



REPUBLIC OF KENYA



**Shayona Timber Limited v Ochieng (Employment and Labour Relations Appeal E031 of 2023) [2025] KEELRC 844 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 844 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E031 OF 2023**

**AN MWAURE, J**

**MARCH 14, 2025**

**BETWEEN**

**SHAYONA TIMBER LIMITED ..... APPELLANT**

**AND**

**DORNARD OBARO OCHIENG ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable K. Kibelion, Principal Magistrate delivered on 2nd October 2023 in Nakuru MCELRC No. E147 of 2022)*

**JUDGMENT**

1. The Appellant, being dissatisfied by the judgment and decree of Honourable Principal Magistrate K. Kibelion, filed this appeal vide a Memorandum of Appeal dated 19<sup>th</sup> October 2023 on the grounds that: -
  1. The Learned trial Magistrate erred in law and in fact in by failing to appreciate the fact that the security services contract dated 2<sup>nd</sup> November, 2015 made the contract between parties a contract for service and as a such the Claimant was an independent contractor and as such the provisions of the *Employment Act* were inapplicable.
  2. The Learned trial Magistrate erred in law and in fact by awarding the Claimant house allowance, public holiday and annual leave yet as per the security services contract dated 2<sup>nd</sup> November, 2015 the Claimant was an independent contractor and not entitled to the same.
  3. The Learned trial Magistrate erred in law and in fact by failing to appreciate as per paragraph 1 of the security services contract dated 2<sup>nd</sup> November, 2015 the relationship as between the Claimant and the Respondent was that of contractor-client relationship and where the Claimant was the service provider (contractor) and the Respondent was client. The



Honourable Court thus attempted to rewrite the contract as between the parties and in so doing fell into error.

4. The Learned trial Magistrate erred in law and in fact by treating the security services contract dated 2<sup>nd</sup> November, 2015 as a letter of appointment whereas the same was not a letter of appointment but rather a contract for service and in this case the service being provided was that of security services.
  5. The Learned trial Magistrate erred in law and in fact by failing to appreciate the import of paragraph 3 of the security services contract dated 2<sup>nd</sup> November, 2015 and which expressly stated that the Claimant shall be paid contractual fee and which confirm that indeed the Claimant was an independent contractor who was being paid an agreed contractual fee. No salary or wages were ever paid to the Claimant by the Respondent.
  6. The Learned trial Magistrate erred in law and in fact in failing to appreciate that the Claimant as an independent contractor was paid his contractual fee by way of petty cash vouchers and where it was well indicated that what was being paid was his contractual fee.
  7. The Learned trial Magistrate erred in law and in fact in failing to dismiss the Claimant's cause considering the overwhelming evidence adduced by the Respondent in support of its defence and where it demonstrated that the employment claim by the Claimant was based on sinking sand as there was never a contract of employment but the same was almost a contract for service and which was paid up until the day the Claimant voluntarily opted to no longer provide the security services to the Respondent and as such the same was a candidate for dismissal.
  8. The Learned trial Magistrate erred in law and in fact in awarding public holiday pay and annual leave whereas the Claimant was an independent contractor and where he testified that he would hire someone else to offer the security services when he wanted to go for leave or during public holidays as agreed in the security services contract dated 2<sup>nd</sup> November, 2015.
  9. The award of house allowance, public holiday and annual leave to the Claimant by the trial magistrate are totally unsupported in law and by the evidence on record since the Claimant was an independent contractor and who would even whenever not available hire and pay another security guard to provide the said security services to the Respondent and as such the provisions of the Employment Act are inapplicable.
  10. The Learned magistrate erred in law and in fact in purporting to put in perspective materials and facts not contained in the pleadings, evidence and submissions of parties.
  11. The Learned trial magistrate erred in law and in fact in failing to consider the evidence on record, the Respondent's submissions and the circumstances of the case prior his final findings.
2. The Appellant prays that:
- a. This appeal be allowed.
  - b. Part of the decision and/or judgment of Honourable K. Kibelion dated and delivered on 2/10/2022 in Nakuru MCELRC No. E147 OF 2020, awarding the Claimant house allowance, public holiday and annual leave totaling to Kshs.444,168.40 be set aside and/or varied, and in its place, the suit be dismissed with costs to the Respondent now Appellant.
  - c. The costs of the appeal and as well as the costs of the suit in the lower court be borne by the Respondent.



3. The Appeal was disposed of by way of written submissions.

### **Appellant's submissions**

4. Being the first appeal, the Appellant submitted the court is required to re-evaluate the evidence adduced in the trial court and come up with its conclusion as it was held in *Kenya Power Lighting Company Ltd v E K O & another* [2018] eKLR.
5. The Appellant submitted that the trial magistrate appeared to overlook and misunderstand the security service contract, which explicitly defined the relationship between the parties as a contract for service rather than a contract of service. The Appellant also submitted that the contract described both parties as the service provider and client, confirming it was a contract for service. The Appellant relied on the case of *Christine Adot Lopeyio v Wycliff Mwachia Pere* [2013] eKLR, where the court stated that the distinction between a contract of service and a contract for service is key to determining the rights of the parties. While a contract of service is clearly defined under the *Employment Act, 2007*, with specific protections, many contracts for service are not written, making the facts and intentions of the parties crucial in each case. The definitions of employee, employer, and contract of service under the *Employment Act, 2007* and the *Industrial Court Act, 2011*, are central to this consideration. Also, in *Omusamia v Upperhill Springs Restaurant* [2021] KEELRC 3 (KLR) and *Fred Mudave Gogo v G4s Security Services (K) Limited* [2014] KEELRC 713 (KLR) the cases brought out the difference between contract of service and contract for service.
6. In *Maurice Oduor Okech v Chequered Flag Limited* [2013] eKLR the court held that that the relationship between the Claimant and the Respondent was not one of employer and employee but rather an independent contractor arrangement under a contract for services based on evidence such as job cards, local purchase orders, job contracts, and payment per completed job, which are not typical of an employment relationship. As a result, the Claimant's case, which relied on the existence of an employment relationship, was dismissed.
7. The Appellant submitted that the security service contract dated 2<sup>nd</sup> November 2015, created a contract for service for the parties, and the trial learned magistrate was trying to rewrite the said contract, which was beyond him and cited the cases of *Danson Muriuki Kihara v Johnson Kabungo* [2017] eKLR, *Albert Chebot & Another v Insurance Regulatory Authority* [2020] eKLR, *Pius Kimaiyo Langat v Co-operative Bank of Kenya* [2017] eKLR, and *National Bank of Kenya Ltd v Pipeline Samkolit (K) Ltd* [2002] 2 E. A 503 in support of that proposition.
8. The Appellant submitted that the Respondent was an independent contractor and had the freedom and independence to operate since 2015. The Respondent voluntarily stopped providing his security services, leading to the hiring of another provider.
9. The Appellant submitted that the Respondent is not entitled to the reliefs awarded to him as he was an independent contractor and not an employee. The Appellant urged this Honourable Court to allow the appeal as prayed with costs.

### **Respondent's submissions**

10. The Respondent submitted that he was employed by the Appellant as a night guard earning Kshs.7,000/=, and he was allegedly unfairly terminated on 3<sup>rd</sup> August 2022. The Respondent submitted that he was not an independent contractor but rather an employee who had entered into a contract of service with the Appellant. The Respondent relied on Section 2 of the *Employment Act*, which defined an employee as a person employed for wages or a salary and includes an apprentice and



indentured learner. Under the same section, a contract of service is defined as an agreement, whether oral or in writing, and whether expressed or implied to employ or 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 IX of this Act applies.

11. The Respondent argued that an independent contractor is considered as individuals who are taxpayers who work within their hours, run the business and do work for more than one employer at the same time while contract of service an individual is placed under supervision for another individual for their employment. The Respondent relied on several authorities including Kenya Hotels & Allied Workers Union v Alfajiri villas (Magufa Ltd) [2014] eKLR, Ready Mixed Concrete v Min. of Pensions [1968] 2 QB 497, Christine Adot Lopeyio v Wycliffie Mwathi Pere (supra), Benjamin Joseph Omusamia v Upperhill Springs Restaurant (supra), and Leornard Musitsa Endoli v Odds and Ends Limited [2022] eKLR in support of that proposition.
12. The Respondent submitted that he entered into a written contract with the Appellant dated 2<sup>nd</sup> November 2015 which was sufficient evidence that he was employed by the Appellant. The Respondent relied on the cases of Danson Muriuki Kihara v Johnson Kabungo (supra) and National Bank of Kenya Ltd v Pipeline Samkolit (K) Ltd (Supra) where the court held that a court will not interfere with contracts entered into by two consenting parties and interest agreed upon unless the terms are on the face of it illegal, unconscionable, or oppressive.
13. The Respondent also submitted that he was unfairly terminated as he had not deserted his job, which was grounds for gross misconduct set out in Section 44 of the Employment Act. The Respondent relied on Section 47(5) of the Employment Act, which provides as follows:

“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.”
14. The Respondent submitted that the trial court did not err in awarding him the house allowance set out in Section 31 of the Employment Act which provides that employers are required to provide reasonable housing accommodation for employees at their own expense or pay a sufficient housing allowance and exceptions include cases where the employee’s contract or a collective agreement incorporates housing costs into their salary. Additionally, the Cabinet Secretary, upon recommendation, may exclude certain employee categories from this requirement via a Gazette Notice.
15. The Respondent also submitted that the trial court did not err in awarding the public holidays and this Honourable Court should uphold the trial court decision. The Respondent also submitted that he is entitled to leave days, as set out in Section 28 of the Employment Act, which provided that employees are entitled to at least 21 working days of paid leave after every 12 consecutive months of service. If employment is terminated after two or more consecutive months, the employee is entitled to 1.75 days of paid leave per completed month. Employers, with employee consent, can divide leave into parts, with at least two uninterrupted weeks required. The uninterrupted leave must be taken within the 12-month period, and any remaining leave must be used within 18 months. Additional leave days, beyond the minimum, can be utilized based on a mutual agreement between the employer and employee.
16. The Respondent submitted that the Appellant failed to discharge its duty as set out in Section 74 of the Employment Act, which require employers to keep records and the Respondent failed to avail records showing the annual leave thus the Respondent urged this Honourable Court not to interfere with award issued by the trial court.



17. The Respondent prays that this Honourable Court dismiss the appeal.

### **Analysis and determination**

18. Having carefully considered the record of appeal and submissions by both counsels, the issues for determination this Honourable Court has come up with are as follows:

- i. Whether the Respondent was an independent contractor or an employee of the Appellant
- ii. Whether the Respondent was unfairly terminated by the Appellant
- iii. If (ii) above is in the affirmative, whether the trial court was right to award the Respondent the reliefs he sought for
- iv. Who should bear the costs.

19. In *Kenya Pipeline Company Ltd v Ndegwa & Another* [2023] KECA 226 (KLR), the Court of Appeal distinguished between an independent contractor and an employee, citing the South African case of *Stein vs Rising Title Productions* (2002) 23 ILJ 2017, which states as follows:

“The main distinction between an employee (servant) and an independent contractor appears to lie in the fact that the former undertakes to render personal services to the employer, while the latter undertakes to perform a certain specified piece of work or to produce a certain specified result for the employer. Unlike an employee, an independent contractor is generally not subject to the control or the instructions of the employer as to the manner in which he or she performs the work or produces the result. .... Although the control test is an important factor in the enquiry, the crucial test, particularly in marginal cases, is whether or not the ‘dominant impression’ of the relationship is that of a contract of employment... The application of the dominant impression test thus requires a topological approach, according to which the right of control is not an indispensable requirement of the contract of service, but one of a number of indicia, the combination of which may be decisive. Other indicia which have been identified in the South African case law are: the nature of the work; the existence or non-existence of a right of supervision on the part of the employer; the manner of payment (eg, whether the employee is paid a fixed rate or commission); the relative dependence or freedom of action of the employee in the performance of his or her duties; the employers power of dismissal; whether the employee is precluded from working for another, whether the employee is required to devote a particular amount of time to his or her work; whether the employee is obliged to perform his or her duties personally; the ownership of the working facilities and whether the employee provides his or her own tools and equipment; the place of work; the length of time of the employment; the intention of the parties, etc.”

20. The Court of Appeal also cited the case of *Christine Adot Lopeyio v Wycliff Mwathi Pere*(supra) where Mbaru J stated as follows:

“In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.



- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

These tests are however not to be seen exclusively by themselves as they only serve as a guide based on the facts of each case. They are however a good guide to the issues as in this case.”

21. In this instant appeal, the parties entered into contract which was hand written and was dated 2<sup>nd</sup> November 2015. Looking at one of the clauses, it is indicated in the agreement that Dornard (the Respondent) will be considered self employed and all government statutory deductions will be handled by himself. Dornard by signing this agreement agrees to the terms and conditions and is “fully aware of his obligations.”

Having signed the contract in the presence of the client and Mr. Kamau the Respondent cannot renege on it and now claim he was an employee.”

22. He has provided no evidence that he was forced to sign the agreement or was cheated in signing the same. If at all this document was forged he should have reported the matter to the police for investigations.

23. There is also several payment petty cash vouchers dated from 2017 to 2022 and are indicated are for security services.

They are all signed by the recipient even though the signatures seem the same in the vouchers but the name of the recipient is not indicated.

24. However the service agreement clearly affirm that the Respondent was an independent contractor and not an employee of the Appellant.

25. The service contract also provided that any of the parties can give one month notice to terminate the contract.

The court has no documentary or even corroborative evidence of how this contract was terminated. The Respondent says he was terminated when the Appellant decided to get security services from private company. Even if this was the case this was as per the terms of the agreement which was signed by the respective parties.

In the absence of any evidence that the Respondent was illiterate and did not sign the service contract knowingly the court holds that the parties are bound by their contracts and as has been held time and again courts cannot rewrite the contract between the parties.



26. The court is persuaded the Respondent was aware he was not employee of the Appellant and he signed the security agreement. He served and received payments from 2015 to 2022 August. He was never paid the government statutory all those years and never demanded the same as he was always not an employee but an independent contractor.

27. The court finds several authorities fortified this assertion that the Respondent was an independent contractor. His was a contract for service not a contract of service which is essentially an employment contract. One such authority is *Christine Adot Lepyio v Wycliffe Mwathi Pere* [2013] KEELRC 244(KLR) the Learned Judge defined the difference between a contract of service and a contract for service and stated as follow: -

“These are important provisions for consideration in this matter as the relationship between the claimant and the respondent is in issue. And there are important questions here as to whether the relationship between parties amounted to a contract of service or contract for service, and on this finding what the rights of the parties herein were and the basis of the claimant’s case.

The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also noting that most contracts for service are not written, the facts for each case are paramount and worth consideration as to the intentions of the parties to such a contract. This is more so due to the fact that in law a contract of service is well outlined with fundamental protections as this is clearly defined under the *Employment Act, 2007* unlike the other contract for service. This is more so in view of the definitions of employee, employer and contract or service under the *Employment Act, 2007* and the Industrial Court Act 2011.

28. In the case of *Albert Cheboi & Another v Insurance Regulatory Authority* [2020] eKLR the learned Judge reiterated that it is not the business of the court to rewrite contracts between the parties.

29. The court has painstakingly considered the record of appeal and the respective submissions of the respective parties and finds the trial court erred in finding the Respondent was an employee of the Appellant while infact he was an independent contractor.

The provisions of the *Employment Act* therefore do to apply in this case and so the award for house allowance, public holiday and annual leave are not applicable and are set aside.

30. The appeal is merited and is allowed.

31. Due to the nature of the case and the former relationship between the parties the court orders each party to meet their respective costs of the trial court proceedings and of this appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF MARCH, 2025.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

