

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E570 OF 2024

MBELESIA JUNIOR VICTOR.....CLAIMANT

VERSUS

ERNIE CAMPBELL & COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant avers that he was engaged by the Respondent as a Quantity Surveyor pursuant to a Consultancy Agreement dated 18th September 2018. According to the Claimant, he carried out his duties to the expected level of proficiency.

2. The Claimant contends that, for reasons unknown to him, the Respondent verbally terminated his employment on 25th May 2024 without lawful cause or justification. He further asserts that the Respondent failed to provide notice, conduct a fair hearing, or furnish any reasons for the termination. Consequently, the Claimant seeks a declaration that his termination was unfair and unlawful. He further claims a total of **Kshs 7,182,033.40**, being notice pay, compensatory damages, accrued leave, service pay, and unpaid house allowance. In addition,

he prays for the issuance of a certificate of service, together with costs of the suit and interest.

3. The Respondent has strenuously defended the Claim, denying the existence of an employer-employee relationship with the Claimant. The Respondent is categorical that the Claimant was engaged under a contract for service, and not a contract of services, as alleged.
4. The Respondent further denies the Claimant's assertions that he was dismissed or terminated from employment without lawful cause or justification.
5. According to the Respondent, the Claimant was engaged as an independent contractor pursuant to the Consultancy Agreement dated 18th September 2018. Consequently, the Respondent contends that the Employment Act does not apply, as the relationship was not one of employer and employee.
6. In light of the foregoing, the Respondent has urged the Court to dismiss the Claimant's suit with costs.
7. The matter proceeded for hearing on 23rd July 2025, during which both parties called oral evidence in support of their respective cases.

Claimant's Case

8. At the trial, the Claimant testified in support of his case and, at the outset, sought to adopt on his Memorandum of Claim, witness statement, and the documents filed on his behalf to constitute his evidence in chief.
9. The Claimant testified that his salary was calculated at Kshs. 875.00 per hour, payable at the end of each month. At the time of his termination, he earned a monthly salary of Kshs. 171,819.00, having previously earned Kshs. 68,162.00. He urged the Court to assess his entitlements based on the higher monthly salary of Kshs. 171,819.00.
10. The Claimant further averred that during his employment, he did not take any leave days.
11. He also contended that the Respondent did not remit his National Social Security Fund and National Hospital Insurance Fund contributions and as such, he is entitled to gratuity and/or service pay.
12. The Claimant further stated that the Respondent failed to pay him house allowance as required under the relevant legislation.

13.It was the Claimant's assertion that his termination from employment was unfair, unlawful, and inhumane, and was carried out in complete disregard of the diligent service he rendered to the Respondent.

Respondent's Case

14.The Respondent presented oral evidence through **Gopal Vajgiani**, who testified as RW1. Mr. Vajgiani, identifying himself as a Director of the Respondent company, adopted his witness statement as his evidence in chief. He further tendered the documents filed on behalf of the Respondent as exhibits before the Court.

15.RW1 testified that the Claimant was engaged as a consultant by the Respondent with effect from 18th September 2018 to provide quantity surveying services.

16.He stated that the terms of engagement provided for a consultancy fee of Kshs. 875/= per hour, subject to applicable withholding taxes.

17.RW1 further explained that, at the end of each month, the Claimant would calculate the hours worked and raise an invoice, which would then be settled by the Respondent.

18.RW1 further testified that, although the consultancy agreement stipulated working hours of 8:00 a.m. to 4:30 p.m. on Monday to Friday and 8:00 a.m. to 1:00 p.m. on Saturday as a general guide, these hours were not strictly followed by either party. He added that, had the working hours been strictly implemented as per the agreement, the Claimant's monthly remuneration would have been consistent.

19.RW1 stated that, in practice, the Claimant worked flexible hours and was remunerated based on hours worked, resulting in variable monthly payments. He referenced the invoices raised by the Claimant, all of which were settled by the Respondent.

20.He maintained that this practice applied throughout the period of engagement, and consequently, the Claimant did not earn a predictable income as alleged in his claim.

21.RW1 further averred that the Claimant provided quantity surveying services to other clients and companies for remuneration and was not exclusively engaged by the Respondent.

22.He added that the Claimant was responsible for filing his own tax returns upon receipt of consultancy fees.

23.RW1 was categorical that the Claimant was not an employee of the Respondent, and the provisions of the Employment Act were therefore inapplicable.

24.He further averred that the Respondent disputes the jurisdiction of this Honourable Court and has filed an appeal at the Court of Appeal to challenge the Court's jurisdiction.

Submissions

25.The Claimant submitted that he had discharged his burden of proving that his termination was unfair. He argued that the Respondent had not denied any of his allegations, and that its only contention that he was an independent contractor had already been addressed and determined by this Court.

26.The Claimant further contended that the termination was unfair because the Respondent did not inform him of any wrongdoing or provide any reason for the termination. He further argued that he was never given an opportunity to

respond to any allegations, nor was he issued with a termination notice or subjected to any disciplinary process, even assuming wrongdoing had occurred.

27. In support of these submissions, the Claimant relied on **David Gichana Omuya v. Mombasa Maize Millers Limited [2014] eKLR** and **Kenya Union of Commercial Food and Allied Workers v. Meru North Farmers Sacco Limited [2013] eKLR**.

28. The Respondent, on the other hand, submitted that a comprehensive review of the evidence and witness testimony confirms that the relationship between the parties bears all the hallmarks of an independent contractor arrangement, as outlined in **Kenya Pipeline Company Ltd v. Ndegwa & another (Civil Appeal 235 of 2020) [2023] KECA 226 (KLR)** and **Kenya Hotel and Allied Workers Union v. Alfajiri Villa Magufa Ltd [2014] eKLR**.

29. The Respondent further contended that the Claimant was not subject to its direction, supervision, or control regarding the manner or means by which the contracted work was to be carried out. It maintained that it had no authority to dictate the nature of the work, the method of execution, or the means to be used.

30. The Respondent also argued that, despite the consultancy agreement indicating working hours, the invoices produced show that the Claimant worked varying

hours each month and consequently issued invoices for differing amounts. In its view, if it had exercised control over the Claimant's working hours, the invoices would have reflected consistency in the hours worked.

31. The Respondent urged the Court to find that the evidence overwhelmingly demonstrates that the Claimant was engaged as an independent contractor, considering both his testimony and the totality of the evidence presented by the parties during the trial.

32. The Respondent further submitted that the intention of the parties, crystallized in the Consultancy Agreement dated 18th September 2018, was for the Claimant to provide consultancy services as an independent contractor, not to establish an employer-employee relationship.

Analysis and Determination

33. Before delving into the issues for determination, it is pertinent to note that, by a Notice of Motion dated 3rd October 2024, the Respondent sought an order striking out the Memorandum of Claim on the ground that the Court's jurisdiction had been improperly invoked, contending that no employer-employee relationship existed between the parties.

34. In its Ruling delivered on 6th December 2025, the Court disallowed the Respondent's Application and found that the relationship between the parties was that of an employer-employee disguised as a consultancy. To this end, the Court found that the Claimant was engaged on a contract of service, hence the relationship between the parties fell within the ambit of the Employment Act 2007.

35. From the record, the Respondent was aggrieved by the said decision and subsequently filed an appeal at the Court of Appeal. As of the date of this judgment, the appeal was yet to be determined.

36. In view of the foregoing, the issue of whether the Claimant was engaged under a contract of service or a contract for service does not arise for determination at this stage, the Court having become *functus officio* on that matter.

37. Against this background, the Court has identified the following issues for determination:

- a) Whether the Claimant's termination from employment was unfair and unlawful;**
- b) Whether the Claimant is entitled to the reliefs claimed.**

Unfair and unlawful termination of employment?

38. The Employment Act, 2007, prohibits the unfair and unlawful termination of employment. Accordingly, an employer is obliged to demonstrate that an employee's termination was both substantively and procedurally fair. The legal framework for assessing the fairness and lawfulness of a termination is provided under Sections 41, 43, and 45 of the Employment Act.

39. With respect to substantive justification, Section 43(1) of the Employment Act requires an employer to prove the reason or reasons for the employee's termination from employment. Failure to do so renders the termination unfair within the meaning of Section 45 of the Act.

40. In addition to the foregoing, Section 45(2)(a) and (b) provides that a termination of employment is unfair if the employer fails to prove that the reason for termination is valid, fair, and related to the employee's conduct, capacity, compatibility, or to its operational requirements.

41. What can be drawn from the foregoing statutory provisions is that an employer, in addition to stating the reasons for termination, must demonstrate that such

reasons are fair, valid, and either related to the employee's conduct, capacity, or compatibility, or based on its operational requirements.

42. The record does not bear a letter terminating the engagement between the parties.

43. It is the Claimant's case that the Respondent verbally terminated his employment on 25th May 2024 without providing any reason for the termination.

44. On the other hand, the Respondent has consistently maintained that the Claimant was engaged as a consultant and that no employment relationship existed between the parties. As noted earlier, the Court in its Ruling dated 6th December 2024, found that the Claimant was engaged under a contract of service rather than a contract for services, and as such, concluded that an employment relationship existed between the parties.

45. Noting the position taken by the Respondent with regards to the employment relationship, it follows that no reason was provided for the termination of the Claimant's employment. Consequently, there are no reasons before the Court against which to assess the fairness of the termination in accordance with the threshold set out in Section 45(2)(a) and (b) of the Employment Act.

46. It follows, therefore, that the Respondent failed to discharge its evidential burden under Sections 43(1) and 45(2)(a) and (b) of the Employment Act, and the Claimant's termination from employment is accordingly deemed unfair.

47. Turning to the aspect of procedural fairness, an employer is required under Section 45(2)(c) of the Employment Act to demonstrate that an employee's termination was conducted in accordance with a fair procedure. Section 41 of the Employment Act prescribes the specific requirements for what constitutes a fair procedure, which include notifying the employee of the allegations against them and affording the employee an opportunity to make representations in response to the allegations in the presence of a fellow employee or a trade union representative of their choice.

48. In view of the Respondent's defence that the Claimant was not engaged under a contract of service, no evidence was adduced to show that the Claimant was notified that the Respondent was contemplating the termination of his engagement for any reason. Similarly, there was no evidence that the Claimant was afforded an opportunity to make representations prior to the termination.

49. Accordingly, I am led to conclude that the Respondent did not subject the Claimant to the procedure prescribed under Section 41 of the Employment Act, and his termination is therefore unlawful.

50. In sum, the Court finds that the Claimant's termination was both unfair and unlawful within the meaning of Sections 41, 43, and 45 of the Employment Act.

Reliefs?

51. Having found that the Claimant's termination was both unfair and unlawful, the Court awards him compensatory damages equivalent to six (6) months' salary. This award takes into account the duration of the employment relationship between the parties, as well as the Respondent's failure to demonstrate valid reasons for the termination or to follow a fair procedure in effecting the said termination.

52. Further, having determined that the Claimant's termination was unlawful, the Court awards him one (1) month's salary in lieu of notice.

53. The Claimant is further awarded service pay pursuant to section 35(5) of the Employment Act. This is on the basis that there is no evidence to suggest that the Claimant falls within the exclusions provided under section 35(6)(d) of the Employment Act.

54. The Claimant's claim for leave pay succeeds only to the extent of 18 months, in accordance with Section 28(4) of the Employment Act, which provides that any accrued leave must be taken no later than 18 months after the end of the leave-earning period.

55. Notably, the Claimant has invited the Court to compute his dues on the basis of Kshs. 171,819.00, being the highest monthly sum he earned during his engagement with the Respondent. For purposes of objectivity, it is prudent to determine the Claimant's earnings by applying the agreed hourly rate to the working hours stipulated in the agreement.

56. A review of the agreement that governed the parties' relationship shows that the Claimant's remuneration was set at Kshs 875.00 per hour. His working hours were from 8:00 a.m. to 4:30 p.m., Monday to Friday, and from 8:00 a.m. to 1:00 p.m. on Saturdays. This amounts to 47.5 hours per week, and consequently, 190 hours per month. Accordingly, multiplying the hourly rate of Kshs 875.00 by the monthly hours results in a monthly earning of Kshs 166,250.00.

Orders

57. In the final analysis, judgment is entered in favour of the Claimant against the Respondent as follows:

- (a) A declaration is hereby issued that the Claimant's termination was unfair and unlawful.**
- (b) The Claimant is awarded one (1) month's salary in lieu of notice in the sum of Kshs 166,250.00.**
- (c) The Claimant is awarded compensatory damages of Kshs 997,500.00, equivalent to six (6) months' salary.**
- (d) The Claimant is awarded leave pay for 18 months, amounting to Kshs 174,562.50.**
- (e) The Claimant is awarded service pay for six (6) years worked totaling Kshs 498,750.00.**
- (f) The total award amounts to Kshs 1,837,062.50.**
- (g) Interest shall accrue on the sum in (f) at court rates from the date of judgment until payment in full.**
- (h) The Claimant is entitled to a certificate of service. This shall issue within 30 days from the date of this judgment.**

58. While the Claimant would ordinarily be entitled to costs upon succeeding in his claim, his submissions were filed outside the timelines set by the Court. Accordingly, each party shall bear its own costs.

Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE