

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

CAUSE NO. E652 OF 2023

GEORGE MUSYOKA MWILU..

.....**CLAIMANT**

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF

TRUSTEES.....RESPONDENT

JUDGMENT

Introduction

1. By a 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, unpaid leave, 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. The Claimant filed a reply to the Response to the claim dated 15th September, 2023.
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, all dated 11th August, 2023.
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 an Assistant Clerk of Works in the year 1989, and later promoted to a Clerk of Works in 1990. He avers that he was tasked with inspecting the workmanship and safety of

work 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.55,000 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 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. It is his case that the Respondent treated him unfairly by treating him as a casual labourer.
13. 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, a redundancy was declared. The Claimant denied being hired as a consultant and argued that the Respondent hired him and seconded him to a consultant.
14. It is his position that salaries were paid to him by the Respondent. he avers that he had to forfeit leave for 8 years due to the overlap of projects, hence his claim for unpaid leave for each year of service.
15. On cross-examination, the Claimant told the court that to the best of his knowledge, he was an employee of the Respondent. He confirmed that he does not have an employment contract with the Respondent, and that his appointment letter indicates his employer as Symbion. He further testified that the appointment letter further indicates that he will receive instructions from his seniors at Symbion.
16. It is the Claimant's evidence that the appointment letter is signed by a senior partner of Symbion, and that he did sign,

indicating his acceptance of the terms and conditions of the contract.

17. The Claimant further states that Symbion engaged him on behalf of the Respondent. He states that he took leave in 2013 and again in 2022, during the one-month notice.
18. The Claimant further avers that he wrote an email on the NHIF deductions on 5th June, 2023, and that he was last at work in October-November, 2022. He confirmed that a detail was missing, thereby preventing the Respondent from registering him for NHIF deductions.
19. The Claimant confirmed that the project he was engaged in ended, hence his termination, and that his issue is with the manner of disengagement.
20. It is his case that it was expected that his service would not be needed once the project came to an end, and he confirmed receiving a termination notice.
21. The Claimant states that he did not take leave for 8 years, though he does not have his leave statement before the court indicating the number of days that had accrued.
22. The Claimant prays that the court allow his claim.

The Respondent's Case

23. 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.

24. 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.
25. The Respondent states that during the NSSF Annex (Parking Silo) construction project, independent contractors named Joel E. D. Nyaseme & Associates, Gath Consulting Engineering, and Quantconsult were engaged, and in 1995 these contractors were authorized to appoint the Claimant as a Clerk of Works. It avers that, in that role, the Claimant worked for Joel E. D. Nyaseme & Associates, not the Respondent.
26. The Respondent states that, in addition to the NSSF Annex project, it was involved in the Nyayo Estate Embakasi construction project, where several independent engineering and architectural firms were engaged as consultants, including Symbian International, Davson & Ward, Kisa & Partners, and Otieno Odongo & Partners, and that the Claimant worked for Symbian International on this project.
27. The Respondent avers that the Claimant was at all times under the direct control and supervision of Symbian

International and later Symbian Kenya Limited, who were the project architects.

28. 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.
29. 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.
30. 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.
31. The Respondent further states that the Claimant's engagements were project specific and were expected to lapse upon completion of each project. It maintains that the Claimant's engagement lawfully ended upon the conclusion of

the defects liability period of the Hazina Trade Center Project, and the Respondent denies any allegations of unfair termination.

32. 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.
33. 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.
34. The Respondent asserts that the claims are time barred under the Limitation of Actions Act and the Employment Act, 2007.
35. The Respondent contends that the Claimant is not entitled to any terminal dues as claimed in paragraph 11 of the Memorandum of Claim.
36. On cross-examination, RW1, a Senior Property Development Officer of the Respondent, told the court that the letter dated 22nd September 1997 on salary review applied to all site staff, including the Claimant. It is her evidence that the letter was addressed to Kisa & Partners, while the Claimant was employed by Symbian, and that the same was not terminated.

37. It is RW1's testimony that an increment would have made a progression of the Claimant's salary, and that no notice was issued to stop the biannual increment.
38. The witness confirmed that by a letter dated 4th February 2020, the Respondent re-assigned the Claimant to Hazina Trade Centre for the completion of the office block and did not copy any of the consultants on the reassignment.
39. She avers further that in a letter dated 21st August, 2014, the Respondent informed the Claimant that he had been appointed as Clerk of Works for the Milimani project, and that the letter was signed by the Respondent's Managing Trustee.
40. It is her evidence that the reason for the Claimant's termination was completion of the Hazina Trade Centre Project, hence his services had come to an end.
41. On re-examination, RW1 told the court that the Claimant was not a consultant, but a Clerk of Works attached to a consultant.
42. It is her prayer that the Claimant's claim be dismissed with costs.

Analysis and Determination

43. 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

44. The Claimant's position is that to the best of his knowledge, he was an employee of the Respondent. He argues that the issuance of his employment letter by Symbion did not mean he was an employee of Symbion. He maintains that Symbion issued the letter to him on behalf of the Respondent, and that the Respondent paid his salary and made statutory deductions therefrom.
45. On its part, the Respondent asserts that the Claimant was never its employee, but was engaged through independent contractors and consultants.
46. 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.'**
47. 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.”

48. 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.

49. 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.”

50. It is not denied that the Claimant worked continuously on the Respondent’s projects from 1996 to 2022. It is also evident that the Respondent paid the Claimant’s salary directly, consistently, and further made statutory deductions.

51. RW1 confirmed to the court on cross-examination that the Respondent issued reassignment letters directly to the Claimant, including a letter dated 21st August 2014 appointing him as Clerk of Works for its Milimani Project, and again the letter dated 4th February 2020 reassigning him to Hazina Trade Centre, which were notably issued without copying any consultant.
52. RW1 further expressly testified that the Claimant was not a consultant, but a Clerk of Works attached to a consultant.
53. In my considered view, the totality of the evidence before this court is a clear indication that while the Claimant's initial appointment letter named Symbion as his employer, the subsequent conduct of the Respondent overwhelmingly points to direct control, assignment, remuneration, and integration into the Respondent's operations.
54. In the premise, I find and hold that an employer-employee relationship existed between the Claimant and the Respondent, and the consultants only served as operational supervisors on site, while the Respondent retained the ultimate control.

Whether the Claimant's termination was unfair

55. 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.

56. 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 was supervising came to an end, and which position the Claimant confirmed in his oral testimony.

57. 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.

58. 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.”

59. 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.

60. In the end, I find the termination of the Claimant's employment procedurally unfair.
61. 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 supervised last.
62. 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.
63. 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 spelt out under Section 40 of the Employment Act.
64. In light of the foregoing, I find that the Claimant's termination was based on valid reasons.

Whether the Claimant is entitled to the reliefs sought.

Salary Underpayments

65. 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.

66. The Respondent's assertion is that the claim for salary increments and the NHIF deductions is statute barred.

67. The Claimant admitted that he never raised any complaint about the salary increments prior to his termination, further indicating that he only wrote an email on the issue in June 2023, after his services had long been terminated.

68. This claim is found to lack merit and is dismissed.

NHIF Deductions

69. The Claimant confirmed that the Respondent could not register him for statutory deductions on the basis that a detail was missing, which prevented the registration. It is also true that the Claimant only raised the issue in June 2023, and not at any time during his employment.

70. There is therefore insufficient evidence that deductions were made and withheld without remittance, and the claim fails and is dismissed.

Unpaid leave days

71. The Claimant alleged unpaid leave for eight years, arguing that due to project overlap, he could not take his leave. He admitted taking leave in 2013 and in 2022.

72. Although the Claimant has not produced his leave statement, it is by law the Respondent/employer's obligation to keep employee records, and for not having done so, the Respondent cannot benefit from it.

73. In the premise, I proceed to award the Claimant three months' salary on account of leave not taken and not paid.

Compensation for the unfair termination

74. 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.

75. 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 3 months' salary equivalent on account of leave not taken at Kshs.444,460.25/-
- c) That the Respondent shall pay the Claimant 6 months' salary as compensation for the unfair termination at Kshs.888,920/-
- d) Costs shall be borne by the Respondent.

76. 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