Adrian Company Limited v Karanja (Civil Appeal 190 of 2019)
[2025] KECA 497 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 497 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 190 OF 2019

F TUIYOTT, AO MUCHELULE & GV ODUNGA, JJA

MARCH 21, 2025

BETWEEN

ADRIAN COMPANY LIMITED ..... APPELLANT

AND

ANTHONY WAINAINA KARANJA ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nairobi (O.N. Makau, J.) dated 15th March 2019 in ELRC Cause No. 1390 of 2014)

JUDGMENT

1. The Employment and Labour Relations Court (ELRC) at Nairobi (O.N. Makau, J.) in a judgment delivered on 15th March 2019 found that the respondent, Antony Wainaina Karanja, was employed by the appellant, Adrian Company Limited, under a contract of service between 8th April 2013 and 8th August 2013; that the respondent had been unfairly terminated by the appellant; that he was entitled to one month's salary in lieu of notice; compensation for unfair termination; arrears of salary and telephone allowance; and a certificate of service. The monthly salary was Kshs.500,000/= and therefore the amount was payable in lieu of notice. The compensation ordered was Kshs.500,000/=; salary arrears amounted to Kshs.1,800,000/=; and telephone allowance was Kshs.10,000/=. The total award was Kshs.2,810,000/=, and then costs and interest from the date of judgment.

2. This is the decision that aggrieved the appellant who came before this Court on appeal raising the following grounds:-

> " 1. The learned trial judge erred in law and fact by holding that the respondent was under a contract of service as opposed to a contract for service.
>
> 2. The learned trial judge erred in law and fact by pegging the claim on a monthly salary of Kshs.500,000/=.

3. The learned trial judge erred in law and fact by failing to find that the respondent had been fully compensated for services he had rendered.

4. The learned trial judge erred in law and fact by laying reliance on draft terms of an employment contract prepared by the respondent of which the appellant was not privy to and did not acknowledge.

5. The learned trial judge erred in law and fact by finding that the respondent was terminated through an SMS which was not produced at the hearing.

6. The learned trial judge erred in fact and law by awarding the respondent telephone allowances and arrears which were not supported by evidence.

7. The learned trial judge erred in law and fact by ignoring the respondent's evidence that he was never on the appellants pay roll.

8. The learned trial judge erred in fact and law by rewriting the terms of engagement between the appellant and respondent.

9. The leaned trial judge erred in law and fact by misapplying the fabricated documentary evidence adduced by the respondent and appellant which did not entitle the respondent to any compensation.

10. The learned trial judge erred in law and fact misapplying the law and disregarding the appellants submissions and the authorities thereof.

11. The learned trial judge erred in law and fact by relying on the respondent's evidence solely without giving reasons for its decision.

12. The learned trial judge erred in law and fact by failing to find that the appellant had proved its defense on a balance of probabilities."

3. As the first appellate Court, our jurisdiction entails the reconsideration and evaluation of the evidence that was tendered before the trial court so that we can draw our own conclusions thereon, while remembering that we did not have the advantage of seeing and hearing the witnesses as they testified. (See Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123).

4. The respondent's case before the trial court was that on 8th April 2013 the appellant engaged him as a permanent employee in the position of a senior telecommunications manager at a monthly salary of Kshs.500,000/=, a car allowance of Kshs.15,000/= per month and a monthly telephone allowance of Kshs.2,500/=. This was an oral agreement which was supposed to be formalized in a letter of employment, but that by the time he was terminated on 8th August 2013 the letter had not been issued. The respondent's job description included the design and installation supervision of four (4) projects in GSM Repeater Systems of Safaricom as one of the appellant's customers and assorted assignments in design and installation for Home Boosters Indoor Coverage Projects; and Customer and Equipment Suppliers Liaison. He had installed and commission tested for Repeater and Acceptance Tests at Voyager Safari Camp in Taita Taveta when he was terminated. By the time, the appellant had paid only Kshs.200,000/= part salary and to cater for telephone allowance and mileage allowance. He was terminated without being afforded any due process, said the respondent. Lastly, that the appellant gave him a staff identification card and business card during the employment.

5. The appellant's response to the claim was that the respondent was engaged to offer consultancy services with regards to the aforementioned projects that the appellant was undertaking; that the respondent

was not under any controlled supervision in the execution of this duties. It was pleaded that the engagement was not on a permanent basis, and that the respondent was paid in piecemeal once an assigned task was concluded. It was admitted that the respondent completed the installation of the Repeater Tests in Voyager Safari Camp, but that he failed to complete the other assigned tasks. The appellant denied that the respondent was unfairly terminated but that, rather, his engagement lapsed. The appellant admitted that the respondent was issued with the job card, but added that the card was to allow for easy access and identification and to enable maintaining of the appellant's corporate image. Lastly, it was the appellant's case that it paid the respondent Kshs.200,000/= being the agreed rate for both the consultancy services and for the completed projects, and denied that there was any outstanding payment.

6. The trial court received the respondent's evidence on the claim and the evidence of Bernard Wachari Njoroge (who was the managing director of the appellant) on the defence. The court considered the evidence and accepted the version of the respondent. It was found that the respondent had shown that he had been employed by the appellant under a contract of service and issued with the job card as a sign of inclusivity to the company for internal and external purposes; that based on the email dated 14th May 2013, the respondent was recognized as the champion of the Repeater and Indoor Solutions who would be involved in all related projects. Concerning the terms of service, the learned Judge concluded that the respondent was employed under a contract of service for the terms in the claim and evidence which the appellant had not been able to dispute. With regards to whether the termination was unlawful, the court noted that, now that it had been proved that the respondent was a permanent employee of the above terms, the appellant ought to have shown that the termination had complied with sections 41, 43 and 45 of the *Employment Act*; that the appellant had failed to show compliance. Judgment was consequently entered for the respondent.

7. It was submitted on behalf of the appellant that, on the evidence, the trial court ought to have found that the respondent was engaged as an independent contractor, and not an employee as had been claimed. Learned counsel Ms. Kariuki for Mr. Gitonga submitted that there was no evidence of supervision, as to when the respondent reported to work and where he worked from. Further, there was no demonstration on the part of the respondent that there were any statutory deductions, including Pay as You Earn, on the Kshs.200,000/= that had been paid. Learned counsel blamed the trial court for relying on Kevin Ochieng -vs- Falcon Signs Limited [2018]eKLR in which it had been held that the issuance of a job card was sufficient evidence to prove the existence of employer- employee relationship, urging that the decision was distinguishable given that the facts therein showed that the claim was not defended and that the claimant had produced copies of payslips, unlike what had happened in the instant appeal.

8. Learned counsel for the respondent supported the findings by the learned Judge. He reiterated that the respondent had been employed under a contract of service as he had been issued with a job and business card; was assigned the role of senior telecommunications manager; and was assigned a company's email.

9. We have considered the record of appeal and the respective submissions. We will not lightly differ with the findings of the fact by the trial court as we recognize that the court saw and watched the witnesses who appeared before it and was able to discern who of the witnesses was credible and believable. (See J.S.M. -vs- E.N.B, [2015]eKLR). If, however, we are satisfied that the findings were not based on the evidence or were based on a misapprehension of the evidence or that the learned Judge demonstrably acted on wrong principles, we should interfere.

10. The questions for determination are whether the respondent was engaged as an employee or as an independent contractor; on what terms, depending on the findings above whether he was unlawfully terminated; and whether the award in the judgment was justified.

11. Section 2 of the *Employment Act* allows for oral contracts of service, and also that a contract to carry out specific tasks, otherwise known as piece work, falls within the definition of contract of service. (See Krystalline Salt Ltd -vs- Kwekwe Mwakele & 67 Others [2017]eKLR).

12. In the contract of service, the employee is subject to the command of the master, subject to the rules and procedures of the employer and is part of the business of the employer (See Charles Juma Oleng -vs- M/s Auto Garage Ltd & Another [2014]e KLR). The employee's salary will be subject to statutory deductions, and he will be entitled to leave, and so on.

13. Where one is dealing with an independent contractor, the contractor will be a registered taxpayer, will work his own hours, run his own business, will usually be free to carry out work for more than one employer at the same time, will invoice the employer for his service and will be paid accordingly. (See Kenya Hotel & Allied Workers Union -vs—Alfajiri Villas [2014]eKLR).

14. The evidence by the respondent was that he was orally employed by the appellant's managing director for the stated salary and other benefits and the employment lasted for four months. He was aware that the appellant had a Human Resources Department and he interreacted with it but did not get the promised written contract of employment. He did not tender any evidence to show that he requested for the contract. For all the four months, he received only one payment of Kshs.200,000/=. He was not paid any of the stated allowances. He was not placed on the payroll of the appellant. When he was engaged, he was given four projects which he begun to work on. At the time he was terminated he had completed only one of the projects. That was when he was paid Kshs.200,000/=. The money was not subjected to any statutory deductions. The respondent was given a job card that allowed him to enter the appellant's building and have meetings with clients. When cross-examined, he stated that the building in which the appellant was located had security protocols that would not allow one to enter without such staff card. According to the appellant's evidence, this card was only facilitative and to identify the respondent as dealing for the appellant. It was not evidence of an employer/employee relationship. The appellant's evidence was that the Kshs.200,000/= one-off payment was for the single assignment that the respondent was able to complete.

15. We have reviewed this evidence. It is our considered finding that, given the facts and circumstances surrounding the relationship between the appellant and the respondent, what becomes clear is that the respondent was contracted to deliver the four assignments, and that he was paid Kshs.200,000/= on the single completed assignment; that the engagement was terminated when the respondent was not able to deliver on the other assignments. This was not an employer/employee relationship.

16. That being the case, the issue whether or not the respondent was lawfully terminated, or the issue of being paid the claimed salary and/or benefits, did not arise. The respondent was not engaged in a contract of service. This was a contract for service.

17. The result is that we allow the appeal, and set aside the judgment and decree of the learned Judge issued on March 15, 2019. In its place, there shall be a judgment dismissing the respondent's claim with costs.

18. Costs of the appeal will be paid by the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

F. TUIYOTT

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR