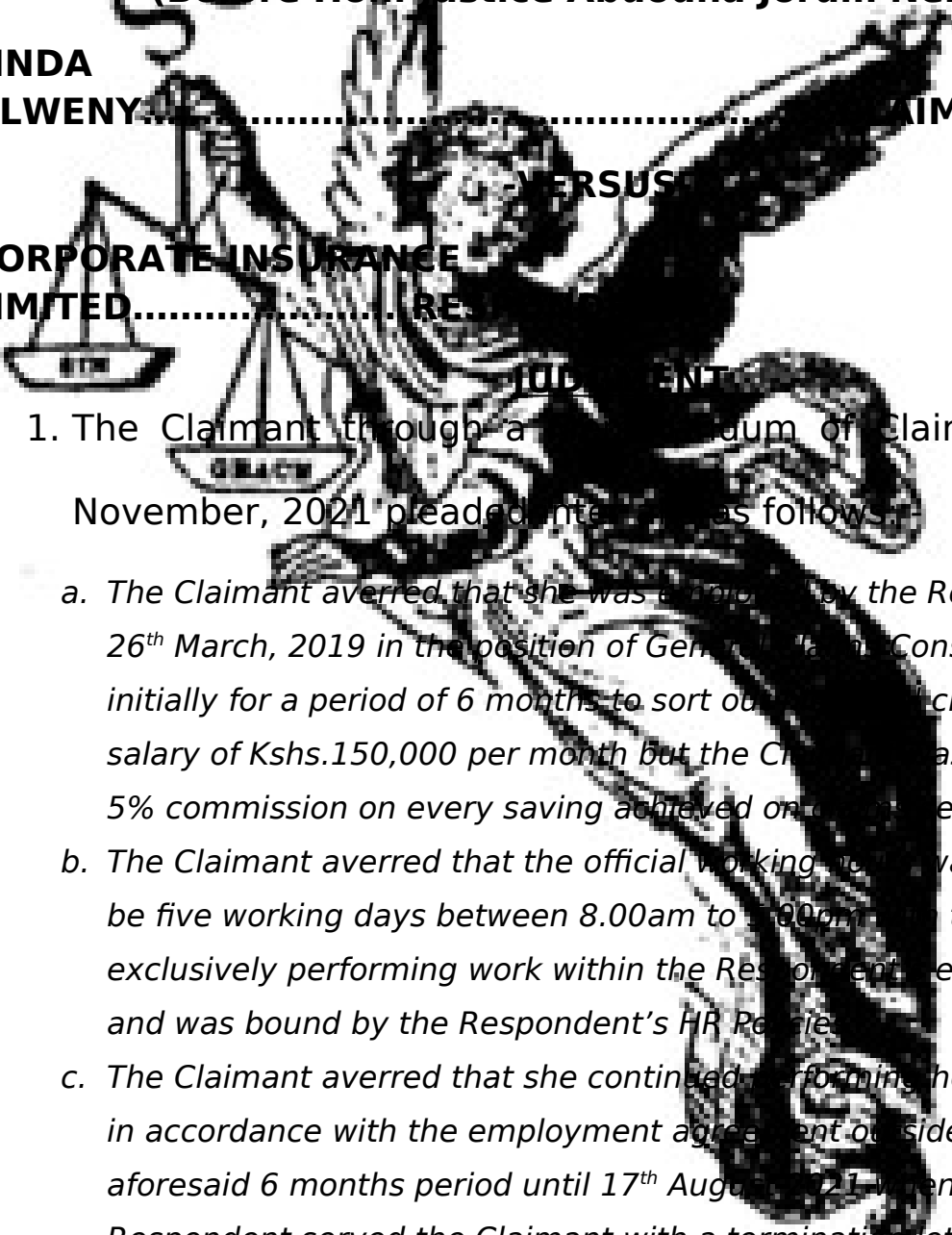


REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E923 OF 2021
(Before Hon. Justice Abuodha Jorum Nelson)

LINDA OLWENYI..... CLAIMANT

VERSUS
CORPORATE INSURANCE LIMITED..... RESPONDENT



1. The Claimant through a Petition of Claim dated 9th November, 2021 pleaded inter alia as follows:-
- a. *The Claimant averred that she was employed by the Respondent on 26th March, 2019 in the position of General Insurance Consultancy initially for a period of 6 months to sort out her claims at a salary of Kshs.150,000 per month but the Claimant was entitled to 5% commission on every saving achieved on her settlement.*
 - b. *The Claimant averred that the official working hours was agreed to be five working days between 8.00am to 5.00pm and the Claimant exclusively performing work within the Respondent's establishment and was bound by the Respondent's HR Policies.*
 - c. *The Claimant averred that she continued performing her obligation in accordance with the employment agreement outside of the aforesaid 6 months period until 17th August 2021 when the Respondent served the Claimant with a termination letter on grounds of operational requirements of the business.*

d. The Claimant averred that she disputes the fronted reasons and that the said reason is not valid nor fair and is in breach of the employment contract and provisions of sections 40, 43 and 45 of the Employment Act.

e. The Claimant averred that she was not availed due process and was not charged nor heard prior to the termination and the procedures under sections 40 and 41 of the Employment Act was not complied with at all.

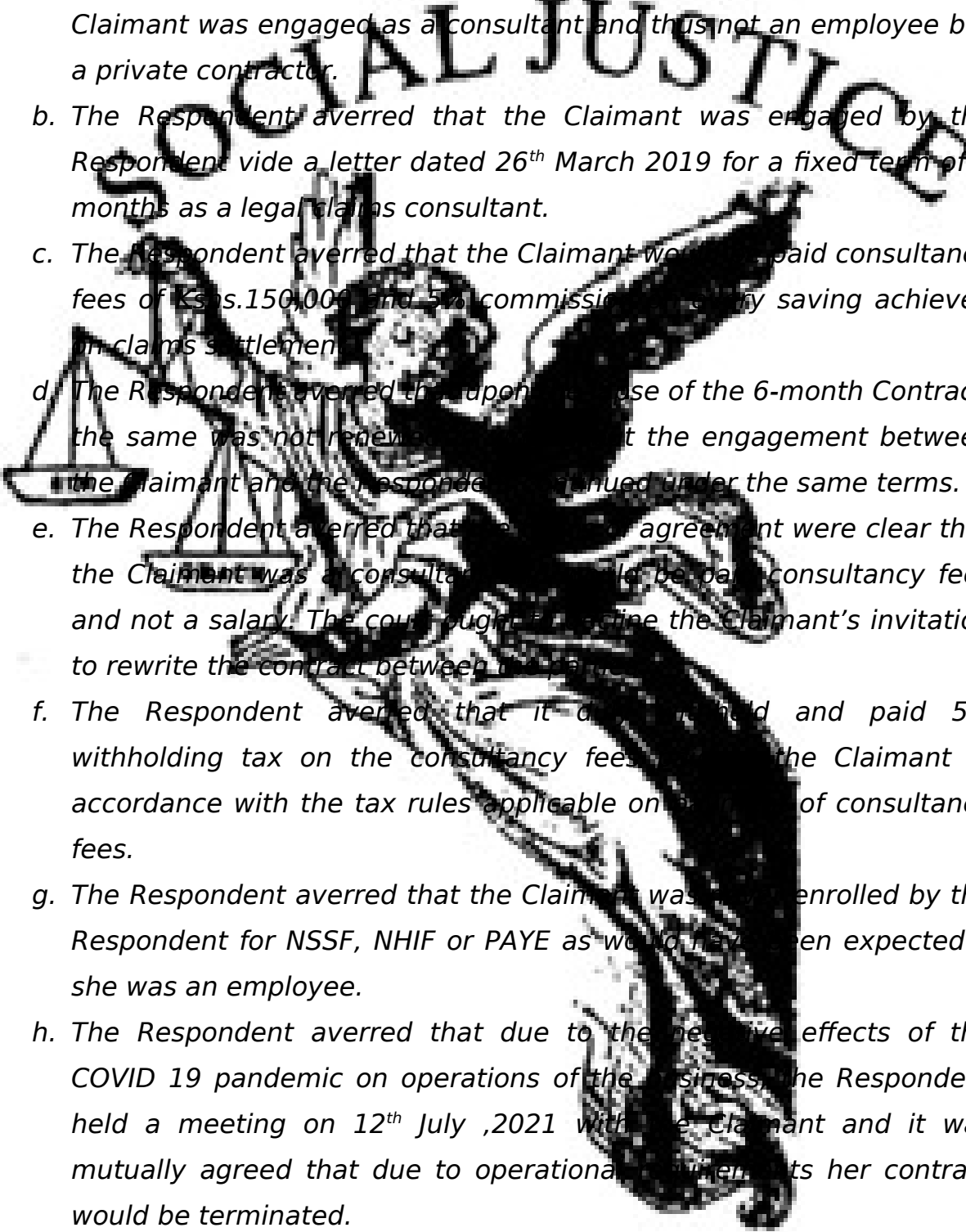
f. The Claimant averred that she performed her duties exceptionally well and achieved huge savings on the part of the Respondent and as per the contract of employment, was entitled to a commission payment of Kshs.

2,356,959.42 as at 5th February, 2020. However, despite several reminders, the Respondent has refused to pay the commission earned thus causing the Claimant to suffer financial loss.

1. The Claimant in the upshot seeks for the following against the Respondent -

- i. A declaration that the Claimant's dismissal from employment by the Respondent is procedural, unfair, unlawful and unconstitutional.
- ii. Payment of 12 months' gross salary as compensation for unfair termination.
- iii. Payment of salary in lieu of notice.
- iv. Payment of accrued and untaken leave.
- v. Payment of a sum of Kshs.2,356,959.42 with court interest from 5th February, 2020 until payment in full.
- vi. Costs of this suit and interests thereon on (a), (b) and (c).

2. The Respondents filed their Response to the Memorandum of Claim dated 27th January, 2022 and averred in their answer as follows: -

- 
- a. The Respondent averred that there was no employee-employer relationship between the Claimant and the Respondent. That the Claimant was engaged as a consultant and thus not an employee but a private contractor.
- b. The Respondent averred that the Claimant was engaged by the Respondent vide a letter dated 26th March 2019 for a fixed term of 6 months as a legal claims consultant.
- c. The Respondent averred that the Claimant was paid consultancy fees of Kshs.150,000 and 5% commission on any saving achieved in claims settlement.
- d. The Respondent averred that upon the expiry of the 6-month Contract, the same was not renewed and that the engagement between the Claimant and the Respondent continued under the same terms.
- e. The Respondent averred that the terms of the agreement were clear that the Claimant was a consultant and should be paid consultancy fees and not a salary. The court ought to decline the Claimant's invitation to rewrite the contract between the parties.
- f. The Respondent averred that it duly withheld and paid 5% withholding tax on the consultancy fees to the Claimant in accordance with the tax rules applicable on payment of consultancy fees.
- g. The Respondent averred that the Claimant was not enrolled by the Respondent for NSSF, NHIF or PAYE as would have been expected if she was an employee.
- h. The Respondent averred that due to the negative effects of the COVID 19 pandemic on operations of the business, the Respondent held a meeting on 12th July ,2021 with the Claimant and it was mutually agreed that due to operational constraints her contract would be terminated.
- i. The Respondent averred that from the date of the meeting, the Claimant did not report to the office for a period equivalent to the

notice period provided for under the consultancy agreement. The Claimant's consultancy was terminated on 17th August 2021.

j. The Respondent averred that the Claimant was not an employee but a private contractor and was thus not covered by the provisions of the Employment Act.

k. The Respondent averred that it does not owe the Claimant commissions of Kshs 2,356,959.42 /=- and it denied the jurisdiction of this court the claim having being filed in employment court when there was no employer-employee relationship between the Claimant and the Respondent.

3. The Respondent in the ground of defence was against the Claimant that the Claimant's suit was dismissed with costs to the Respondent.

4. The Claimant's case was heard on 1st April, 2024 where the Claimant (CW1) testified and adopted the documents filed and her witness statement as her evidence. She further stated that she was issued with an employment contract dated 26th March, 2019 which was a fixed term contract. She was entitled to one month notice and the reasons for termination were stated in the contract.

5. CW1 testified that she was paid remuneration of Kshs. 150,000/= per month plus commission of 5% and that the contract provided for official working hours from 8.am to 5.00

p.m and that the terms applied to all staff members. She was required to seek permission to be away from work and was expected to apply for leave and not take up work elsewhere. That she was provided with tools to carry out her work and used to prepare reports and hand them to the CEO.

6. CW1 testified that she was employed as a General Claims Consultant within the claims department and that in the minutes of 22nd July 2020 she informed the Respondent was planning reorganization with a view to downsize. She was told that the respondent intended to do away with legal consultancy.

7. It was further the claimant's evidence was she was required to furnish her NSSF, NHIF Cards and National ID but she was not registered under NSSF and NHIF. The Respondent was bound to enroll her to NSSF and NHIF and that her salary was paid through the bank which was monthly just like the rest of employees but was not issued with a pay slip.

8. CW1 testified that she was not aware she was to be issued with withholding tax certificate. That there was no contract for renewal as her contract was not renewed but she continued

working. Further that the meeting of 12th July, 2021 was abrupt and after the communication she needed to know the procedure and her last working day. That the Respondent promised to respond but it did not. That she was issued with termination letter.

9. CW1 stated that she was not paid her pay as per her termination letter and she continued working until 17th August, 2021 and was given one month salary in lieu of notice. That she was asked to hand over to allow processing of her dues which she did. She further stated that she was entitled to the commission on amounts saved which in this case was 47.3 million.

10. In cross-examination CW1 confirmed that her engagement was governed by the contract and she was supposed to provide legal services and that she was offered general claims consultancy.

11. CW1 confirmed that the contract was fixed term contract with a remuneration of Kshs 150,000 which was a gross amount as she could not tell how it was broken down. She confirmed that she was not issued with P9 form and that she

was not aware if other employees were issued with the form and further that she never asked for the P9 forms to file her returns and never received the withholding certificates. She only saw them first time in court.

12. CW1 confirmed that there was no other agreement apart from the contract with the working terms remaining the same. That she never had any benefits or medical cover and she was not aware if others were given.

13. CW1 confirmed that the leave forms were not stamped but they used to be filed in a box where employee would retain one and the other was away on the dates she requested for leave. That the medical documents were issued while still in employment as she needed permission to go away while on maternity.

14. CW1 confirmed that the meeting was abrupt and she did not expect such a decision in light of the company's performance. That she worked until she received termination letter.

15. CW1 confirmed that the Respondent had biometric system at 13th Floor and the other floor had a register. That she used

to sign in like any other staff. That the document presented in court was not signed. That the meeting ended on 12.50 pm.

16. CW1 confirmed that she could not issue an invoice and she was not paid her commission that she kept asking but was not paid.

17. On re-examination, CW1 clarified that the contract did not provide for withholding tax and she was not issued with any communication about withholding tax. That the leave form was a standard form used by all employees. That the leave form presented was her file and it was not signed. That she was entitled to annual leave.

18. CW1 confirmed that she worked for Respondent until she was terminated and the employer never raised any issue of discrimination.

19. The Respondent's case on the other hand was heard on 13th May, 2025. Sharon Juma (RW1) testified as the Respondent Head of HR and Admin. RW1 adopted her witness statement and the Respondent's bundle of documents filed as her evidence in chief.

20. RW1 testified that the Claimant was engaged by the Respondent as a legal consultant. That the Claimant was to be

paid Kshs 150,000/= per month plus a commission of 5% on savings made on settlement. That the payments were subject to tax. That the Claimant's contract was for six months but she continued working on the same terms. That the Claimant never worked for a month prior to termination hence notice pay was forfeited.

21. On cross-examination RW1 confirmed that she was not the HR when the Claimant signed and expired as she took that position in February 2023. That paragraph 3 of the contract provided that the Employer could terminate the fixed term contract by giving notice.

22. RW1 confirmed that the Claimant was described in the contract as an employee. That the HR was provided for what constituted gross misconduct. That the Claimant was not dismissed on gross misconduct. That the Claimant was a consultant not an employee.

23. RW1 confirmed that the Claimant was entitled to remuneration and the contract had working hours similar to other employees. That the Claimant was supposed to give one month notice of termination or pay in lieu of notice.

24. RW1 confirmed that the withholding tax was not provided for in the contract. That the Respondent followed the law concerning consultancy. That the Claimant was subject to HR manual as she was a consultant.

25. RW1 confirmed that the termination letter accused the Claimant for being away without authorization. That the Claimant was on a fixed pay basis she needed to seek authorization for being away.

26. RW1 confirmed that the Respondent was going to close the position of legal consultant. The person about office was not notified as there was no need. RW1 confirmed that there were dues to be paid on termination which were consultancy fees.

27. RW1 confirmed that by December 2019 amount of 7,339,128/= was saved but the document was not verified and the Respondent objected to the document.

28. RW1 confirmed that the Respondent did not pay the commission because the document was not verified and no demand was made for the payment of the same.

29. On re-examination RW1 clarified that the documents were handed over to her and she knew the Claimant as a colleague.

That the spirit of the contract was that of consultancy although she did not draft it. That the contract did not provide for leave as an ordinary employment contract.

30. RW1 clarified that the termination was mutual after the meeting of 12th July 2021. RW1 could not confirm if the document with the stamp was from the Respondent.

31. The second Respondent's witness was Geoffrey Munywoki the Director ICT Manager of the Respondent who adopted his witness statement as his evidence in chief.

32. RW2 testified that the Respondent maintained biometric systems that managed entry and exit to Respondents premises. That he was in charge of the system and ensured the system was working.

33. On cross-examination RW2 confirmed that they were unable to retrieve the Claimant's login records from the biometric system.

34. On Re-examination RW2 clarified that the data was not before the court because there was clearing that was done to adopt the new system. That there was no need to keep data that was acted on.

CLAIMANT'S SUBMISSIONS

35. The Claimant's Advocates Ogembo & Associates filed written submissions dated 23rd June, 2025.

36. On the issue of whether the Claimant was an employee or independent consultant of the Respondent, Counsel relied on the case of **Christine Achi Lohia v Wycliffe Mwathi Pere [2013] KEELRC 2013/10** and **the Halsbury's Laws of England Vol. 126, 4th Edition** to submit that in determining whether someone is an employee, in addition to the control test whereby a servant is a person who is subject to the command of the master, more factors to be considered include, the method of payment, any obligation to work only for that employer, stipulation as to hours, and the contract may be terminated among others.

37. Counsel submitted that from the terms of the contract, the Claimant was under a contract of service hence an employee of the Respondent. That the Respondent exercised control over the Claimant with regards to when and where to perform

her roles and even held the power to terminate the Claimant on account of gross misconduct.

38. Counsel submitted that the Claimant during the course of her employment faithfully reported to work at the Respondent's work premises and was subjected to the employment policies including the policy on leave hence she could not be absent from work without permission from the Respondent. That in support of this assertion the Claimant produced in evidence her leave application form which confirmed that the Claimant was entitled for annual leave as part of the policies of the Respondent.

39. Counsel submitted that the Claimant throughout her entire period of her employment she reported to and was working under the supervision of the Respondent's CEO. Further that the Claimant's duties were integral to the business of the Respondent such that she was provided with an office and all the work implements she needed to perform her duties and participated in all staff activities and staff meetings.

40. Counsel further submitted that the termination letter under paragraph 4 alluded that the Claimant had been away from

the office without authorization for a period equivalent to the notice period shows that the Claimant could be absent with express authorization of the Respondent. That the Claimant never performed her duties on her own personal routine or schedule.

41. Counsel relied on the case of **Ortega v Upperhill Springs Restaurant (Cause 857 of 2017) [2021] KEELRC**

where the court defined a servant as one where the servant agrees that in performance of that service they will be subject to the master's control which includes the power of deciding the things to be done, the way in which they shall be done, the means to be employed, and in doing so the time and place where it shall be done.

42. Counsel relied on the Black's Law Dictionary 9th Edition to submit that an independent contractor is one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. That the Claimant's role was so integrated into business of the Respondent such that she continued to carry out her role as a legal officer even after the expiry of the contract.

43. Counsel submitted that to further support that the Claimant's role was integrated in to business of the Respondent the minutes dated 30th August 2019 showed that the Respondent introduced the Claimant in the meeting as amongst its new staff which meant that the Respondent identified the Claimant's role in the business as amongst its employees.

44. Counsel submitted that at the meeting of 12th July, 2021 the Respondent considered the Claimant as a staff member under a department that has been considered for downsizing. That the Claimant's role although christened as a consultancy formed an integral part of the business of the Respondent. That the Claimant was also required to hand over her duties to the Respondent hence an integral part of the business of the Respondent.

45. Counsel relied on among other cases the case of **Lydia Limbe v Akili Dada [2022] KEELRC 151 (NJR)** to submit that by all means the Claimant was an employee of the Respondent and not an independent consultant. That the Claimant reported to work from Monday to Friday with

specified reporting and leaving time, she was provided with office space and the material necessary to complete her duties and she would attend staff meetings and participated in all staff activities, in the meeting of 30th August, 2019 she was introduced as new staff, she was supervised directly by the CEO, Her role was critical and she was retained past her fixed term contract, she required permission to be absent as per termination letter and she was asked to hand over her roles.

46. Counsel submitted that the respondent in arguing the court that the Claimant was an independent consultant, stated that the Claimant received monthly payments which were subjected to withholding Tax but did not provide any material before the court to indicate that it was a mutual agreement of the parties that the Claimant's pay would be subjected to withholding Tax. That the Claimant was never made aware that her monthly salary was being subjected to withholding tax as it was paid directly to the bank and she was never issued with any tax certificates during her employment period or at her termination.

47. Counsel relied on among other cases, the case of **Kollengode Venkatachala Talsminarayan v Intex Construction Limited** [2020] KEELRC to submit that the fact that the Respondent paid withholding Tax is not an automatic factor to determine that the Claimant was not an employee but an independent consultant.

48. On the issue of whether the termination of the Claimant's employment was unfair and wrongful, counsel submitted that the Claimant was never issued with any prior notices on redundancy, payment in lieu of notice and was never subjected to any processes or procedure contemplated under section 40, 43 and 45 of the Employment Act. She was merely issued with a termination letter effective immediately, 17th August 2021.

49. Counsel relied on sections 40, 43(1) and 45(2) of the Employment Act to submit that the burden lay on the Respondent to prove that there existed a valid reason for redundancy and that it followed the procedure set out.

50. Counsel relied on the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v**

Mombasa Sports Club [2014] eKLR to submit that even though the law allows an employer to terminate the services of an employee on account of its operational requirements, the reasons for the termination must be justified.

51. Counsel relied on the case of **Emmanuel Lino Chang'oka v Plan International Kenya [2022] eKLR (C 119 (KLR))** to submit that the Respondent has failed to establish that there existed a redundancy situation related to the termination as well as failed to produce any material to prove that the company was undergoing financial difficulties. That the Respondent never produced any financial statements or reports to prove that the business operations were affected by the pandemic.

52. Counsel relied on Section 40 (1) of the Employment Act to submit that the Respondent has not proved that it complied with any of the conditions provided under the law. The Claimant was never issued with any letter informing her of the redundancy and there equally exists a letter copied to the Labour Officer in notice of redundancy.

53. Counsel submitted that the Claimant was never consulted on the decision to terminate her employment on grounds of the operational requirements as alleged in the purported minutes in the meeting held on 12th July 2021. The Claimant disputed the said minutes and stated that she was never consulted on the decision to terminate her employment on grounds of operational requirements of business.

54. Counsel submitted that the Respondent's signature was not on the purported minutes and the Respondent has failed to prove that the Claimant actually attended the purported meeting held on 12th July 2021.

55. Counsel relied on the case of **Shah v Borderless Tracking Limited (Cause 537 of 2021 [2023] KEELRC** to submit that the Respondent failed to comply with the mandatory law and procedure on redundancy as provided under section 40 of the Employment Act. That the termination of the Claimant was unlawful, unprocedural and illegal.

56. On the reliefs sought by the Claimant, Counsel submitted that the Claimant should be awarded 12 months compensation for unfair and illegal termination. The Claimant never contributed

to her termination and at all times she performed her work in accordance to the terms and conditions and service, however, the Respondent maliciously and abruptly terminated the Claimant's service without justification.

57. Counsel submitted that she was also entitled to one month's salary in lieu of notice as she was not on leave at the time of termination and further that the Claimant was entitled to be paid her accrued salary for the year 2021 as records had been provided to show that the Claimant indeed received the leave entitlement.

58. On the claim for commissions of Kshs 2,356,959.42/= counsel submitted that the Claimant was entitled to the said commission as at 5th February, 2020 being a commission for savings achieved as at 31st December 2019 of Kshs 47,339,128.44/= which was as per her employment contract clause 3. Counsel relied on the legal document of the Respondent for the year ended 31st December 2019 where the amount saved was Kshs 47,339,128.44/=

59. Counsel submitted that 5% of the above savings tabulates to claimed commission of Kshs 2,356,959.42/= which should

earn interest from 5th February,2020 being the time the claim was payable.

60. Counsel relied on the case of **Mbuthia Macharia v Annah Mutua Idwiga & another 2017 KECA290** to submit that having laid the claim for payment of the commission and adduced evidence in support of the claim, the evidentiary burden of proof shifted to the Respondent to show that the Claimant was either not entitled to the commission or was indeed paid the 5% commission in savings. Since none of the above has been proved, the Claimant was entitled to be paid the commission of KSh 2,356,959.47.

RESPONDENT'S SUBMISSIONS

61. The Respondent's Advocates Lloyd & Partners Advocates filed its submissions dated 11th September 2020 and on the issue of whether the Claimant was a consultant or an employee, counsel submitted that the Claimant was not an employee of the Respondent and the suit should be dismissed with costs. Counsel relied the case of **Martinyama Kundu v Kemu Salt Packers Production Limited (2016) eKLR** to

submit that the onus of proving that a person was employed under a contract of service lies with the Claimant. That the Claimant has not discharged the burden of proof.

62. Counsel relied on Black's Law Dictionary 9th Edition on the definition of an independent contractor. Counsel further relied on the case of **Stanley Mungai Mwangi v National Oil Corporation of Kenya (2013) 1 KLR** on irreducible minimums used in determining existence of a contract of service that is the control test, integration test, the test of economic or business reality and the nature of obligation test.

63. Counsel submitted that based on the above case law that the agreement recognized the Claimant as a consultant, the Claimant's scope of responsibilities was that of negotiating settlement of historical legal claims and that the agreement expressly provided that the Claimant was to be paid a gross fee for her services which the Respondent fully withheld and paid 5% withholding tax in accordance with the rules.

64. Counsel relied on among other cases the case of **Ongola v and Beyond Kenya Ltd (Civil Appeal E008 of 2021) [2023]** to submit that the terms of payment is determinant of

the nature of the engagement of labour, other factors such as frequency of reporting, normal supervision or normal employment terms such as leave and pension act as interpretation tools of the relationship but do not constitute conclusive evidence.

65. Counsel submitted that the Claimant's allegation that she was integrated into the employer's structures and was subjected to the employer's terms including leave were not substantiated.

66. Counsel submitted that the leave application form, doctors report, medical claim paper and minutes dated 30th August 2019 in support of the Claimant's assertion were unsigned and contained no stamp or evidence that they came from the Respondent. That the consultancy agreement did not provide for leave. That the Claimant's working hours and station were terms negotiated and agreed upon.

67. Counsel relied on the case of **James Heather Haya v African Medical Research Foundation (AMREF) (2014)** to submit that parties to a contract reserve the right to negotiate terms that suit their needs and it is trite law that

courts' do not rewrite parties' contract. That the intention of the parties was a consultancy agreement dated 26th March, 2019 and should be construed as is and the court should decline the invite by the Claimant to rewrite the contract.

68. On the issue of reliefs sought by the Claimant counsel on the claim of payment of compensation for unfair termination and salary in lieu of notice, counsel submitted that there was no employer-employee relationship between her and the Respondent hence the Claimant was not entitled to the compensation for unfair termination and salary in lieu of notice.

69. On the claim for unpaid leave counsel submitted that the Claimant was not entitled to the claim for accrued and untaken leave days as she was not an employee and the agreement did not provide for leave. That the Claimant did not specify the accrued and untaken leave days.

70. On the claim for commission counsel submitted that the Claimant's claim of unpaid commissions of Kshs 2,356,956.42/= was unsubstantiated as the claim is anchored

on alleged legal claims paper for the year ended 31st December 2019 which was not signed or stamped by the Respondent.

71. Counsel relied on the case of **Mugo Mungai & 4 other v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & others [2019]** to submit that an unsigned document of no probative value and cannot be relied on. The legal claims paper did not say that the savings of Kshs. 72,912,844/= was wholly made by the Claimant and there was no basis for using the said figure to compute commissions as claimed.

72. Counsel submitted that the claim could be tenable if the same was anchored on a report prepared by the Claimant and approved by the Respondent. That there was no evidence that the Claimant demanded for the payment of the alleged commissions which if she was to be believed fell due for payment on 31st December, 2019.

73. Counsel submitted that the Claimant was duly paid her gross fees and commissions as shown in the withholding certificates one of which showed that a payment of Kshs

589,240/= was made on 21st October, 2021. Counsel relied on the case of **Angela Gwiyo Kuria v Schenker Limited (2020) KEELRC 1345(KLR)** on the Claimant's proof that she was entitled to the said commissions. That she needs to specifically plead and proof.

DETERMINATION

The court has reviewed and considered the pleadings, testimonies, submissions and affidavits filed by both parties. The court takes the view that the issues to be determined are as follows: -

- i. *Whether there was employer-employee relationship between the Claimant and the Respondent*
- ii. *Whether the Claimant's termination of employment was unfair and unlawful*
- iii. *Whether the Claimant is entitled to the reliefs sought.*

Whether there was employer-employee relationship between the Claimant and the Respondent

82. The employer-employee relationship is paramount before this court can adjudicate any employment matter. It is not in dispute that the Claimant was engaged by the contract dated 26th March, 2019 as the Legal claims- consultancy for a fixed term contract of 6 months. She continued working under the same terms until her service was terminated. This fact was an agreed issue among the parties. The only disagreement was that the Claimant alleged that she was an employee of the Respondent hence entitled to be protected under the Employment Act while the Respondent alleged that the Claimant was a consultant and not an employee hence she was not to be protected by the Employment Act.

83. Under section 2 of the Employment Act an employee is defined as:

"means a person employed for wages or a salary and includes an apprentice and indentured learner"

Black's law dictionary relied by the parties defines an independent contractor as:

"one who is entrusted to undertake a specific project but who is left to do the assigned work and to choose the method for accomplishing it"

84. This court notes the definition of an independent contractor as defined by Radido J in **Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR** where he stated as follows:

“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 hall marks of a true independent contractor are that the contractor will be a registered tax payer, 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 payee (tax on income) will not get annual leave, sick leave, 13th cheque and so on”.

85. In this case the Claimant was not working on her own hours and she was not allowed to work for other employers. Further in the case of **George Onyango Rachuonyo v African Development Solution (ADESO) [2022] KEELRC 890 (KLR)** the court held as follows: -

In the Court’s view, where the employer has chosen to mix elements of an independent contractor with elements normally applicable to an employee, the Court has a duty to critically look at the relationship and determine the dominant factors in the relationship so as to find the true status of the relationship between the parties. In the present case, upon a critical analysis of facts before me, the dominant elements in the relationship between the claimant and the respondent were as follows: -

- (i) As at the time of termination, the claimant held a function in the organogram of the organization as head of department.*
- (ii) The claimant reported to work daily from 8 a.m. to 5 p.m.*
- (iii) The claimant supervised staff and chaired staff meetings.*
- (iv) The claimant reported directly to the Chief Executive Officer.*

(v) The claimant received allowances to ease his work in addition to the monthly payment he received.

(vi) The claimant had no written contract of employment as at the time of termination but had been offered his present job by the Chief Executive Officer vide an email which job he accepted and continued doing.

51. These elements clearly demonstrate that the claimant was an employee of the respondent and not an Independent Consultant. The claimant did not work for any other person during the tenure of his employment.

86. Borrowing from the above holding, in this case the Claimant reported to work daily, attended Respondent's staff activities and meetings, she was supervised by the CEO, she received monthly salary, she was recognized as such hence an employee of the Respondent not an independent contractor, the contract provided for a termination clause and she used to be paid a monthly pay in to a bank account like the rest of the employees.

87. The fixed term contract between the parties provided that the Claimant was to be remunerated Kshs 150,000/= per month though termed as consultancy fees plus a commission of 5% on every savings achieved on the settlement. The Claimant was to work from 8.00am to 5.00pm for five days a week at the Respondent's premises and she was not take up any other work from another employer. The contract

provided for termination upon issuing a one month notice and the Claimant could be terminated for gross misconduct.

88. The court notes that the Claimant was supervised by the CEO, she was given office space and tools to aid her work at the Respondent's premises. The Claimant also used to log in just like the other employees. The Respondent apart from the contract letter, the Claimant was referred to as a staff member from the introduction meeting of 30th August, 2019 to the meeting of 12th July, 2021 on downsizing. The termination letter required her to hand over her roles as an employee.

89. The Respondent alleged that the Claimant was a consultant because it used to pay withholding tax but its witness confirmed that the same was not provided for in the employment contract and the Claimant confirmed that she was not aware of the same nor given the withholding certificates and she came to know of them for the first time in court. Even if the Respondent alleged that the Claimant was not deducted NSSF ns NHIF for her not to qualify as an

employee or P9 to file her returns the Claimant confirmed her salary used to be paid to the bank.

90. On the issue of leave application form even though it was not provided for in the contract the Claimant confirmed that the form was a standard form used by other employees and the leave form was not signed and stamped because it was her file copy. That during the said period she did not work as she was on leave.

91. From the foregoing it is clear that even if the contract letter referred to the Claimant as a consultant she was for all practical purposes, respondent's employee for the reasons shown above and further due to the fact that she could only be away from work with the Respondents authorization.

92. The Claimant was also an integral part of the Respondent's organization since despite her fixed term contract of March, 2019 expiring on September 2019 the Respondent continued to utilize her services up to August 2021 when it decided to downsize.

93. Whereas it was the duty of the employee to prove the existence of the employer-employee relationship before the

employer can be called to produce records as was held in the case of **Transport Workers Union v Euro Petroleum Products & Another [2019] eKLR**, the court stated that -

The Respondents on their part did not produce any documents to prove that the grievants were neither their employees nor engaged on casual basis. However, the Claimant ought to have at the least established that there was an employment relationship between the grievants and the Respondent(s) before the respondent would be called upon to produce records.

94. In this case the Claimant discharged the burden that she was an employee of the Respondent and the evidentiary burden shifted to the Respondent to prove that the Claimant was an independent consultant. In this regard, the Court therefore found and held that there existed an employer-employee relationship between the Claimant and the respondent.

Whether the Claimant's termination of employment was unfair and wrongful.

95. The court having established that there existed an employer-employee relationship it means that the Claimant was to be protected by the provisions of the Employment Act. The claimant was terminated on 17th August 2021 and the reason for termination was due to operational requirements

of the business. The respondent alleging the business was doing badly financially due to effects of Covid-19.

96. Under the contract of employment, the Respondent could terminate the fixed term contract due to operational requirements but upon giving the Claimant one-month notice. This leads to the conclusion that the ground for termination was on account of redundancy. The Respondent alleged that parties agreed via the meeting held on 12th July, 2021 to terminate the contract. The Claimant refuted the said meeting stating as above and the reason of redundancy was not fair and the Respondent was doing okay. The Minutes were not signed by the Claimant to confirm their authenticity.

97. In addition, the Claimant alleged that she continued working up to when she was terminated while the Respondent alleged that after the meeting the Claimant did not report to work hence why she forfeited notice pay. The Respondent's witness the ICT -Manager did not have the biometrics system records to show that the Claimant did not attend work after the meeting. The Claimant also confirmed that she never

received any complaints of absenteeism. This therefore meant the Claimant was terminated without the required notice or payment in lieu thereof.

98. Regarding downsizing, the Respondent never produced any financial statements to show that it was experiencing financial difficulties hence the reason was not valid as provided for under section 43 of the Employment Act. The law allows business to adopt operational strategies to remain in the market but an employer must have valid reasons for declaring the employee redundant. This was the position in the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Allied Workers v Mombasa Sports Club [2014] eKLR.**

99. In addition, section 2 of the Employment Act defines redundancy as follows: -

means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of an employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

100. Concerning procedural requirements for declaration of redundancy, section 40 of the Employment Act sets down

the requirements the employer must meet before declaring an employee redundant. That is to say, a one month notice to labour officer, the union where an employee is a member of union, to the affected employee, payment of one month's salary in lieu of notice, severance pay at 15 days for each complete year of service and any accrued leave pay.

Kenya Airways Limited v Aviation and Allied Workers Union of Kenya and 3 Others (2014)

eKLR, the Court of Appeal outlined itself as follows:

"Thus, redundancy is a valid ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with the procedure. As Section 43(2) provides, the test of what is a redundancy is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy, that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office job or loss of employment."

101. In this case the Respondent's witness confirmed that no notice was sent to labour office nor the required payments made to the Claimant. This therefore meant that the Respondent did not follow the laid down procedure in

declaring the Claimant redundant hence the termination was unfair and unlawful both substantively and procedurally.

Whether the Claimant is entitled to reliefs sought

102. The court having found that the Claimant was unfairly terminated proceeds to assess suitable compensation for unfair termination of service as provided for under section 49 of the Act. The Claimant sought 2 months compensation but this court will be guided by considerations under section 49(4) of the Act. In this case the Claimant had worked for the Respondent from July 2019 to August 2021 which was around 2 years four months. The court also considers the nature of termination which it has found to be unfair and the fact that the claimant never prayed for severance pay applicable in redundancy cases. Even if the claimant being an advocate would not find it profitable to start her own practice. The Court in the circumstance awards the claimant six month's salary as reasonable compensation for unfair termination. Regarding severance pay, this is an entitlement provided for in the Employment Act whenever an employee

declared redundant was not registered for NSSF or a pension fund. The claimant worked for the respondent for about two complete years and is therefore entitled to 15 days salary for each of the two years which works out to one month's salary.

103. On the prayer for one-month salary in lieu of notice, since the claimant was never issued with a notice of termination of her service, she is entitled to the award.

104. On the prayer for accrued leave days the Claimant never pleaded the number of leave days which had accrued. This prayer ought to be specific, pleaded and proved. Failure to plead and prove the same, the court has no basis for making the award. The claim is therefore rejected.

105. On the prayer for unpaid commission the claimant alleged that she was entitled to Kshs 2,356,900/= as at 31st December, 2019 which became due on 31st February, 2020 after achieving savings on settlement of Kshs 47,339,128.44/=. The Claimant relied on Legal Claims paper of the Respondent which the Respondent denied because it was not signed and stamped by the Respondent. The Respondent also alleged that the Claimant never made any

demand for the same hence the reason why it never paid.

The Respondent further alleged that it paid commission to the Claimant vide the withholding tax certificate of September 2021.

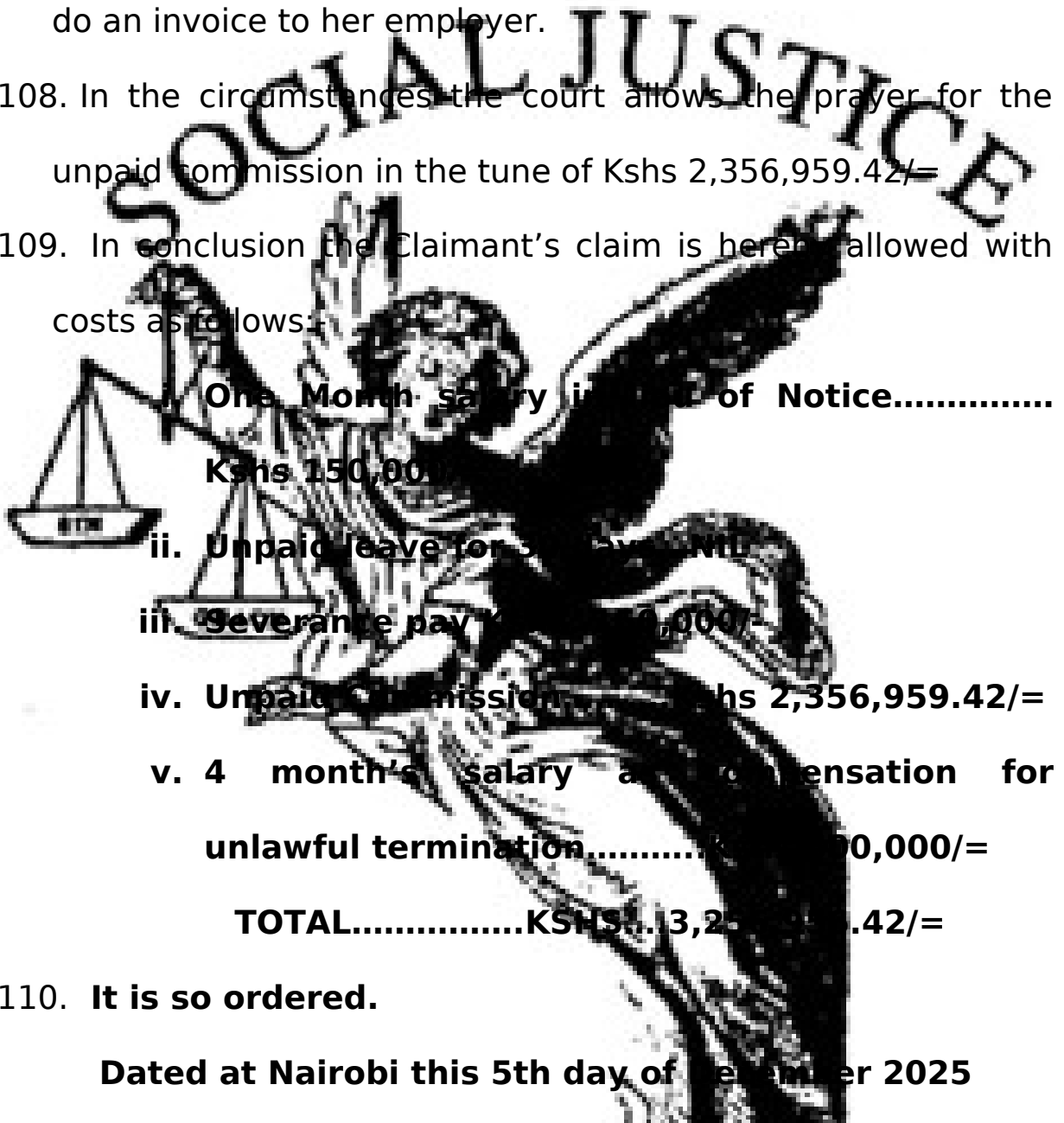
106. It was not in dispute that the Claimant was entitled to commissions on savings achieved at 5% per her contract of employment. The said withholding tax certificate of September 2021, the Respondent claims to have paid the Claimant commissions, was a nullity as the Claimant was terminated. The rest of the certificate was for her normal salary and there was no proof that she was paid any commission.

107. The Respondent disowned the Letter on no paper yet the same was in the Respondent's letter. Its witnesses confirmed that they could not confirm the document originated from the Respondent and when the Claimant was wholly responsible for the whole savings. This court notes that since the Claimant was responsible for recovering the savings without any evidence by the Respondent to the contrary she was therefore entitled to her commission even if

there was no demand made she explained that she could not do an invoice to her employer.

108. In the circumstances the court allows the prayer for the unpaid commission in the tune of Kshs 2,356,959.42/=

109. In conclusion the Claimant's claim is hereby allowed with costs as follows:



One Month salary in lieu of Notice.....

Kshs 150,000/=

ii. Unpaid leave for 3 days.....

iii. Severance pay Kshs 10,000/=

iv. Unpaid Commission..... Kshs 2,356,959.42/=

v. 4 month's salary as compensation for unlawful termination..... Kshs 100,000/=

TOTAL.....KSHS 3,256,959.42/=

110. **It is so ordered.**

Dated at Nairobi this 5th day of December 2025

Delivered virtually this 5th day of December 2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

