



**Ongola v And Beyond Kenya Ltd (Civil Appeal E308 of 2021)
[2023] KECA 93 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 93 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E308 OF 2021
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

ESTHER AUMA ONGOLA APPELLANT

AND

AND BEYOND KENYA LTD RESPONDENT

*(Being an appeal from the Judgment and Decree of the Employment
and Labour Relations Court of Kenya at Nairobi (M. Onyango,
J.) delivered on 16th April 2021 in ELRC Cause No. 697 of 2018)*

JUDGMENT

1. The appellant, Esther Auma Ongola, sued the respondent, And Beyond Kenya Limited, in Nairobi ELRC Cause No 697 of 2018 claiming that she was unlawfully terminated from her employment. She prayed for: an order compelling the respondent to pay to her a sum of Kshs 31,004,450/60; an order compelling the respondent to issue her with a certificate of service within 14 days of judgment; costs and interest.
2. According to her Memorandum of Claim dated May 11, 2018 and amended on December 17, 2018, the appellant's case was that she was employed by the respondent on 1st December 2006 as a masseuse at a monthly salary of Kshs14,000, which increased to Kshs103,505/30. In addition, she claimed to be entitled to a commission of 10% of her basic salary. According to her, she was terminated on May 12, 2015 without any warning letters prior to her termination or paid her terminal dues. She stated that she never went on annual leave, and was never paid leave allowance or house allowance during her employment.
3. In its Statement of Response dated December 17, 2018, the respondent stated that the appellant was in its employment from January 1, 2007 to June 2009 when the respondent revised its operational policies and began outsourcing massage therapists as a professional service; that the appellant agreed



to the change in the terms of her contract; that she agreed to offer massage services as an independent contractor with effect from July 2, 2009; that, after being issued with a warning letter requesting her to appear and discuss a complaint that had been raised against her, the appellant left the respondent's Kichwa Tembo Camp in Masai Mara where she was posted, and did not return. Accordingly, she ceased to offer professional services to the respondent.

4. The respondent's case was that, as an independent contractor, the appellant was not entitled to any benefits under the *Employment Act*. According to the respondent, the appellant ought to have organised to proceed on her annual leave; and that she was not on a monthly salary, but was entitled to a 40% commission of revenue realised from her massage services.
5. In her Reply to the Respondent's Statement of Response dated January 14, 2020, the appellant denied that she received a warning letter or left the respondent's camp without notice; that she worked as an independent therapist; that she executed a massage service agreement; and that she got her terminal dues.
6. In her judgment dated April 16, 2021, Maureen Onyango, J. dismissed the appellant's claim, but directed that she be issued with a certificate of service. The learned Judge found that the claimant did not fit in the definition of an employee under the *Employment Act*, but qualified as an independent contractor who did not enjoy the employment benefits that an employee is entitled to.
7. Aggrieved by the judgment of Onyango J., the appellant, who was unrepresented, moved to this Court on appeal on the following grounds:
 - “ 1. That the Hon. Judge erred in law by only using written laws instead of also using common law.
 2. That the Hon. Judge erred in law in failure to consider to(sic) any other relief the Hon. Court shall deem fit but instead dismissed the cause with costs to a giant company which had been using services to the claimant in bait of being a permanent employee by paying using pay slips obtaining NSSF, NHIF deductions.
 3. That the Hon. Judge erred in law by not looking at other exhibits but only considered exhibits of 2007 – 2018 which led to discrimination against Article 27 of the *constitution* which states equality from discrimination and Article 159 of the *constitution*.
 4. That the Hon. Judge erred in law by lack of empathy and sympathy to a poor Kenyan citizen by denying her constitutional rights by using procedural technicalities/subversive activities.
 5. That the Hon. Judge erred in law by going against Articles 160 and 165 respectively due to the acts of both Advocates i.e company Advocates and my advocates.”
8. In addition to the appellant's record of appeal, the respondent filed a supplementary record of appeal dated September 30, 2022 containing 24 documents, including the appellant's Memorandum of Claim dated May 11, 2018; the respondent's Statement of Response dated December 17, 2018; the appellant's reply to the respondent's statement of response dated January 14, 2020; typed proceedings in the ELRC; and a copy of the impugned judgment, all of which were not included in the appellant's record of appeal.



9. In support of her appeal, the appellant filed written submissions and list of authorities dated October 13, 2022 and further submissions dated December 13, 2022. She cited the cases of Kenya Revenue Authority v Salim Morgan [2010] eKLR; Calveries and Others v Chief Constable of Merseyside Police and Others (1989) All ER 1025; England (1996) 2 All ER 58; and Secretary of State for the Home Department and Others (2004) 4 All ER 1158, all of which relate to the right to compensation of a plaintiff for loss and damage suffered on account of the tort of misfeasance on the part of a public officer.
10. In addition to the foregoing, the appellant cited the Supreme Court decision in Kenfreight EA Limited v Benson K. Nguti [2019] eKLR where the Supreme Court dismissed the appeal from the decision of the Court of Appeal upholding the judgment and decree of the ELRC in which the respondent, an employee of the appellant, was awarded damages for unfair termination in the sum of Kshs8, 116,344 less terminal dues paid as ex gratia payment.
11. On their part, learned counsel for the respondent, M/s. Kemboy Law, filed written submission and list of authorities dated December 13, 2022. In response to the appellant’s contention that the learned Judge erred by only applying statute law in disregard of common law, counsel for the respondent cited the case of *David Sironga Ole Tukai v Francis Arap Muge and Others* [2014] eKLR for the proposition that in so far as the Constitution and written laws do not apply, then, and only then, shall the substance of common law be applied to determine a matter.
12. On the authority of *Co-Operative Bank of Kenya Ltd v Banking Insurance and Finance Union* [2014] eKLR, learned counsel for the respondent submitted that, even if the appellant would have qualified for reliefs under section 49 of the *Employment Act* (namely payment *in lieu of* notice, salary arrears, and 12 months’ salary), it is trite that such awards are of reliefs are discretionary and to be awarded on a case-to-case basis.
13. In addition, counsel for the respondent dispelled the appellant’s allegation that the learned Judge acted in a discriminatory manner in not granting the relief sought and cited the Supreme Court decision in *Gichuru v Package Insurance Brokers Ltd KESC* 12 KLR, contending that mere differentiation or inequality of treatment does not per se amount to discrimination (see also *Nyarangi and Others v Attorney-General* [2008] eKLR).
14. On the allegation by the appellant that the learned Judge lacked empathy and sympathy, learned counsel cited the case of *Peter Mwangi Mbutia v Samow Edin Osman and Another* [2004] eKLR, submitting that:

“Judicial decisions are not made whimsically or capriciously, and emotions are not benchmarks of any judicial considerations.”
15. This being a first appeal, it is our duty, in addition to considering the written and oral submissions made by the appellant and learned counsel for the respondent, to analyze and re-assess the judgment and all the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.
16. In *Selle’s* case (*ibid*), the Court held that:

“An appeal to this Court from a trial by the High Court (as well as the ELRC) is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled.



Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions”

17. Having considered the record of appeal, the written and oral submissions of the appellant and of the learned counsel for the respondent, we are of the considered view that the appeal herein stands or falls on our findings on four main issues, namely: whether the appellant was an employee of the respondent within the meaning of the Employment Act, or whether she was an independent contractor; the terms of employment, or of the contract for services, as the case may be, whether the appellant was engaged; whether the appellant was entitled to any of the relief sought in the ELRC; and the appropriate orders to make in determination of the appeal, including orders as to costs.
18. On the first and second issues before us, the appellant claims that she was an employee of the respondent, having been employed as a massage therapist on 1st December 2006 at a monthly salary of Kshs 14,000 which was gradually increased to Kshs 103,502/30. According to her, she remained in employment until May 12, 2015 when she was allegedly terminated unlawfully, unfairly and without notice.
19. The respondent denied the appellant’s claim, but admitted employing her as a massage therapist with effect from January 1, 2007 until June 19, 2009 when the two entered into an independent Contract for Service dated July 2, 2009 in terms of which the appellant agreed to provide massage therapy services at a commission computed at 40% of the gross revenue generated on her account. From then on, the appellant worked as an independent service provider until May 12, 2015 when she ceased offering her professional services. Accordingly, the terms of that agreement fell outside the provisions of the Employment Act.
20. Addressing the issue as to whether the appellant was an independent service provider or an employee within the meaning of the Employment Act, the learned Judge correctly observed that:

“The claimant signed an agreement dated July 2, 2009 where she started offering the respondent independent masseuse therapist services. As such her contract changed to a contract for services. Her services were duly compensated in payment of commission and not salary or wages as defined in the Employment Act The claimant does not fit in the definition of an employee under the Employment Act but qualifies as an independent contractor who does not enjoy the employment benefits that an employee is entitled to.”
21. Having carefully considered the record of appeal, the written and oral submissions of the parties, and the impugned judgment, we find nothing to fault the learned Judge’s finding that the appellant was an employee of the respondent within the meaning of the Employment Act only for the brief period between January 1, 2007 and July 2, 2009. In relation to that period of employment, the appellant was paid, and acknowledged receipt of, terminal dues amounting to Kshs 19,898/48 being “termination gratuity” comprised of accrued service charge, accrued off days, accrued leave days, three months’ notice, and long service award proportion.
22. We take to mind the fact that the terms of payment is determinant of the nature of the engagement of labour – whether it amounts to a contract of service or a contract for services. To illustrate, the Supreme Court of Nigeria in *Shena Security Co Ltd v Afropak (Nig.) Ltd & 2 Others* [2008] 18 NWLR laid down the following factor that should guide courts in determining which kind of contract the parties entered into. In this regard, the Court had this to say:

“If payments are made by way of “wages” or “salaries” this is indicative that the contract is one of service. If it is a contract for service, the independent contractor gets his payment



by way of “fees”. In like manner, where payment is by way of commission only or on the completion of the job, that indicates that the contract is for service.”

23. Section 2 of the *Employment Act, 2007* sheds light on the distinction between an employee and an independent contractor, and defines an employee thus:

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;”

24. On the other hand, a “contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;” Section 3(1) of the *Act* provides that “this Act shall apply to all employees employed by any employer under a contract of service.” It follows, therefore, that the appellant fitted the definition of an employee within the meaning of sections 2 and 3 of the Act for the limited period between January 1, 2006 and July 2, 2009 after which she became an independent contractor rewarded by way of commissions on expressly agreed terms.

25. The Black’s Law Dictionary 10th Edition defines a “Contract for Service” as “A contract for a job undertaken by an independent contractor, as opposed to an employee.” That brings the second and third issues to rest.

26. On the third issue, we agree with the learned Judge that the appellant was duly compensated by payment of commission under the agreement and, therefore, was not entitled to the relief sought. Having received her “terminal gratuity,” and there being no evidence on the record as put to us to suggest that any of her commissions were withheld by the respondent, we reach the inescapable conclusion that the appeal fails. Accordingly, we hereby order and direct that:

- a. The appeal be and is hereby dismissed;
- b. The judgment and decree of the ELRC (Maureen Onyango, J.) dated April 16, 2021 in Nairobi ELRC Cause No 697 of 2018 be and is hereby upheld; and
- c. Each party do bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

