



Aku v Nakuru Rahisi Wholesalers & another (Employment and Labour Relations Cause E267 of 2021) [2023] KEMC 294 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEMC 294 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
EMPLOYMENT AND LABOUR RELATIONS CAUSE E267 OF 2021**

PA NDEGE, SPM

MAY 25, 2023

BETWEEN

FELILSIANO SIKOYO AKU CLAIMANT

AND

NAKURU RAHISI WHOLESALERS 1ST RESPONDENT

PAUL AMUNGE 2ND RESPONDENT

JUDGMENT

1. The matter before this court arises out of a Memorandum of Claim, which is undated, unsigned and unverified as the verifying affidavit is not commissioned; but filed on 1st October 2021 in which the claimant herein, Felisiano Sikoyo Aku, is claiming that he was an employee of the Respondent, Nakuru Rahisi Wholesalers Limited and Paul Amunze (herein referred to as the 1st and 2nd Respondent respectively). That, the 2nd Respondent was at the material time trading at Nakuru Chonjo Superior services, a business that specializes in security and dog patrols, private investigation and cash in transit, with an office as Langa Langa within Nakuru county.
2. It is his further claim herein that he was employed by the 2nd Respondent under the provision of the [Employment Act](#) No.11 of 2007 in August 2000 as a security guard, earning a monthly salary of Ksh. 5,500 whereby he was deployed to the 1st Respondent company to effect security services. That he used to receive his dues from the 2nd Respondent until the year 2004 when the 2nd Respondent's business collapsed and then he was absorbed by the 1st Respondent as their Employee. That is 2005, his salary was then increased to Ksh.7750 and later in 2017, the same was increased to Ksh. 10,750. That since 2000, he worked diligently for the Respondents without any warnings whatsoever until 31st August 2020 when his services were terminated by the 1st Respondent on grounds of Covid 19 situation. He avers that that amounted to a dismissal which came as a surprise to him as there was no prior notice to



that effect and further that he was not paid his dues for the month of August. He therefore prays for judgment against the Respondents as hereunder: -

- a. That this Honourable Court do find that the claimant's termination was unfair and unlawful as the same was not within the ambit of the Employment Act 2007 or any other employment Law.
 - b. That this Honourable Court do award the claimant 12 months compensation for the unfair termination as provided for under section 49(c) of the Employment Act 2007, Laws of Kenya, to the tune of Ksh. 150,272.40.
 - c. That the 1st Respondent herein be ordered to pay the claimant 1 month's pay in lieu of notice as provided in the Employment Act, 2007, as well as his August remuneration at Ksh 25,045.40.
 - d. That the court do order for payment of dues emanating from normal overtime which remain unpaid for the period of time the claimant worked for the Respondent amounting to Ksh. 512,862.
 - e. Payment of dues emanating from working on public holidays at Ksh. 58,925.87 (against 1st Respondent).
 - f. That the 1st Respondent do issue the claimant with a Certificate of Service.
 - g. That the 1st Respondent do pay the Claimant all dues emanating from unpaid house allowance for the period of employment amounting to Ksh. 142,751.
 - h. That the Respondent herein to compensate the claimant for all underpayments for the enter period of the claimant's employment amounting to Ksh. 133,673.25.
 - i. That the Respondent do pay interest on all claim.
 - j. Cost of the suit.
 - k. Any other relief that the Honourable Court may deem fit to grant.
3. Whereas there was no response from the 2nd Respondent the 1st Respondent did oppose the claim and filed a response dated 22nd November 2021 and filed on 24th November 2021, denying the claimant's averments and more specifically that the Claimant was its employee and had worked overtime, on weekends and holidays and without pay as alleged. It is the 1st Respondent's prayer that the claim herein be dismissed and be struck out with costs.
4. Let me clarify that whereas the 2nd Respondent did not file a response, there is no proof herein that he was served in the first place. The claimant in this matter appears to have abandoned his claim against him and decided to concentrate on the suit against the 1st Respondent. As such and because of lack of proof as to service, no order shall be made against the 2nd Respondent without sufficient proof that he was formally notified and hence invited into this suit.
5. The claimant testified as the 1st witness in his case and called CW 2, Patrick Kariuki. They both stated that they initially worked for Kaa Chonjo Security before switching or being absorbed by the 1st



Respondent Noteworthy is the Claimant's evidence in chief where he stated as follows with regards to the 2nd Respondent: -

Paul Amunga is an electrician Nakuru Rahisi used to pay me salaries. My salary was Ksh. 5,500/= . It then moved to ksh.7,500, by the time I was being dismissed it was Ksh. 10,750/ = I work for 20 years. I do not know Paul Amunge.....

6. Also a part form the demand letters, there was no other document produced by the claimant to buttress his claim against the 1st Respondent herein. He cannot however casually dismiss some of the documents by the 1st Respondent as fake mainly denying that he was employed by Nakuru Kaa Chonjo Service as indicated in most of the documents.
7. Both parties filed their written submissions as directed and I have adequately been informed by them and the authorities referred
8. The issues for determination herein flow from the pleadings and are framed as follows: -
 - i. Whether the claimant herein was an employee of the 1st Respondent
 - ii. If the answer to the above issue is in the affirmative, then whether the claimant was unfairly terminated.
 - iii. Whether the claimant is entitled to the remedies sought.

Determination: -

9. On the 1st issue of whether the Claimant herein was an employee of the 1st Respondent, I do agree with the impressive submissions by the learned counsel for the 1st Respondent on the same.
10. The Claimant herein alleges that he was employed by the 2nd Respondent and deployed to the 1st Respondent Company to offer security services upto the year 2004 when he was absorbed by the 1st Respondent upon the collapse of his employment with the 2nd Respondent.
11. It is trite law that whoever alleges must prove. The provisions of section 107 (1) of the Evidence Act is clear on the same. It was the duty of the Claimant to demonstrate that he was so employed and then absorbed by the 1st Respondent as an employee. Section 2 of the Employment Act defines an employee as “person employed for wages or a salary, and includes an apprentice and indentured learner”
12. A contract of service is defined as ‘an agreement whether oral or in written, 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 certificate of service’
13. In Kenya Hotels & allied Workers union - Versus – Alfajiri Villas (Magufa Ltd) (2014) eKLR, the court expressed itself as follows: -

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 workers? See Cassidy – Vs- Ministry of Health (1951) 2 KB 343 and multiple or mixed factor test which was initially formulated in Ready Mixed Concrete – Vs – Ministry of Pensions (1968) 2 QB 497.



14. In Christine Adot Lopeyio – Vs – Wycliffe Mwathi Pere (2013) e KLR , Mbaru J. stated as follows: -

The issue of whether this 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 with consideration as to the intention 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 Employment Act 2007 unlike the other contract for service.

15. In the instant case, whereas the Claimant alleges that he was absorbed into employment by the 1st Respondent upon the demise of the 2nd Respondent company, the 1st Respondent avers that the claimant was always an employee of the 2nd Respondent and was never absorbed by it as claimed. The Claimant however failed to involve the 2nd Respondent completely in this case yet he claims that he transitioned seamlessly from his employer to that of the 1st Respondent a fact which has clearly and consistently been denied by the 1st Respondent herein. This failure by the claimant to serve the 2nd Respondent appears deliberate and also confusing. In his evidence in chief, he purported to deny ever knowing the 2nd Respondent whom he described as a mere Electrician in town and attempted to allege that it is the 1st Respondent herein who is trying to hide behind the back of the 2nd Respondent herein so as to evade liability herein. Well, it is obviously clear herein that the 1st Respondent did not sue itself. It was sued alongside the 2nd Respondent by the Claimant and the gap left by the omission by the claimant to serve or at least pursue this case against both respondents who he claims to have been his employers, and instead opting to concentrate on the 1st Respondent herein reeks of dishonesty on the part of the claimant herein. His credibility is thus found wanting herein.

16. In Ndungu Kimanyi – Versus – Republic (1976-1980) KLR 1444, the Court of Appeal said: -

We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness or to do as say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which make it unsafe to accept his evidence.

17. It is furthermore noteworthy that the Claimant led no evidence to establish that his monthly pay was as per figures claimed in paragraphs 5 and 7 of his Memorandum of Claim, whether he paid taxes or was a member of NSSF and NHIF.

18. The 1st Respondent on the other hand maintain that the Claimant was not its employee, but of Nakuru Kaa Chonjo Superior Services owned by the 2nd Respondent whom it had contracted to offer security services to it, which contract it later terminated. It produced several documents to prove the same. That assertion all the evidence, especially the invoices and receipts more so R Ex H No.6A proves that the 1st Respondent up to and until 28th August 2020 had contracted Nakuru Chonjo Superior Services and was being billed and was paying the contractor for the services. These documents and the evidence therein have not been adequately challenged or controverted in any way and they tally with and support the Claimant's averment in paragraph 3 of his Memorandum of Claim that: -

- a. The 2nd Respondent trades as Nakuru Chonjo Superior Services, a business that specializes in security and dog patrol etc. and
- b. The 2nd Respondent employed the Claimant who worked a security guard.



19. The payments and receipts for the contract have been made till 2020, prove that the 2nd Respondent's Company did not collapse in the year 2004 as alleged by the Claimant.
20. I do therefore agree with the learned counsel for the 1st Respondent that the clear facts emerging herein are that the Claimant was an employee of the 2nd Respondent. He was deployed to the 1st Respondent company to offer security services. There was therefore a contract for service between the 1st Respondent and the 2nd Respondent to offer security services as per the deployment letter dated 3rd June 2019 signed by the 2nd Respondent and produced herein as R Exh No.1. It is thus clear as light of day that the relationship between the 1st Respondent and the Claimant was that of an independent contractor under a contract for service.
21. The allegation in the claimant's evidence during cross examination that the 1st Respondent's documents were fake; and also as made in the Claimant's counsel submissions dated 4th April 2023 that the 1st Respondent forged the said documents have been made carelessly without the same having been specifically pleaded as required by order 2 rule 4 of the Civil Procedure Rules and as submitted by the counsel for the 1st Respondent, I do hereby dismiss and disregard the same as mere careless allegations.
22. In conclusion, in the first issue, the Claimant has failed to prove the existence of an employment relationship between him and the 1st Respondent. There is no employment contract, or any document at all evidencing a direct employment relationship between the Claimant and 1st Respondents. Moreover, the claim that has received his salary from the 1st Respondent has been denied and remain unsupported. As held in Everret Aviation Limited – Vs – The Kenya Revenue Authority (2017) eKLR, there is no fact or fundamental behavior of the parties herein or any documentation evidencing or establishing an employer – employee relationship between the Claimant and the 1st Respondent.
23. All the other issue also fail in line with my conclusion in the 1st issue. The 1st Respondent cannot be said to have dismissed, unfairly or otherwise the Claimant herein who is or was not its employee in the first place. The remedies herein are therefore not available to the Claimant's as regards the 1st Respondent herein.

Conclusion

24. The 1st Respondent while admits that the Claimant worked for it, asserted with evidence that he did so under a contract for service; the relationship thereof being that of a contractor - client. The claimants claim for unfair termination and other dues does not stand as there was no employment relationship in existence. The upshot is that the Claimant's suit shall be and is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED IN NAKURU IN OPEN COURT THIS 23RD DAY OF MAY 2023.

In the presence of

Owino present for claimant

Obiero present for 1st respondent

Claimant absent

1st respondent absent

Hon. A.P Ndege SPM

25th May 2023



Obwero – prays for a copy of the judgment. I will pay for the same.

Court – Copy of judgment be supplied to the 1st Respondent counsel upon payment for the fees thereof.

Hon. A.P Ndege SPM

25th May 2023

