to 22nd October 2021, including those involving Paix Data Center, Kenya Limited, Vishy Talwar, Nairobi Street Kitchen (NSK), and Lexo Energy.
13. In relation to Paix Data Center Kenya Limited, the Claimant states that they issued the 1st Respondent with a practical completion certificate dated 3rd March 2021 sent through the Claimant's email. On 23rd June 2021, PAIX issued an interim valuation no. 5 in favour of the 1st Respondent in the sum of Kshs. 6,020,591.00/-. The Claimant is categorical that he was not tasked with keeping and controlling the 1st Respondent's asset register for projects and equipment for members of his team. In fact, the 1st Respondent's Project Secretary/Project Administrator, one Ann Wanja Gichiku, was in charge of



- the asset register. When the Human Resource Manager was employed, one of her allocated duties was to maintain an asset register. The Claimant also states that it is false for the Respondents to allege that he was the head of operations when he was only the head of projects as is clear from all the email correspondence.
14. The Claimant, after the termination, handed over to the Respondents all the projects, PPEs, gadgets and information relating thereto; the company items return sheet to the Respondent's human resource officer; and financial information. It is pointed out that the Respondents have not filed the assets register or items return sheet as evidence that the Claimant has in their possession items other than the ones disclosed in his pleadings and which he has attempted, on numerous occasions, to hand over but was frustrated by the 2nd respondent. Between 20th September 2021 and 27th September 2021, the Claimant states that tried to organize for handover of the items, but was frustrated.
 15. On the tax payments, it is the Claimant's case that prior to 2018, the Claimant was paid for his work through his company, the 2nd Respondent, purportedly as a tax management measure. After 2018, PAYE was deducted from the Claimant's salary. He reiterates that the Respondents were racist against him in that they offered written contracts for the caucasian employees while they did not do the same for him. The Claimant denies that there was a change of employment to consultancy. Instead, he states that he reported to work daily (during working days), worked overtime, was supervised by the 2nd Respondent and was under regular performance reviews. The only issue was payment of taxes whereby the 1st Respondent/Counterclaimant demanded that he would be paid through the 2nd Respondent company in the counterclaim. Indeed there was no conversation, email correspondences or written contract when the claimant stopped paying him through the 2nd Respondent company in 2018, and commenced paying PAYE. He insists that he was at all times taken as and treated as an employee by the Counterclaimant, its Director, its customers and employees. The increment of his salary was mainly for optic purposes to hoodwink investors. At the time many junior caucasian employees were earning much higher salaries than him, yet he was their supervisor. Even after the increment they still continued earning higher salaries. The Claimant avers that employees of the Counterclaimant were caused to sign addendums to their contracts whereby their employment was converted to consultancy so that the Counterclaimant could pay less tax to the Government of Kenya, but the same was not offered to the Claimant. Further, the Counterclaimant eventually paid terminal dues to its other employees but discriminated against the Claimant and failed to pay his dues.
 16. On the return of items, the Claimant states that he was never assigned duties to collect property in the possession of his subordinates or any other person. When he requested to return the items in his possession, he was informed by the 2nd Respondent that they expected the return of properties worth Kshs. 41,000,000/-. He wonders why the value of the alleged property has gone down to 6,441,416/-. On the allegation that the Claimant incorporated a competing business to the 1st Respondent, the Claimant clarifies that the 1st Respondent/Counterclaimant and 3rd Respondent were not in the same industry. The 1st Respondent is a technology platform, while the 3rd Respondent is a construction company. There was therefore no competition whatsoever. While confirming that the 3rd Respondent was indeed requested to complete some tasks by the Counterclaimant, he confirms that the Claimant himself was also requested to complete some projects, including the PAIX project, at the same monthly salary. He was also assured that his terminal dues would be paid after the completion of the said project. Once the project was completed, the 1st Respondent was paid over 7 million shillings but still refused to pay the Claimant's terminal dues.
 17. The Claimant is apprehensive that the 1st Respondent will be struck off the register as the 2nd Respondent made an application for striking off which was published in Gazette Notice No. 5479



dated 13th May 2022. According to the Claimant, the 2nd Respondent had a duty to inform him of the application under Section 900 of the *Companies Act*.

Respondent's case in brief

18. The 1st Respondent/Counter-claimant admits that the Claimant/1st Respondent is their former employee, having been offered employment as head of operations on 1st July 2016. Following negotiations on email, an agreement in principle crystalized by the acceptance of the job offer by the Claimant on 8th July 2016. The terms of the employment relationship were contained in the employment agreement shared with the Claimant and included: the Claimant was employed as the Head of Operations per Clause 1.1; per Clause 6.3 the Claimant was precluded from engaging in, undertaking other employment, occupation, consulting relationship or commitment that is directly and indirectly related to the business of the Counterclaimant; and per Clause 9 of the appendix to the agreement the Claimant would return all the Counterclaimant's property in his possession or control upon termination without request from the Counterclaimant. The Claimant bound himself to not retaining the items. Further, the Claimant agreed not to compete with the Counterclaimant or solicit its employees and consultants under clauses 11 and 12 of appendix B to the agreement; agreed to not hold shares or directorship in competing companies or engage in a manner that is not in the best interest of the Counterclaimant under appendix C to the agreement, clauses 6 and 13.
19. According to the 1st Respondent/Counterclaimant, the relationship that existed between the Counterclaimant and the Respondents in the counterclaim was an intricate and complex relationship that has different moving facets. The contractual relationship between the parties was created partly orally and can further be construed through correspondences, by conduct of the parties and in the course of dealings between the parties.
20. The Respondents aver that the employment relationship between the 1st Respondent/Counterclaimant and the Claimant/1st Respondent did not last for long as within the same 2016, the Claimant/1st Respondent informed them that he had incorporated Red Sherman International Limited, the 2nd Respondent in the counterclaim, for purposes of offering consultancy services. He further negotiated and opted out of the employment relationship crystalized on 8th July 2016 and opted to offer consultancy services through the said company. A verbal agreement was arrived at between the Claimant in the counterclaim, and the 1st and 2nd Respondent in the counterclaim to the effect that the employment agreement between the Claimant in the counterclaim and the 1st Respondent in the counterclaim was terminated as of August 2016; a consultancy agreement was entered into between the Claimant in the counterclaim and the 2nd Respondent in the counterclaim; the 1st Respondent in the counterclaim being the sole director/shareholder in the 2nd Respondent was to be responsible for performance of the consultancy services; the terms of the employment agreement (now terminated) between the Claimant in the counterclaim and the 1st Respondent in the counterclaim would be applicable to the consultancy relationship between the Claimant and 2nd Respondent in the counterclaim in so far as the same were not repugnant; the 2nd Respondent in the counterclaim would provide the Claimant in the Counterclaim with the registration and other corporate governance documents for records and to effect the consultancy relationship; the 2nd Respondent in the counterclaim would provide the Claimant in the counterclaim with the bank account details for payment of the consultancy fees; the Claimant in the counterclaim would remit all the consultancy fees to the 2nd Respondent in the counterclaim less the applicable withholding tax; and all the obligations of the 1st Respondent in the counterclaim would be transferred to the 2nd Respondent in the counterclaim.



21. Other terms of the consultancy agreement were that the 1st and 2nd Respondents would not during the pendency of the agreement with the Claimant in the counterclaim: engage in any business whether as directors, consultants or employees in any other business offering the same goods and services as the claimant in the counterclaim; engage in any activity that would be in conflict of interest with the Claimant in the counterclaim; or solicit any of the Claimant in the counterclaim's employees or clients.
22. The consultancy agreement between the Claimant and the 2nd Respondent subsisted from 2016 to 2020.
23. In compliance with the oral consultancy agreement, the Claimant/1st Respondent in the counterclaim provided the Claimant in the counterclaim with incorporation and corporate governance documents of the 2nd Respondent in the counterclaim to aid the transition from employment relationship to consultancy, including, its certificate of incorporation, company search (CR12) dated 6th May 2016, Kenya Revenue Authority (KRA) Pin certificate no P0515912841 dated 6th May 2016, KRA Tax compliance certificate dated 13th May 2016, certificate of registration for youth access to government procurement opportunities (YAGPO) No NT/PPD/YP/21906/E dated 17th May 2016, statement of nominal capital, CR1, CR2, and company profile. The 1st Respondent in the counterclaim also provided the Claimant in the counterclaim with the bank account details for payments.
24. The 1st and 2nd Respondents in the counterclaim performed their obligations from 2016 to 2020, in return for consultancy fees as agreed, and remitted withholding tax to KRA as required of consultancies.
25. It is the Respondent's case that the change in the nature of agreement between the parties from employment to consultancy is further confirmed by the Claimant/1st Respondent in the counterclaim through the payslip that he has produced before the court where the tax applicable is indicated as withholding tax which is applicable to consultancies, as opposed to PAYE applicable for employment.
26. During the term of the agreement, and in performance of the 1st Respondent in the counterclaim's obligations, he developed a PPE policy on the use of PPE's provided by the company.
27. According to the Respondents, through an oral agreement between the Claimant in the counterclaim and the 1st Respondent in the counterclaim, the relationship between the parties reverted back to that of an employer and employee albeit with improved terms. The 1st Respondent in the counterclaim now earned a salary of Kshs 515,555/- subject to statutory deductions commencing January 2020. However, the Counterclaimant/1st Respondent's business was affected by the COVID 19 pandemic in 2020, forcing it to enter into mutual contract termination agreements with individual staff members. Consequently, the Claimant/1st Respondent and Counterclaimant held discussions on 26th January 2022 and mutually agreeing on the terms of separation. The parties agreed that the Counterclaimant would pay the Claimant/1st Respondent his final dues once he returned all the Counterclaimant's property. Unfortunately, the Claimant/1st Respondent in the counterclaim refused to execute the mutual termination letter.
28. As a projects head, the property contemplated included the property of the subordinates under the Claimant/1st Respondent as is customary practice in all organizations and the PPE's per the PPE policy. At the time of the termination the Claimant/1st Respondent in the counterclaim had in his possession and direct control laptops, PPE's and tools of trade as more particularized in the projects team handover sheet.
29. 28. The value of the items in the Claimant/1st Respondent's possession was in excess of Kshs 6,000,000/-. To date, he is yet to return the Counterclaimant's property which he has continued to



use for his profit. The value of the same has further depreciated. In addition to the Counterclaimant's property, the Claimant/1st Respondent in the counterclaim refused to return the Counterclaimant's PPE's contrary to the PPE policy that he was the one who prepared.

30. Notwithstanding the Claimant/1st Respondent's refusal to execute the mutual termination agreement, the parties orally agreed on a soft landing for the Claimant/1st Respondent to the effect that the Claimant/1st Respondent in the counterclaim had incorporated Brookhill Projects Limited, the 3rd Respondent in the counterclaim, which was to undertake similar jobs as the Counterclaimant as soon as it exited the market. It was agreed that the 3rd Respondent in the counterclaim would complete some of the projects the Counterclaimant was undertaking. Further, the 3rd Respondent would be paid for the work done subject to provision of invoices. On completion of the works, the relationship between the parties would be construed as terminated.
31. In line with the said soft landing agreement, the 3rd Respondent in the counterclaim undertook the Counterclaimant's remaining works and invoiced the Claimant whereupon it was paid. At no point was the Claimant/1st Respondent in the counterclaim retained to complete certain works after the mutual termination of employment.
32. The Respondent/Counterclaimant avers that it later learnt that the Claimant/1st Respondent had actually incorporated the 3rd Respondent in the counterclaim while still in its employment and was engaging in a competing business while still drawing a salary from the Claimant in the Counterclaim. He had further solicited an employee of the Counterclaimant, one Simon Kahiha Kahura to the 3rd Respondent, and they were accordingly engaging in competing business under the auspices of the 3rd Respondent in the counterclaim. The 1st and 3rd Respondents in the counterclaim were so audacious in their competing business that they advertised their services on social media using the Counterclaimant's PPE's thereby gaining benefit therefrom.
33. In the circumstances, the Counterclaimant contends that it is entitled to recover the salary paid to the Claimant/1st Respondent during the entire period he engaged in competing business before the termination of employment that is from November 2020 to March 2021 in the sum of Kshs 2,577,775/=. It is also entitled to recover the salary paid to the solicited employee in the sum of Kshs 1,125,000/=.
34. The Respondents deny the Claimant/1st Respondent's claim for the reasons that a person is entitled to service pay only after serving for more than 13 months continuous service, and is payable in circumstances where the employer was not remitting NSSF to the government. Seeing as the employment relationship between the Counterclaimant and the Claimant/1st Respondent in the counterclaim resumed and subsisted for only 11 months, he has not met the threshold for service pay. During the pendency of the employment relationship the Counterclaimant in the religiously paid the NSSF of the Claimant/1st Respondent in the counterclaim. The Claimant/1st Respondent refused to sign the mutual termination agreement thus no claim therefrom can be sustained on his part. The claims for violation of the Claimant/1st Respondent's constitutional rights including the right against discrimination, are challenged on the ground that during the term of his employment, the Claimant/1st Respondent in the Counterclaim was paid at par with all the other employees of the company, and was indeed one of the highest paid employees. They state that the Counterclaimant was always a fair employer, with recruitment, promotions and remuneration being done on merit. The Counterclaimant denies the claims of fraud and seeks to be indemnified by the 1st and 2nd Respondents in the counterclaim against any claims from statutory bodies as all of its actions were premised on their representations. They claim all the profits made by the 3rd Respondent in the counterclaim accruing from the 1st Respondent and all the Counterclaimant's employees working therein during the pendency of their employment.



DETERMINATION

Preliminary issue

11. The claimant submitted that he gave evidence on oath on 26th April 2023, adopted his witness statement and produced his 3 bundles of documents. 12. The 2nd respondent took the stand on 26th September 2023 and adopted his statement. He was briefly cross-examined and the matter was adjourned to 23rd October 2023. 13. On 23rd October 2023 1st respondent could not be cross-examined since he had difficulties tracing documents referred to him for cross examination. The matter was adjourned so that his advocate could forward hard copies of the documents. 14. The 1st respondent on subsequent hearings failed to attend court and the respondents case was closed before their witness was fully cross-examined. Their witness statement and documents have therefore not been tested on cross-examination. The foregoing was established by the court to be true.

Issues for determination

35. The Claimant outlined the following issues for determination in the suit-
- a. unfair termination and redundancy and the handover
 - b. racial discrimination
 - c. unfair labour practices
 - d. the counterclaim
36. The respondent did not file submissions. The court on perusal of the pleadings by the parties was of the considered opinion that the issues placed before the court by the parties in the claim and counterclaim were –
- a. The nature of relationship between the parties
 - b. Whether there was a case of unfair termination
 - c. Whether there was prove of racial discrimination by the respondent against the claimant
 - d. Unfair labour practices
 - e. Whether the claimant was entitled to reliefs sought
 - f. Whether the counterclaim was merited

The nature of relationship between the parties

37. The claimant's brought the claim stating he was an employee. However, in the response and counterclaim the respondent contended the claimant was only an employee for 11 months having orally agreed to convert from employment to consultancy from 2016 to 2020. That he was later returned to employment and worked for 11 months before termination.
38. The claimant on other hand contended that from 2018 he was deducted PAYE, hence employee. He said through out the period he was treated as an employee. During the cross-examination the claimant stated that he knows the respondent contended that his contract was that of consultancy. The claimant



was referred to his email of 8th July 2016 (page 49 of the claimant's bundle of documents). The court considered the email reproduced as below- 'Adam and Joi

On Fri, Jul 8, 2016 at 9:25 AM, Mem Maina <memmaina@hotmail.com> wrote:

Hello Adam and Joi,

Thank you for your reply.

As you are aware, I am really interested in Joining Lynk and making it into an Amazing Company, Your offer of a gross of 200,000/- is still below my current pay. I fully understand why this is so and I also know of the prospects in the future. I spoke to a good friend and financial advisor; I think we can make the 200,000/- work if you agreed to remit the money as a service fee (away from a salary structure). This way, you will be required to do a withholding tax (5%) and I will be responsible for all my taxation (NSSF, NHIF, Income Tax etc.)”

39. The claimant was also referred to a contract of employment (at page 51 of the claimant's documents). The court finds that the employment contract was materially varied by the email of the claimant of 8th July 2016 to a contract for services hence consultancy. A key element of contract of service in Kenya is the deduction of statutory deductions from the salary. In this case the claimant asked for a service fee away from salary structure of which he was only deducted withholding tax and evaded the burden of employee of Pay as you Earn (PAYE) of 30% , NHIF, NSSF at that time. In response to counterclaim at paragraph 6(b) the claimant confirmed the foregoing and that even the service fee was paid to Red Sherman International Limited where the claimant was a director and not to the claimant , obviously to avoid employee obligations on statutory deductions. The claimant was thus not an employee. The court deals with employees and not consultancies. The claims for the period of the consultancy are not subject of the jurisdiction of this court. The court found the claimant stated that in 2018 the respondent started deducting PAYE and produced 2 payslips for February 2018 and January 2019 where he was deducted PAYE , NHIF and NSSF. There was no request to revert to employee status by the claimant, as he did in July 2016, and taking into account the conduct of the parties, the court was not persuaded that the position had changed.
40. The court then finds that the claimant was a consultant under contract for service from July 2016. The claimant told the court he entered into negotiations for mutual separation and there was mutual separation. He told the court there was redundancy situation in the company and being an executive he opted to negotiate his contract. The foregoing establishes that the claimant had a unique fluid relationship with the respondent removing him from the usual safeguards for employees under the Employment Act. I say so since even after the said separation, he continued to work for the respondent and his company , Red Sherman International Limited, which was part of that relationship between the parties, receiving his salary since July 2016.
41. Due to the foregoing determination by the court, the claims for unfair termination and racial discrimination hinged on the underpayment and terminal dues cannot arise against the respondents as the claimant asked to be treated as a consultant to evade employee statutory deductions.

Decision on counterclaim

42. The claimant was referred to the response to his demand letter by the respondent at page 101 where among others it was stated that he was using the respondent's PPE's material under his company, the 3rd respondent, Brookhill Projects Limited. On this the claimant responded that the letter came when they had already filed the suit herein and they decided to wait for the matter to be determined first. The court finds this is another proof that the relationship between the parties was fluid. This claim



on the PPE material arose outside the employee-employer relationship. The claimant appeared to have been on a consultancy, and the court has no jurisdiction over the same. The claimant did not deny the averments in the letter Dated 11th February 2022. The witness for the respondent was stood down as he was having difficulty in finding the document referred to by counsel for the claimant at cross-examination. The court then finds the respondent's case aborted at hence the counterclaim was not prosecuted.

In conclusion

43. The court found that the claimant, having requested to be put on consultancy and his salary paid through his company, was not an employee in that relationship to enjoy the safeguards of an employee under the *Employment Act*, and the court lacked jurisdiction over that relationship. The claimant told the court he negotiated his contract and there was a mutual separation, hence the case of redundancy could not arise. Redundancy, by definition, is a forced termination, and the procedure is as stated in section 40 of the *Employment Act*. The government is involved through the Ministry of Labour. This was not the case here and the claimant did not challenge the entire process save for the payment of the said terminal dues.
44. In final orders, in the interest of justice, taking into account the existence of the employment letter and only issue being performance of contract (the conversion to consultancy to evade statutory deductions), the court ordered the claimant's dues of Kshs. 1,393,114.80 settled by the 1st respondent, being a company, within 30 days of surrender of the properties the claimant admits to possess under paragraph 14 of his claim. On costs -The court finds that each party has outstanding issues with each other(payment of terminal dues vs return of company property) in their mixed business relationship . Each party to bear own costs in the claim and counterclaim.
45. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF OCTOBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Ms. Wachira h/b for Magee

Respondent: Absent

