

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO. E653 OF 2023

ALBERT NJUE MAVUTTA.....

.....CLAIMANT

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF

TRUSTEES.....RESPONDENT

JUDGMENT

Introduction

1. For determination is the Claimant's Memorandum of Claim dated 11th August, 2023, and filed in court on 16th August, 2023, the Claimant seeks the following reliefs as against the Respondent: -
 - i. A declaration that the termination of his employment was unfair, unlawful, and in breach of the statutory requirements under the Employment Act.
 - ii. A declaration that the Respondent's conduct in respect to non-remittance of NHIF deductions and non-conformity to the directions under the letter bearing reference SF/SIM.0/75 VOL. XII [14] constitute unfair practices under Article 41 of the Constitution.
 - iii. Award of terminal dues and damages comprising salary underpayments, unremitted NHIF deductions, and

compensation for unfair termination and unfair labour practices.

- iv. Costs of the suit and interests thereon.
2. The Respondent entered an appearance on 22nd August, 2023, and subsequently filed a Response to the Memorandum of Claim dated 23rd August, 2023, denying that the Claimant was ever its employee.
3. The Claimant's case was heard on 19th March, 2025, when the Claimant testified in support of his case, adopted his witness statement and further witness statement, and produced a bundle of documents filed as exhibits in support of his case.
4. The Respondent's case was heard on 7th October, 2025. Ms. Josephine Mutiso (RW1) testified in support of the Respondent's case. The witness adopted her witness statement and produced the list and bundle of documents filed as exhibits in support of the Respondent's case.
5. Submissions were filed for both parties and have been duly considered.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent as a Supervisor for mechanical and electrical works in the year 1999. He avers that he was tasked with overseeing mechanical and electrical engineering works at various construction sites commissioned by the Respondent.

7. It is his case that in consideration of the services rendered, he was offered an initial salary of Kshs. 45,000 per month, which amount was later increased to Kshs. 100,000/- per month. The Claimant avers that he performed his duties diligently, professionally, and competently.
8. It is his case that on 11th October, 2022, the Respondent, without due regard to statutory pre-requisites under Sections 41 and 43 of the Employment Act, issued him with a letter terminating his employment. He avers that the Respondent's conduct in terminating his services was unlawful, unfair, and carried out in bad faith, and that it generally amounted to an unfair practice under Article 41 of the Constitution.
9. It is his case that the Respondent failed to grant him an opportunity to make representation before effecting the termination of his employment. He avers further that the Respondent failed to pay him his terminal dues and did not issue him a certificate of service.
10. The Claimant states that by a letter dated 22nd September, 1997, REF: SF/S/A/10/75 VOLXII/14, all the Respondent's staff were notified of a 15 per cent bi-annual salary increment, but which the Respondent neglected to effect in respect of the Claimant.
11. The Claimant avers that despite making statutory deductions from his salary in respect of NHIF, the Respondent failed to remit the same as mandated, causing him to suffer loss in the utilization of medical benefits under the NHIF scheme.

12. In examination in chief, the Claimant told the court that he was issued one month's notice at the end of the project he was supervising, and hence, in his view, he was constructively declared redundant. The Claimant denied ever being hired as a consultant.
13. On cross-examination, the Claimant told the court that he got instructions on his work from the Respondent. He confirmed that, when he commenced work on the Nyayo Estate project, he was employed by Kisa & Partners, but the Respondent decided to pay him directly. He further testified that the Respondent never communicated directly with him regarding the salary review.
14. The Claimant avers that his salary was reviewed in 1997 and 1999 by 15 per cent, but that no increase was given until 2007. It is his case that he and two others wrote to Symbion International as letters were required to be written through the consultant, and that Symbion responded to their letter and effected the salary review in 2007.
15. The Claimant confirmed that the project he was engaged in ended, hence his termination, and that he was given a one month's notice of termination.
16. The Claimant told the court that he never registered for NHIF as he did not deem it necessary. He further argued that it was his employer's duty to register him.

17. The Claimant prays that the court allow his claim.

The Respondent's Case

18. The Respondent states that the Claimant was engaged through independent contractors and consultants involved in construction projects where the Claimant acted as the Resident M&E Services Engineer. The Respondent denies the existence of any employment relationship between itself and the Claimant, asserting that there was no written or oral employment contract between the parties.
19. The Respondent further contends that the claim is incompetent because it can only arise from a Contract of Service, while the Claimant was engaged under Contracts for Services through independent contractors.
20. The Respondent avers that at all material times relevant to this suit, it had contracted the services of Kisa & Partners as consultants in the Nyayo estate project and that the Claimant was specifically employed by the said Kisa & Partners.
21. The Respondent further avers that although it arranged to pay site staff salaries directly, including the Claimant's salary, this was purely an administrative arrangement to simplify salary processing. It is its position that Independent contractors submitted details of their site staff for this purpose, and the direct payment of salaries did not create an employment relationship between the Respondent and the Claimant.

22. The Respondent maintains that the Claimant was never its employee and that the arrangement for direct payment of salaries did not create or imply an employment contract or employment relationship. The Respondent further asserts that the Claimant was, at most, an independent contractor providing services on a non-employee basis and worked under the supervision and control of various consultants, and not the Respondent.
23. The Respondent reiterates that no contract of service existed between it and the Claimant, and that any tasks assigned to the Claimant were done through independent contractors and consultants who exercised full control and supervision over the Claimant.
24. The Respondent avers that it had no contractual relationship with the Claimant concerning the terms or payment of salary under the letter dated 22 September 1997, which was addressed to employees of Kisa & Partners on site. The Respondent further states that the Claimant never raised any complaint regarding the alleged withheld or underpaid salary with the Respondent, a labour officer, or any court at the time.
25. The Respondent contends that the Claimant has only raised these salary related claims long after the fact, despite the cause of action having accrued more than sixteen years ago.

26. The Respondent asserts that the claims are time barred under the Limitation of Actions Act and the Employment Act, 2007.
27. The Respondent contends that the Claimant is not entitled to any terminal dues as claimed in paragraph 10 of the Memorandum of Claim.
28. On cross-examination, RW1, a Senior Property Development Officer of the Respondent, told the court that the Claimant's services were terminated by the Respondent. She testified that the termination letter did not indicate that the Claimant was a consultant and further buttressed the fact that the Claimant was not a consultant.
29. It is RW1's evidence that the Respondent made NSSF, NHIF, and income tax deductions and remitted the same. She states that Kisa & Partners were the Respondent's consultants until 2011.
30. RW1 further testified that bi-annual salary was effected upto the time the Claimant was terminated from service.
31. It is her evidence that the letter dated 22nd September 1997 on salary review was addressed to Kisa & Partners, and that the same was not terminated.
32. The witness confirmed that by a letter dated 24th June 2014, the Respondent transferred the Claimant from Kisa & Partners, which was no longer working for the Respondent.

She states that the Claimant was seconded to work at Hazina Trade Centre on the same terms and conditions.

33. It is her prayer that the Claimant's claim be dismissed with costs.

Analysis and Determination

34. I have considered the pleadings, the witnesses' testimonies, the evidence adduced, and the rival submissions. The Court isolates the following issues for determination: -

- i. Whether an Employer-Employee relationship existed between the Claimant and the Respondent, and if so, whether the termination of the Claimant's engagement was unfair and unlawful
- ii. Whether the Claimant is entitled to the reliefs sought

Whether an Employer-Employee relationship existed between the Claimant and the Respondent, and if so, whether the termination of the Claimant's engagement was unfair and unlawful

35. The Claimant's position is that he was an employee of the Respondent. On its part, the Respondent asserts that the Claimant was never its employee, but was engaged through independent contractors and consultants, specifically Kisa & Partners.

36. An '*employee*' is defined under Section 2 of the Employment Act 2007 as '***a person employed for wages or salary and includes an apprentice and indentured learner.***'

37. An employer, on the other hand, is defined to mean **‘any person, public body, firm, or corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm, corporation or company.’**
38. Courts have consistently held that the existence of an employment relationship is a question of fact, and not merely of documentation or labels. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions [1968] 2 QB 497**, the court set out the classic tests of employment, namely the control test, the Integration test, and the Mutuality of obligation test.
39. These principles were adopted in **Everret Aviation Limited v Kenya Revenue Authority [2013] eKLR**, where the Court emphasized that courts must look at the real nature of the relationship between the parties. Further in **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR**, the Court held that: -
- “Payment of salary, supervision of work, and the power to assign duties are strong indicators of an employment relationship regardless of the nomenclature used by the parties.”**
40. It is not denied that the Claimant worked continuously on the Respondent’s projects from 1999 to 2022. Further, although

the Respondent's pleadings strongly denied any employment relationship with the Claimant, contending that the Claimant was engaged through consultants, particularly Kisa & Partners, the testimony of its own witness (RW1) substantially weakened this position.

41. The witness, RW1, admitted on cross-examination that the Claimant's services were terminated by the Respondent, and that the termination letter did not describe the Claimant as a consultant. RW1 further confirmed that the Claimant was transferred by the Respondent from Kisa & Partners in 2014 and seconded to Hazina Trade Centre on the same terms and conditions as those he had while working under the consultant.
42. It is RW1's evidence that the Respondent made statutory deductions, including NHIF, NSSF, and PAYE, and remitted them on behalf of the Claimant. It is also evident that the Respondent paid the Claimant's salary directly and consistently.
43. The totality of the evidence before this court is a clear indication that while the Claimant's initial appointment letter named Kisa & Partners as his employer, the subsequent conduct of the Respondent overwhelmingly points to direct control, assignment, remuneration, and integration into the Respondent's operations.

44. In the premise, I find and hold that an employer-employee relationship existed between the Claimant and the Respondent.

Whether the Claimant's termination was unfair

45. Having found that an employment relationship existed between the parties herein, the next question is whether the Respondent fairly ended the Claimant's employment. Termination is only considered fair where the Respondent/employer adheres to the twin tenets of fair process and the substantive justification espoused in Sections 41, 43, 45, and 47 of the Employment Act.

46. On the issue of procedure, the Respondent's witness told the court that the Claimant's employment was terminated on the basis that a project he worked under came to an end, and which position the Claimant confirmed.

47. In my opinion, the circumstances of the termination constitute redundancy, yet there is no evidence that the Respondent issued a redundancy notice to the Claimant, and the Labour Officer, or that it applied a selection criterion and paid redundancy dues. In other words, the Respondent did not at all attempt the redundancy framework provided under Section 40 of the Employment Act, 2007.

48. In ***Kenya Airways Ltd v Aviation & Allied Workers Union [2014] eKLR***, the Court of Appeal held that:-

“Even where redundancy is justified, failure to follow the mandatory procedure renders the termination unfair.”

49. Similarly, in ***Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR***, the Court emphasized that the procedure under Section 40 of the Employment Act is not optional.
50. In the end, I find the termination of the Claimant’s employment procedurally unfair.
51. On the substantive justification test, the Respondent’s reason for terminating the Claimant was completion of the Hazina Trade Centre Project, which was the project that the Claimant worked on last.
52. The Claimant testified that he was issued a one month notice at the end of the project, and that he expected to disengage once the project ended. This position aligns squarely with a redundancy situation, distinct from a simple lapse of contract, and justifies termination on the grounds of redundancy.
53. Redundancy is generally a legitimate ground to terminate employment, and all an employer needs to show is that actual redundancy was the reason for the termination, and further prove strict compliance with the redundancy procedure set out under Section 40 of the Employment Act.

54. In light of the foregoing, I find that the Claimant's termination was based on valid and justified reasons.

Whether the Claimant is entitled to the reliefs sought.

Salary Underpayments

55. The Claimant contends that in a letter dating back to the year 1997, he was entitled to a bi-annual salary increment, but the Respondent did not implement the same. The court notes that the Claimant was employed in 1999; hence, the bi-annual increment could not have been made prior to his employment.

56. The Claimant further confirmed that he, together with two others, wrote a complaint letter on the salary increment and that the same was responded to, followed by a review of their salaries in the year 2007.

57. The Claimant further admitted that he never raised any complaint about the salary increments prior to his termination, and on this basis, the court finds this prayer an afterthought, noting that the increment was effected later in 2007, yet the Claimant has proceeded to lay claim for the entire period he was employed.

58. I thus find the claim lacking in merit and is hereby dismissed.

NHIF Deductions

59. The Claimant confirmed that he did not register for NHIF as he did not find the need to. Because the Claimant was not

registered with the NHIF, there is insufficient evidence that deductions were made and withheld without remittance, and the claim fails and is dismissed.

Compensation for the unfair termination

60. The Court has found the Claimant's termination procedurally unfair, which entitles him to compensation. Considering his length of service and the fact that the termination was for no fault of his own, I deem an award of six (6) months' salary to be sufficient compensation for the unfair termination.

61. In the end, the Claimant's claim succeeds in terms of the following orders:-

- a) A declaration that the Claimant was unfairly terminated.
- b) That the Respondent shall pay the Claimant 6 months' salary as compensation for the unfair termination at Kshs.1,444,566/-
- c)The Respondent shall bear the costs of the suit.

62. Judgment accordingly.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

**C. N. BAARI
JUDGE**

Appearance:

Mr. Maingi present for the Claimant

Ms. Karumi h/b for Mr. Omiti for the Respondent

Ms. Esther S- C/A

ORIGINAL