



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mekubo v Vivo Energy Kenya Limited (Cause 867 of 2017)  
[2025] KEELRC 683 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 683 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 867 OF 2017  
CN BAARI, J  
MARCH 6, 2025**

**BETWEEN**

**NEHEMIAH ANTHONY MEKUBO ..... CLAIMANT**

**AND**

**VIVO ENERGY KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Statement of Claim dated 9<sup>th</sup> May 2017, seeking for the following reliefs;
  - a. 1 month's pay in lieu of Notice
  - b. House allowance not paid for 129 months (15% of basic salary)
  - c. 3 days weekend in March 2017
  - d. Underpayments of salary for 129 months
  - e. Tax deducted and not submitted and penalties if any
  - f. Public holidays worked 120 days
  - g. Severance pay (10 years)
  - h. 12 months maximum compensation for wrongful and unfair termination as per the [Employment Act](#) 2007 Section 49 (1) (c)
  - i. Refund all costs and expenses incurred by the Claimant as per the [Employment Act](#) 2007 Sect. 49 (4) (j) Kshs. 5,000
  - j. Issue a certificate of service to the Claimant as per [Employment Act](#).



2. The Respondent filed a Memorandum of Response dated 5<sup>th</sup> June, 2017, wherein, it denied being the employer of the Claimant.
3. The suit was first heard by Hon. Justice James Rika on 28<sup>th</sup> July, 2023, when the Claimant testified in support of his case. The Respondent's case was partly heard on 7<sup>th</sup> March, 2024 and concluded on 29<sup>th</sup> October, 2024 with the cross-examination of RW1 and the testimony of RW2 by this Court. The Respondent presented the evidence of Ms. Anne Marie and one Lucy Mwangi in support of its case.
4. Both parties filed submissions in the matter.

### **The Claimant's Case**

5. The Claimant's case is that he was employed by the Respondent's company in May, 2015 as a driver at the Respondent's head office, and later relocated to the aviation branch of the Respondent's company within Nairobi.
6. It is his case that he was issued a card passport No. 12101 and a job description as a driver, and that the operating unit was the head office located at Nairobi. He avers that he was being paid monthly basic salary of 25,440/= per month without provision for house allowance.
7. The Claimant states that on 4<sup>th</sup>/5<sup>th</sup> March, 2017, he was to report for night shift starting 16.00 hrs to 0600 hrs, but was denied access to his work station and all the other drivers and the security staff instructed by the Respondent Company Depot Superintendent one Patrick Lutta not to allow him entry into the company premises. He states that he was also denied access to the Respondent company vehicles which he used to operate, without being given valid reasons or a chance to be heard as required by the laws of natural justice.
8. The Claimant further states that on 18<sup>th</sup> February, 2017 his Union wrote to the Respondent Managing Director raising serious issues that were affecting staff at the Respondent Aviation branch.
9. He avers that on 28<sup>th</sup> February, 2017 the Respondent Managing Director, responded to the Union letter and instead of acting and investigating the serious issues raised, he directed staff to contact the Distribution Manager for discussion.
10. The Claimant states that on 9<sup>th</sup> March, 2017, the Union responded to the letter and stated that Nehemiah Mekubo was actually a whistle blower on corruption and nepotism at the Respondent Aviation branch located at JKIA, and for this action the managers had targeted him with harassment and intimidation.
11. The Claimant avers that the Respondent has been deducting and not remitting Pay As You Earn (P.A.Y.E) from his salary, and was wrongly calculated and inflated and believes that the money was never remitted to the relevant authorities.
12. It is his case that he has been a member of the Shelloyees Sacco Society which was founded by employees of Shell Kenya who are still the employees of the Respondent Company.
13. It is his case that he worked diligently and tirelessly for the Respondent for a period of 11 years and 8 months without any warning letters on record, hence had a clean employment record.
14. That he demands to be paid his Leave not taken for 5 years (2013-2017) at a rate of 21 days per year as per the [Employment Act](#) Section 28.



15. The Claimant further demands payment of severance pay for 11 yrs being the period worked in accordance with Section 40 of the Employment Act, and to be issued with a certificate of service pursuant to Section 51 of the Employment Act.
16. The Claimant further demands payment of maximum 12 months compensation for wrongful termination.

### **The Respondent's Case**

17. The Respondent states that it has never had any contractual relationship with the Claimant. It is its case that it does not directly employ most of its staff, and that persons are usually seconded to it by Human Resources Outsourcing firms based on the contracts that may exist between the parties from time to time. It further states that that was the case in so far as the Claimant is concerned.
18. The Respondent avers that pursuant to the terms of engagement, it directly pays the companies which in turn settle the dues of their employees.
19. It is the Respondent's position that the Claimant was an employee of a company known as Tropical Focus (K) Limited, seconded to the Respondent as a driver. That this is a fact that was well known to the Claimant.
20. The Respondent states that Tropical Focus (K) Limited had entered into various specific term employment contracts with the Claimant, and it is in the basis of this contract that the Claimant was seconded to the Respondent as a shift driver.
21. The Respondent states that the said employer was responsible for payment of the Claimant's salary as well as matters to do with disciplinary action. That additionally, the Claimant being well aware of who his employer was, would from time to time apply for leave through the said employer.
22. It is the Respondent's case that it could not under the circumstances have terminated the services of the Claimant as the Claimant was never its employee, and indeed by the time the Claimant had left the place of work at VEKL, the same was on the ground of leave taken through the Claimant's employer.
23. The Respondent further states that this being a claim for termination of employment, it is at a loss as to why the Claimant would insist on suing it, or even indeed sustaining a suit against the Respondent whilst it is all the while clear, firstly from the documentation filled by the Claimant in the course of employment, and secondly from the communication by Tropical Focus (K) Limited as regards the employment status of the Claimant's employment.
24. The Respondent prays that the Claimant's claim be dismissed with costs.

### **The Claimant's Submissions**

25. In submitting that he was an employee of the Respondent, the Claimant argued that he was subject to the control of the Respondent, worked for the Respondent, the Respondent allocated him duties and even facilitated his training. He placed reliance in the case of *Everret Aviation Limited V Kenya Revenue Authority (Through The Commissioner of Domestic Taxes)* [2013] KEHC 6352 {KLR} whereby the Court stated that there were various tests to be employed when there is doubt whether a person is an employee.
26. To further buttress the point that he was an employee of the Respondent, the Claimant produced an "Authorization to Drive Certificate" dated 16<sup>th</sup> March 2015, issued by the Respondent which was



signed by the Claimant and a Representative of the Respondent, which he submits is evidence that he was subjected to the control of the Respondent.

27. It is the Claimant's submission that there was no outsourcing agreement presented before this honourable court to show that indeed, an outsourcing agreement was executed and the terms of the said outsourcing agreement. He submits further that it is trite law that he who alleges must prove and as such, if the Respondent alleges that there was an outsourcing agreement between it and a 3<sup>rd</sup> Party, it was imperative that the agreement was produced for this Court to determine the terms of the agreement. He sought to rely in the case of *Maundu & 40 others v Beiersdorf EA Limited & another* [2024] KEELRC 1504 (KLR) to support this assertion.
28. The Claimant submits further that the allegations of outsourcing were only aimed at denying him a recourse for his unfair termination as the court cannot determine the nature of the outsourcing agreement, if at all it existed.
29. It is the Claimant's submission that the Respondent's allegation that he went on leave and never returned, was never substantiated. He submits further that the testimony provided by the Respondent's witnesses did not provide any evidence that they tried looking for him or any steps that they took to try and locate the Claimant as required by the law.
30. It is his submission that he never absconded duty, but was instead sent him away by the Respondent when he reported back to work. He submits that his termination was therefore wrongful and unlawful.
31. It is his submission that his claims were not opposed by the Respondent, and as such, they should be awarded as prayed.

### **The Respondent's Submissions**

32. It is the Respondent's submission that the Claimant whose main interest is to receive compensation for the alleged unlawful termination, was well clear in his mind as to who his employer was, and as to whom he needed to sue, but for some reason opted to go for the Respondent without any justifiable cause.
33. The Respondent submits that the Claimant upon sighting the Respondent's documents, did issue a notice to produce dated 3<sup>rd</sup> August 2023 seeking to be allowed to inspect the original documents which are the letters of contract and copies of leave forms, and that the Claimant with the consent and directions of Court made 3<sup>rd</sup> October 2023, visited the Respondent's Counsel's Chambers to inspect the documents, with the matter being slated for further directions on 25<sup>th</sup> October 2023.
34. It is the Respondent's submission that the inspection was conducted, which entailed verification of the contracts of employment and the leave application forms under the letterhead of Tropical Focus (K) Ltd, and executed by the Claimant, and the Counsel for the Claimant confirmed having inspected the same, and were satisfied. That most importantly, the Court will note that no challenge to the said documents as not having been authentic was raised.
35. The Respondent further submits that payment of wages or a salary would be a key ingredient in establishing an employment relationship. It had reliance in the case of *Korir v Mosonik (Employment and Labour Relations Cause 006 of 2023)* [2024] KEELRC 2051 (KLR) (31 July 2024) to buttress this position.
36. The Respondent further sought to rely in *Wachira v Mbote & another (Cause 821 of 2018)* [2022] KEELRC 12992 (KLR) to submit that when the employer denies that the Claimant was its employee, the burden shifted to the Claimant to prove the existence of an employment relationship.



37. It is the Respondent's further submission that the time sheets produced by the Claimant, were only a demonstration that the person attended to the assigned duties, to enable the Respondent render an account to the Claimant's employer, and does not, imply any employment relationship between the Claimant and Respondent. It is submitted that by DW1's testimony, it is the said record that the Respondent would share with the Claimant's employer to confirm that the Claimant worked and facilitate his payments.
38. The Respondent finally submits that for not having proved existence of an employment relationship, the Claimant's claim must fail. It is their prayer that the claim be dismissed with costs.

### **Analysis and Determination**

39. The issues that crystallize for determination are:
- i. Whether there was an employer-employee relationship between the parties herein
  - ii. Whether the Claimant was unfairly terminated
  - iii. Whether the Claimant deserves the reliefs sought

### **Whether there was an employer-employee relationship between the parties herein**

40. The Claimant's position is that he was employed by the Respondent as a driver in May, 2015, where he served until March, 2017 when he was locked out of his place of work, giving rise to this suit.
41. On its part, the Respondent denies ever employing the Claimant, and instead avers that the Claimant was an employee of a company known as Tropical Focus (K) Limited, a Human Resources Firm where it outsources workers and that the Claimant was one such employee outsourced to it by Tropical Focus.
42. The Respondent further avers that by dint of the fact that the Claimant was outsourced, it has never had any contractual relationship with the Claimant. In *Elizabeth Washeke & 62 others v Airtel Networks (K) Ltd & Ano* (Cause No 1972 of 2012 NBI) the court explained outsourcing in the following words:-

“Outsourcing’ occurs where the managers of a business prefer to concentrate on the core work of the business and to enter into a contract with another entity to perform services that are peripheral. It does not mean the rights of employees in whichever entity abet, but employees either move as part of a going concern in the outsourcing or remain with the employer with their rights unaffected.”

43. The question is whether or not there existed an employer-employee relationship between the Claimant and the Respondent herein.
44. In *Industrial Court of Kenya Cause Number 684 of 2011 between Child Welfare Society of Kenya v. Margaret Bwire and Isiolo Children's Home- Isiolo County*– the Court said:-

“an employer- employee relationship exists, where an Employee agrees to work for an Employer, full time or part-time, for a specified period or indeterminate period of time, in return for wages or salary. The Employer has the right to decide where, when and how the work is to be done. There are four factors [at common law] in determining the presence of an employment relationship: control; ownership of the tools of work; the chance of profit or risk of loss; and integration.”



45. Further, in *Casmir Nyankuru Nyaberi v Mwakikar Agencies* (2016) eKLR the court opined that the mere fact that people work together, does not necessarily give rise to an employment relationship.
46. The Claimant has not placed before this court an employment contract as prove that he was an employee of the Respondent. On the flipside, the Respondent has produced a myriad of documents linking the Claimant to Tropical Focus (K) Limited and not itself, further corroborating its assertion that the Claimant was outsourced to it from Tropical focus.
47. Employment contracts issued in the years 2011, 2015 and 2016 between the Claimant and Tropical Focus (K) Limited appointing the Claimant as a shift driver in the service of the said company, and bearing the Claimant’s signature acknowledging the contract, remain uncontroverted.
48. Further, leave application forms indicating that the Claimant applied for leave and which leave form was on Tropical Focus (K) Limited’s letter heads, together with a warning letter to the Claimant from the same Tropical Focus (K) Limited concerning a motor vehicle accident that he caused, are further confirmation that indeed the Claimant was under the control of Tropical Focus (K) Limited and not the Respondent.
49. In the case of *Samuel Wambugu Ndirangu vs 2NK Sacco Society Limited* [2019] eKLR, the Court spelt out the ingredients necessary to determine the existence of an employer-employee relationship as follows:-
- “A review of the elements above reveals that in order for a positive determination of the existence of an employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee’s conduct.”
50. The Claimant produced an ‘Authorization to Drive Certificate’ as prove that he was an employee of the Respondent, the authorization having been issued by the Respondent herein. He also placed before court time sheets indicating that he reported to work at the Respondent’s premises and which he asserts are prove of control by the Respondent.
51. In my view, and as correctly submitted by the Respondent, the time sheets only show that the Claimant attended to the duties assigned by the Respondent as an accountability instrument, but are not prove of an employment relationship.
52. In *Havi v Judicial Service Commission & another (Petition E039 of 2024)* [2024] KEELRC 798 (KLR), the court held that employment relationships or work engagements can take diverse arrangements, including a triangular model where the owner of the work does not directly employ the worker as it happens in outsourcing.
53. In conclusion, I find nothing pointing the Claimant as a direct employee of the Respondent. I am instead convinced that the Claimant was an employee of Tropical Focus (K) Limited outsourced to the Respondent.
54. In the end, I find and hold that the Claimant has not proved an employer-employee relationship with the Respondent.



**Whether the Claimant was unfairly terminated**

55. Having held that no employer-employee relationship existed between the Claimant and the Respondent, it would be an academic exercise to proceed and determined whether the Claimant was unfairly terminated, Tropical focus (K) Limited not being party to this suit.

56. I thus proceed to dismiss the Claimant's claim with no orders on cost.

57. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 6<sup>TH</sup> DAY OF MARCH, 2025.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Ochineg h/b for Mr. Onyony present for the Claimant

Ms. Akiso h/b for Mr. Maondo for the Respondent

Ms. Esther S- C/A

