



**Namonyo v Barasa (Employment and Labour Relations Cause
10 of 2023) [2025] KEELRC 78 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 78 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 10 OF 2023
JW KELI, J
JANUARY 22, 2025
(FORMERLY NAIROBI CAUSE NO.261/2018)**

BETWEEN

ROBERT MAYEKU NAMONYO CLAIMANT

AND

HON DIDMUS WEKESA BARASA, MP RESPONDENT

JUDGMENT

1. The Claimant on 5th March, 2018 filed suit against the respondent vide a statement of claim dated 20th February, 2018 which was amended vide an Amended statement of Claim dated 18th January, 2023 supported by the Claimant's verifying affidavit sworn on even date seeking the following reliefs:-
 - a. Kenya Shillings Two Million Four Hundred Thousand only (2,400,000/=) being salary arrears for the last five(5) years by the time of filing this suit plus interest until payment in full.
 - b. General damages for breach of employment contract
 - c. Damages for loss of pain and suffering occasioned due to the financial and personal embarrassment caused by non-payment of salaries
 - d. Costs of this suit
 - e. Interest on the above items
 - f. Any other or further relief that this Honourable Court may deem just and fit to grant.
2. The claim was filed together with the list of documents, a bundle of documents, a list of witnesses and the Claimant's witness statement all dated 20th February 2018. The Claimant's Statement of Claim, list of Documents and list of Witnesses were all amended and dated 18th January 2023.



3. The 1st Respondent entered appearance through their Advocates Gazemba Wekesa & Company Advocates on the 17th May, 2018 and filed a Memorandum of Response dated 28th May, 2018 together with the 1st Respondent's witness statement, list of witnesses, list of documents of even date and the bundle of the documents of even date.
4. The 2nd Respondent entered appearance through his Advocate Job Wambulwa on the 14th May, 2018 and filed a Response to the Claim dated 29th May, 2018 to the statement of claim.
5. The Claimant filed an Application dated 19th January, 2023 seeking to Amend the Statement of Claim which Application was canvassed by the Parties vide their Written submissions and was allowed by the Court vide a Ruling dated 3rd November, 2023.
6. In the said Ruling, Hon. Justice Rika further on his own motion, transferred the file from Nairobi to ELRC Bungoma and the file was issued with a new Case No. from Nairobi Cause No.261/2018 to ELRC Cause No. 10 of 2023, Bungoma.
7. The 1st Respondent filed a Notice of Change of Advocates dated 17th April, 2023 changing their Advocates from Gazemba Wekesa & Co Advocates to H.K Law Advocates.

Hearing and Evidence

8. The Claimant's case was heard on the 8th April, 2024. Mr. Robert Mayeku testified as CWI in his case, produced as his evidence documents under the Claimant's list of documents dated 18th February, 2023 as Exhibits 1-8 and 10-14 that were eventually adopted by the court as the CW 1's evidence and his witness statement dated on 5th March, 2018. The Claimant was cross-examined by counsel for the Respondent, Mr. Malinzi Counsel for the Respondent. On even date, Inspector Martin Letayi, Forensic Document Examiner testified as CW 2. The Claimant's case was marked as closed.
9. The Respondent's case was heard on the 23rd of September, 2024. Mr. Didmus Wekesa Barasa, MP, the Respondent gave sworn testimony as DW1. He adopted his witness statement dated 28th May 2018 and filed on 31st May 2018 as his evidence in chief, producing his bundle of documents as respondent's evidence documents under the list of documents dated 28th May 2018 as Respondent's exhibits(DWB) 1-6. On even date, the witness was cross-examined by the counsel of the claimant Mr. Lorot and re-examined. The defence case was marked as closed.

The Claimant's case in summary

10. The Claimant in his Amended Statement of Claim dated 18th January 2018 stated that he was employed by the Respondent on or after 11th August 2017 as a personal and official driver at a gross salary of Kshs. 40,000/=.
11. The Claimant asserted that since his employment, the Respondent has not paid his salary as it is in the arrears of Kshs. 2,400,000/= being payment for the last five(5) years particularly from the months of April, August, September- December 2017 onwards.
12. It is claimed that on 11th November, 2017, a Notice to Show cause was issued to the Claimant and indeed the Claimant responded and contacted the Respondent and established a reasonable and logical foundation for retention of his employment.
13. The Claimant claims that his dismissal was unjust, unfair and unlawful and in breach of the provisions of the *Employment Act*.



14. The Claimant's case was heard on 8th April, 2024 where the Claimant Robert Mayeku(CW 1) adopted his witness statement dated 15th March, 2018. The Claimant testified that the Respondent was his boss worked as his driver and was not paid his dues.
15. The Claimant testified that when he asked for his payment, the Respondent asked him to take off and after one week of being in Nairobi, he went to Kitale. After two weeks, the Claimant testified that the Respondent called him asking why he was not in Nairobi. The Claimant claims that he has never been paid by the Respondent and the documents produced by the Respondent are not his signatures. When the Claimant saw the said documents, he reported the forgery of his signature to the Police who gave him a report produced in Court.
16. The Claimant testified that for the Five (5) years he had worked with the Respondent, he was not paid his salary and gratuity. It is claimed that the Respondent used false documents to stop Parliament from paying the Claimant's gratuity.
17. During cross-examination, the Claimant stated that he had an employment contract with the Respondent but did not have the appointment letter by the Respondent. The Claimant confirmed that he relied on his Bank statements as proof of his employment but there was no proof of transaction personally with the Respondent.
18. The Claimant admitted that among his documents there was no alleged apology letter to the Respondent as claimed. The Claimant admitted that the Respondent was not personally liable for the payment of gratuity as his letter dated 7th December, 2022 was addressed to Parliament and not to the Respondent.
19. On re-examination, the Claimant clarified that he had initially sued the Parliamentary Service Commission. It is claimed that the Respondent has not denied he was in employment. The Claimant further stated that on the apology, he explained to the Constituency office the reason he travelled to Kitale was that he lacked funds and Kitale was close to Kimilili Constituency.
20. Further, it was stated that the Respondent dictates staff and negotiates over their salaries. Further, the Respondent as the MP authorizes payment as per the funds remitted by the Parliamentary Service Commission. The Claimant contended that the Constituency office is under the MP who had his salary.
21. Inspector Martin Letayi(CW-2) testified in the Claimant's case. He stated that he was a qualified Forensic document examiner with more than 10 years of working experience on a full-time basis working under the Director of Criminal Investigations(DCI) in the National Police Service. CW-2 testified that on the 30th July, 2018 Exhibits were submitted for forensic examination brought by Corporal Ruth Mugo from the Nairobi Central Police Station.
22. He testified that exhibit A was a memo signed and stamped which was a copy of Declaration dated 27th September, 2017, Exhibit B was a copy of Kimilili Constituency Office letter dated 10th November, 2017 addressed to Robert Namonyo. Exhibit C was a Copy of the employee salary advance request form dated 15th October 2017. Exhibit D was a copy of the employee advance salary dated 11th December 2017, Exhibit E bared specified signatures of Robert, and Exhibit F was a handwritten Statement of Robert.
23. CW-2 stated that the request was for him to examine and ascertain the specimen signatures compared with specimen signature named E and unknown signature at Doc F whether it was made by the same person. He further testified that upon his examination he found that the said signatures were by different individuals as explained in his Report dated 15th August 2018.



24. During cross-examination, CW-2 stated that he was not physically present when collecting the specimen signatures and could not tell whether the specimen signature belonged to the Claimant as he had never met him physically. He stated that his duty was only limited to comparing the signatures of the Claimant. He also stated that there was no copy of Exhibit F in his report but he referred to the handwritten statement (Exhibit F) during the examination. He further stated that he did not interrogate original documents but copies of the documents provided by Ms. Mugo.
25. On re-examination, CW-2 clarified that he was not an Investigating officer but just an examiner.

Respondent's case in summary

26. Conversely, in his Statement of Response dated 28th May 2018, it is the Respondent's case that the Claimant was engaged as a driver for a period of 3 months from 1st October 2017 to 31st December 2017 at a gross salary of Kshs. 40,000/= . The Respondent averred that from the very onset, the Claimant was rude, late and absconded duty on various occasions despite verbal warnings by the Respondent.
27. The Respondent asserted that in November 2017, the Claimant absconded duty for a period of One(1) week leading the Respondent to issue him with a Show Cause letter on the 11th of November, 2017. The Claimant failed to respond to the Show cause letter occasioning the Respondent to suspend the Claimant from work vide a letter dated 13th November 2017 with a requirement that he report to the office on 20th November 2017 for directions.
28. That during the suspension period, the Respondent came to learn that the Claimant was still employed at the National Police Service which probably affected his duties with the Respondent. With this new information, the Respondent issued the Claimant with another Show Cause Letter dated 16th November, 2017 which was not responded to by the Claimant. The Respondent avers that as a result of the Claimant absconding duty and failing to respond to the two(2) show cause letters or offer an explanation, the Claimant's services were terminated on 27th November, 2017. It was the Respondent's case that the Claimant was accorded several opportunities to defend himself but failed to do the same. It was also claimed that the Respondent followed due procedure and accorded the Claimant an opportunity to be heard.
29. The Respondent denied the claim that it did not pay the Claimant his salary and asserted that it paid the Claimant Kshs. 100,000/= which amount is more than what the Claimant is entitled to for the period he served as a driver. The salary was paid for the month of October 2017 as the Claimant absconded duty at the beginning of November, 2017 up to the time the Claimant was terminated.
30. The Respondent's case was heard on 23rd September 2024. The Respondent Hon. Didmus Wekesa Barasa (DW-1) adopted his witness statement and the list of documents as outlined above. DW-1 told the Court the Claimant was a Police Officer before coming to work for him and that he did not receive a resignation letter from the Police Service. DWI stated that the Members of Parliament are facilitated by the Parliamentary Service Commission with money to hire and pay staff and file returns on who they had paid money.
31. During cross-examination, the Respondent stated that the letter inviting the Claimant for disciplinary proceedings was served on the Claimant who appeared before the Disciplinary Committee and replied to the show cause letter. However, the Committee was not satisfied with the response by the Claimant and went ahead to dismiss him.



32. Further the respondent testified that the Claimant attempted to process gratuity at the Parliamentary Service Commission without the Respondent's approval as the documents were fake and the Respondent stopped the process as the Claimant was not entitled to gratuity.

Written Submissions

33. The parties filed written submissions after the closure of the hearing.

Determination

Issues for determination

34. The claimant in written submissions raised the following two (2) issues for determination namely: -
1. Whether the claimant was constructively dismissed by sending him on stand by for a full parliamentary term.
 2. Whether there are pending arrears to be paid by the respondent
35. The respondent in written submissions addressed one issue namely: -
- a. Whether the Respondent had a valid reason and employed a fair procedure in summarily dismissing the Claimant.
36. The court having heard the case and considered the submissions of the parties was of the considered the opinion that the issues for determination in the suit were as follows:-
- i. What was the nature of the employment of the claimant?
 - ii. Whether the claimant was terminated from employment
 - iii. Whether the termination was lawful and fair
 - iv. Remedies

What was the nature of the employment of the claimant?

37. The employment relationship is the foundation of any employment claims. The claimant stated in paragraphs 3 and 4 of the amended claim dated 18th January 2023 that he was employed by the Respondent, the Member of the Parliament for Kimilili Constituency who was his immediate employer since August 2017. To further confirm the appointment, the respondent forwarded the claimant's details to the Parliamentary Service Commission as is the procedure.
38. The Respondent vide replying affidavit dated 22nd March 2023 paragraph 9 stated that the allegations in the amended claim emanate from a different contract of employment. He annexed and marked as DWD 1 copy of a document named confirmation of contract dated 21st June 2021. The said contract had engaged the claimant as driver in the NG-CDF office of Kimilili constituency for duration of one year.
39. The respondent submits that the Claimant was employed by the Respondent as a Driver for a fixed term of three months, from 1st October 2017 to 31st December 2017, earning a gross monthly salary of Kshs. 40,000. The Respondent denies that the Claimant was engaged beyond the agreed term or throughout the alleged five-year parliamentary period. Further, the Respondent denies that the Claimant was a standby employee or consistently on call as claimed.



40. The burden of proof in employment claims is as stated in section 47(5) of the Employment Act,

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

41. The claimant stated he was employed from August 2017 to end of the parliamentary term of the Respondent. The respondent asserted that he employed the claimant only for 3 months October to December 2017. The respondent produced as DWD 1 confirmation of contract dated 21st June 2021 for one year engaging the claimant as a driver in the NG-CDF office of Kimilili Constituency for one year. He stated that was a sister office. The court holds that under section 10 of the Employment Act, the employer ought to provide an employment contract to the employee with particulars to wit:-

“(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection(3) be given in instalments and shall be given not later than two months after the beginning of the employment.

(2) A written contract of service shall state—

- (a) the name, age, permanent address and sex of the employee;
- (b) the name of the employer;
- (c) the job description of the employment;
- (d) the date of commencement of the employment;
- (e) the form and duration of the contract;
- (f) the place of work;
- (g) the hours of work;
- (h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
- (i) the intervals at which remuneration is paid;
- (j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and
- (k) any other prescribed matter.”

42. Under section 74 of the Act the employer must keep records under section 10 above being the contract of employment.

43. The court has had in the past opportunity to hear from the Parliamentary Service Commission on the nature of employment of staff serving Members of Parliament in the case of Ekirapa v Kaunya & another (Cause 34 of 2021) [2022] e KLR Where the commission's (2nd respondent informed the court as follows:-

“25. The 2nd respondent submits that it is a constitutional office under Article 127 of the Constitution of Kenya. That it is charged with the responsibility to facilitate functioning of parliament with respect to constituency offices. Public Service Commission allocates money



for each member of parliament to hire staff and operate constituency office in their respective constituencies.

26. The 2nd respondent submits that the *Parliamentary Service (Constituency Offices) Regulations 2005* were enacted to guide members of parliament on running of the constituency offices. That the members of parliament employ own staff independent of parliamentary service commission.
27. That regulation 22 (supra) provides for recruitment of staff by members of parliament who determine their terms of employment and salary scales. That each member has voted monthly allocation for purposes of hiring staff under regulation 13(supra).
28. That the 2nd respondent has no role whatsoever on the recruitment and dismissal of staff under constituency offices who have their own funds and vote ends.”
44. The foregoing position was upheld in the Court of Appeal in Mombasa Civil Appeal No 59 of 2014 *Parliamentary Service Commission v George Okoth Owour & 2 others* where the court held the contract of employment having expressly identified the 3rd respondent(Member of Parliament) as employer there was no need for the court to infer agency relationship with appellant(the Commission).
45. The contract in the instant case was not produced and the court believed the respondent never issued the claimant with one. The employment of staff of Members of Parliament is guided *Parliamentary Service (Constituency Offices) Regulations 2005* as stated in *Ekirapa case(supra)* and thus the court holds the Respondent was the employer and one responsible for the remuneration of the claimant.
46. The respondent stated the claimant started work in October 2017 for three months. He did not produce any evidence to that effect. The claimant produced several correspondence as evidence he was in employment way beyond the alleged 3 months contract by the respondent being letter dated 8th February 2018 to the chief officer of the constituency office stating he had not been paid salary since September 2017 and letter dated 15th December 2020 to the Claimant by the Manager Kimilili Constituency office on alleged misconduct related to being a driver of the Respondent. From the foregoing the court holds the claimant was on open ended contract of employment before 21st June 2021 as driver of the respondent during the parliamentary term.

Whether the claimant was terminated from employment

47. The employment of the claimant was of a driver of the Respondent. He was working for the Respondent hence pegged on the parliamentary term. A perusal of the documents produced before the court indicates that he was under the disciplinary control of the constituency office held by the Respondent. The evidence of the respondent was to the effect he was the employer and could issue disciplinary proceedings against the claimant like notice to show cause. The Claimant received a show cause dated 11th November 2017, a suspension letter dated 20th November 2017, show cause letter dated 15th December 2020 among others. The court taking into account the foregoing finds that the termination of the employment was by effluxion of time taking into consideration the confirmation contract of 21st June 2021((DWD1) for 1 year produced by the Respondent in affidavit dated 22nd March 2023. The court found the Respondent was not candid on the employment record of the claimant as the employer. The court determined the claimant was under the respondent’s employment until the letter of 21st June 2021.



Whether the termination was lawful and fair

48. The court noted the submission by the respondent on alleged termination in 2017. The court finds the respondent was not candid on the employment of the claimant and sought to short change him by alleging he was on 3 month fixed term contract contrary to evidence before court. In view of the court's findings on the employment of the claimant, the court holds that though the claimant was mistreated for failure to be paid salary, vide the one year confirmation contract of 21st June 2021((DWD1) which the claimant did not deny, his services with the respondent just came to an end.

Remedies

49. On claim for Kenya Shillings Two Million Four Hundred Thousand only(2,400,000/=) being salary arrears for the last five(5) years by the time of filing this suit plus interest until payment in full.

The claimant stated he was never paid a salary during his period of service. By letter dated 10th January 2018, the claimant wrote to the Clerk of the National Assembly and stated that he was engaged as the official driver of the Respondent and had not been paid salary since employment. The respondent filed two documents as evidence of salary advance amounting to Kshs. 100,000 (DWB5-6). The claimant called a forensic expert examiner Martin Kitayi who produced his report to court to state that the signatures of the claimant on the said payment vouchers were forgeries. The claimant stated his salary was Kshs. 40000 per month. He produced before court letter dated 1st November 2022. During Cross-examination the respondent denied that was his signature on the letter dated 1st November 2022, which indicated the names of the staff who had served under him. The respondent did not object to the production of the report or produce report to the contrary. The court then finds that the claimant proved on balance of probabilities he was not paid his salary during his entire employment by the respondent. The court further caps the salary arrears from September 2017 to May 2021 pursuant to the letter dated 21st June 2021 being confirmation of a new contract to the claimant.

Claim for General damages for breach of employment contract

50. The court finds that the claimant would be sufficiently compensated by award of unpaid salary with interest from date of filing suit.

Claim for Damages for loss of pain and suffering occasioned due to the financial and personal embarrassment caused by non-payment of salaries.

51. The court awarded salary arrears of months September 2017 to May 2021 with interest at court rates from date of filing suit. That is sufficient compensation.

Further relief- Payment of Gratuity for service

52. The court finds that the respondent was the one who stopped the Parliamentary Service Commission from payment of the 31% gratuity to the claimant. The gratuity is due to the claimant for September 2017 to May 2021 the period of service as driver of the respondent. The gratuity was the claimant's his social security as envisaged under section 35 of the *Employment Act* and in accordance with the *Parliamentary Service (Constituency Offices) Regulations 2005*. The court Orders gratuity be paid for the period of service as stated.



Conclusion

53. In the upshot, the court holds the claim as amended on the 18th January 2023 as merited. Judgment is entered for the claimant against the respondent as follows:-
- a. The respondent to pay the claimant salary in arrears at kshs. 40,000 pm for period September 2017 to May 2021 (45 months) total sum of Kshs 40,000x45 total sum of Kshs. 1,800,000 payable with interest at court rates from date of filing suit.
 - b. Payment gratuity for the period of service from September 2017 to May 2021 in accordance with the Parliamentary Service (Constituency Offices) Regulations 2005.
 - c. Costs of the suit.
54. Stay of 30 days is granted.
55. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND JANUARY 2025

**JEMIMAH KELI,
JUDGE.**

In the Presence of:

Court Assistant: Otieno

Claimant : Malinzi

Respondent: Rotich h/b Kiplagat

Legal Representation:

Claimant:- Ndugutse Malinzi & Co Advocates

Respondent:- H & K Law Advocates

