



**Bosire v Thermosystems East Africa Limited (Appeal E077 of 2023)  
[2025] KEELRC 712 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 712 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E077 OF 2023  
NJ ABUODHA, J  
MARCH 7, 2025**

**BETWEEN**

**SAMSON NYAKUNDI BOSIRE ..... APPELLANT**

**AND**

**THERMOSYSTEMS EAST AFRICA LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. C.K CHEPTOO  
delivered at Nairobi on 28th April 2023, CMEL Cause No. E1998 of  
2021: Samson Nyakundi Bosire vs. Thermosystems East Africa Limited)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 26<sup>th</sup> May, 2023, the Appellant appeals against the whole of the Judgment of Honourable C.K Cheptoo delivered at Nairobi on 28<sup>th</sup> April 2023.
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in law and fact by declining to award the Claimant his salary for May, 2021.
  - ii. The Learned Magistrate erred in law and in fact by finding that the claim for the Claimant's salary for the month of June 2021 had not been proved hence denying the Claimant this claim.
  - iii. The Learned Magistrate erred in law and fact by declining to award the Claimant his salary for the two weeks he worked in July, 2021.
  - iv. The Learned Magistrate erred in fact by failing to award the Claimant's prayer seeking monthly airtime compensation for the months of June and July 2021.
  - v. The Learned Magistrate erred in law and in fact by failing to award the Claimant a certificate of service.



- vi. The Learned Magistrate by failing to consider and have due regard to the Appellant's case and to the facts and evidence presented in support thereof.
3. The Appellant prayed that the appeal be allowed; the judgment and decree of the Chief Magistrate's Court dated and delivered on 28<sup>th</sup> April 2023 be set aside in its entirety and the Honourable Court be pleased to award the Appellant the terminal dues and compensation as prayed in the statement of claim amounting to Kshs 86,012/= or such amount as the Honourable court may deem fit and just.
4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates Nyabena Alfred & Co. Advocates filed written submissions dated 20<sup>th</sup> December, 2024 and on the issue of whether the Appellant was the Respondent's employee counsel submitted that the trial court erred by holding that the Appellant was not an employee of the Respondent. That the trial court cited lack of evidence of employment from the Appellant against the backdrop of weighty evidence submitted by the Appellant to substantiate his claim.
6. Counsel submitted that the Appellant became the Respondent's employee on 15<sup>th</sup> April, 2021 when the Respondent engaged his services as a medical representative. That to prove his claim he filed his application for the job post as well as a job card issued by the Respondent confirming that he was a staff working for the company. Further the Appellant filed his pay slip for the month of June, 2021.
7. Counsel submitted that despite the Appellant's engagement with the Respondent being oral as opposed to it being reduced in writing as per the provisions of Section 9 & 10 of the Employment Act, the Appellant did the best he could with the documents he had to prove his case on a balance of probabilities.
8. Counsel submitted that the Respondent in an attempt to challenge the Appellant's claim alleged in their initial defence that the Respondent was engaged on a need be basis during his holidays but in its further defence the Respondent contradicted its initial position and stated that the Appellant was an independent contractor. Counsel relied on the case of *Omusamia v Upperhill Springs Restaurant (Cause 852 of 2017) (2021) KEELRC 3 (KLR)(5 October, 2021) (Judgment)* on the difference between an employee and an independent contractor particularly where the employee is engaged orally.
9. Counsel associated himself with the sentiments in the above case and submitted that while the Respondent provided a pay slip and Job ID as evidence to show that the Appellant was an employee, the Respondent omitted to file a contract between the Appellant and itself corroborating that the Appellant was an independent contractor or any other document for that matter. That during cross-examination the Respondent's witness admitted that the issuer of the pay slip Mr. Nelson Agina was the Respondent's Auditor.
10. Counsel further submitted that if the Appellant was not an employee of the Respondent why would the Respondent's Auditor issue him with job card and pay slip. That that was a proof that the Appellant was an employee of the Respondent and not an independent contractor.
11. On the issue of whether the Appellant is entitled to claims for terminal dues pleaded, counsel submitted that the trial magistrate erred by not awarding any of the terminal dues pleaded by the Appellant. That the trial magistrate in dismissing the claims cited lack of evidence from the Appellant. That the Appellant having proved the employer-employee relationship between him and the Respondent then it became imperative that he was entitled to terminal reliefs sought.



12. Counsel submitted that the Appellant produced all documents in his care to substantiate his claims but the Respondent merely denied the existence of employer-employee relationship which defence was not sufficient and it did not produce any employee records as per section 74 of the *Employment Act* leading to miscarriage of justice. Counsel prayed for the salary for May, June and 2 weeks worked in July 2021, monthly airtime compensation for June and July 2021 and pro-rata leave. That the Respondent did not produce any document to show that the Appellant was paid any of the claims.

### **Respondent's Submissions**

13. The Respondent did not participate in this appeal despite proof of service.

### **Determination**

14. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

15. In this case, the Judgment of the trial court was that the court found no merit on the Claimant's case and the same was dismissed with each party bearing the costs of the suit. The Appellant was aggrieved by the entire judgment and proposed the 6 grounds of Appeal in his memorandum of Appeal which this court will collapse in to two issues: -
- a. Whether the trial Court erred in finding that the Appellant was engaged on need basis by the Respondent.
  - b. Whether the trial court erred in not awarding the terminal dues claimed by the Appellant.

### **Whether the trial court erred in finding that the Appellant was engaged on need basis by the Respondent.**

16. It is not in dispute that the Appellant was engaged by the Respondent when in his University holidays between April-July 2021. The Appellant alleged that he was employed as a medical representative by the Respondent at a monthly salary of Kshs 30,000/= . He produced June 2021 payslip and Job card to prove this employer-employee relationship.
17. The Respondent on the other hand alleged that the Appellant was engaged on need basis and produced cheque payments for different payments made for the assignments. The Respondent denied the job card and the pay slip and denied that the said Nelson Agina was its Auditor.
18. The trial court found that there was employer-employee relationship but on need basis. This court agrees with the trial court because first, the Appellant used to work during his university holiday and secondly the Respondent produced payments made to the Appellant on the assignments given. The trial court also noted that the so -called job card was a business card and not a job card. In addition, the June,2021 pay slip from the so-called auditor was not proved to be authentic first because the Respondent denied that the same was its employee, the Appellant did not call him as a witness and the fact that the Appellant is claiming payment for June,2021 is curious how a pay slip could be issued without payment. It is a general rule that a pay slip is issued to an employee after payment hence the



same could only be manufactured to suit the Appellant's case who now turns around to state he was not paid.

19. The Appellant also attached NSSF statement which ends in 2019 and it does not assist in this case to show that any remittances were made by the Respondent in the months in question of May, June and July 2021 to support his claim that he was a continuous employee of the Respondent. The Appellant was therefore engaged on piece rate or need basis employment with the Respondent.
20. The Court in the case of *Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others* [2017] eKLR defined the different engagements as follows: -

“The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.....The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer.”

21. In the case of *Kiverenge v Mbarire & another* (Cause E881 of 2021) [2024] KEELRC 1216 (KLR) (24 April 2024) (Judgment) the court held as follows: -

The Respondent's case is that the claimant was employed as an independent contractor on a need-by-need basis. This did not amount to contract of service but a contract for service. He cannot therefore deem this as employment in the strict sense of the word, fact and law. Moreover, he has not established a case of employment on a balance of probabilities or even preponderance of evidence.

22. The court therefore agrees with the trial court finding that the Appellant was only engaged on need basis.
23. In conclusion the appeal is found without merit and is hereby dismissed with costs.
24. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH, 2025**

**DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF MARCH, 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

