



REPUBLIC OF KENYA



KENYA LAW
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Mutii v Apex Valuers Limited (Employment and Labour Relations Cause E218 of 2021) [2025] KEELRC 1215 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1215 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E218 OF 2021**

HS WASILWA, J

APRIL 29, 2025

BETWEEN

DAVID TIMAYIO MUTII CLAIMANT

AND

APEX VALUERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Statement of Claim dated 3rd March 2021 on grounds that the Respondent was in breach of the employment contract. He prays for judgment against the Respondent for: -
 - a. A declaration that the Claimant's dismissal was unlawful and the Claimant be awarded damages.
 - b. The Claimant be paid his terminal benefits as set out in paragraph 10 of the Statement of Claim totalling to Kshs. 1,790,000.
 - c. The Honourable Court to issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - d. The Respondent to pay the costs of this suit.
 - e. Interest on the above at court rates.
 - f. The Respondent be ordered to issue a certificate of service to the Claimant in accordance with Section 51 of the [Employment Act](#).



Claimant's Case

2. The Claimant states that on or about June 2017, he was engaged by the Respondent as an Associate and Assistant Director in charge of Administration vide a contract between the Respondent and the Kwale County Government for a valuation roll. The employment agreement was that he was to be paid Kshs. 70,000 per month and commission of Kshs. 150,000.
3. It is the Claimant's case that the Respondent's director, Mr. Oketch notified him of delay in payment by the Kwale County Government and requested for tolerance as he was sourcing funds from other projects, in the meantime, the Claimant accepted payment of Kshs. 50,000 from October 2017 to February 2018.
4. The Claimant avers that the Respondent eventually received payment from the county government and its director disappeared: It was later confirmed that he was undertaking another project in Migori County.
5. It is the Claimant's case that after consultations and disagreement, he decided to demand his dues and resign from his position vide a letter dated 27th August 2019.
6. The Claimant avers that the Respondent is in breach of the employment contract as agreed between the parties which required that after the Claimant witnessed the project between the Respondent and Kwale County Government, Mombasa and Taita Taveta, he was to get a commission of Kshs. 150,000.

Respondent's Case

7. In opposition, the Respondent filed an Amended Response to the Statement of Claim dated 14th October 2024.
8. The Respondent avers that the Claimant was merely a casual worker who ran errands in the office as required and that the Claimant has not adduced any employment contract in his pleadings to ascertain the same.
9. The Respondent avers that there was no discussion between it and the Claimant in regards to remuneration and the Claimant has never been authorised to sign documents on behalf of the Respondent.
10. The Respondent avers that it did not authorise the letter dated 27th August 2019 dubbed 'Withdrawal from the valuation roll preparation by apex valuers' and contends that it is a mere allegation by the Claimant.
11. The Respondent denies that the Claimant was dismissed and avers that the contract between the Respondent and Kwale County Government lapsed rendering the Claimant's services redundant.

Evidence in Court

12. The Claimant (CW1) adopted his witness statement dated 3rd March 2021 as his evidence in chief; and produced his list of documents dated 3rd March 2021 and supplementary list of documents dated 13th September 2024 as his exhibits 1-9.
13. During cross examination, CW1 testified that he was an employee of the Respondent and the employment contract is in the Respondent's possession.
14. CW1 testified that documents of his association with the company are in the Respondent's custody, he has not produced the employment contract or any payslip in Court.



15. The Respondent's witness (RW1) Francis Oketch, testified that he is a director of the Respondent company which is a valuation firm. He adopted his witness statement and documents dated and filed on 14th October 2024 as his evidence in chief.
16. RW1 testified that the Claimant is a personal friend since the year 2004 and sometime in 2017-2018, he assigned the Claimant some duties on an individual level to carry out some temporary assignment on need basis.
17. RW1 testified that the Claimant had no contract of employment with the Respondent and the disbursements made to him were a token and not a salary. The token was paid on a daily basis or cumulatively depending on the assignment undertaken.
18. RW1 testified that the Claimant was reimbursed for any services rendered to the Respondent and they do not owe him anything.
19. During cross-examination, RW1 testified that the contract with the Claimant was oral and the Claimant worked for the Respondent on and off for about one year.
20. RW1 testified that the disbursement schedule of 26th February 2018 provides the amount payable to the Claimant is Kshs. 50,000.
21. RW1 testified that the Respondent has not produced any document before this Court to show the status of the Claimant's employment with the Respondent.
22. During re-examination, RW1 testified that in the list of documents produced by the Claimant, the Claimant did the letter when he was not in office and he had no authority to act on his behalf.

Claimant's Submissions

23. The Claimant submitted that his letters dated 5th June 2019, 16th April 2019 and 27th August 2019 conveyed that the agreed salary of Kshs. 70,000 per month as well as an agreed commission of Kshs. 150,000. From this, the Claimant's consistency on the terms of engagement is clear whereas the Respondent did not produce a single document demonstrating the terms of engagement.
24. The Claimant submitted that the Respondent's director deliberately refused to produce the employment contract executed by the parties in his custody as it would be prejudicial to the Respondent's case.
25. It is the Claimant's submission that even if he was employed as a casual worker, which is denied, the same was converted into a regular employment by virtue of the duration of the engagement between the parties and in line with section 37 of the *Employment Act*. RW1 testified during cross-examination that the Claimant was employed by the Respondent from 2017-2019, therefore, the allegation he was a casual worker is untenable. He relied on *Boniface Ingosi v Stella Builders Ltd (2017) eKLR* and submits that he has proved his case on a balance of probabilities.

Respondent's Submissions

26. The Respondent submitted on two issues: whether the Claimant was an employee of the Respondent; and whether the Claimant is entitled to remedies for unlawful termination and a certificate of service.
27. On the first issue, the Respondent submitted that the Claimant has failed to produce any substantial evidence in support of his alleged employment: his lists of documents merely contain letters and invoices relating to the Respondent and do not pass the threshold for burden of proof as envisioned in the *Evidence Act*.



28. The Respondent submitted that at no time was the Claimant an employee of the Respondent and the Claimant has failed to establish his claim as per the required standard of proof as he has not availed any witnesses to corroborate his claim or produced any document in his claim of employment.
29. The Respondent relied on the case of *West Kenya Sugar Company Limited v Chilande (Employment and Labour Relations Appeal E009 of 2023)* [2024] KEELRC 2119 (KLR) which quoted Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited (2016) eKLR where the Court stated:-
- “ 11. This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”
30. The Respondent submitted that the Claimant failed to establish his claim of unlawful termination either in his pleadings or testimony in court. He failed to detail the nature of the alleged unlawful termination or give an exact date of the said termination. It relied on *Asakhulu v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 1 of 2023)* [2024] KEELRC 705 (KLR) and *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* [2021] KEELRC 1084 (KLR).
31. I have examined all the evidence and submissions of the parties herein. The issues for this court’s consideration are:
1. What was the nature of engagement between the claimant and the respondent.
 2. What was he salary/allowance of claimant during the period
 3. What remedies is the claimant entitled to if any.

Issue No 1

32. On the first issue there is no written contract between the claimant and respondent submitted before this Court. The claimant averred that the contract was in possession of the respondent. The respondent averred that he had an oral contract with the claimant to do some work for him on casual basis on need basis in 2017 and 2018. He avers that he paid the claimant daily or cumulatively depending on the assignment undertaken.
33. The claimant sought to rely in a letter dated 11/9/2017 to the National Land Commission to show he was working for the respondent. He also sought to rely on another, the valuation roll dated 16/9/2017 by Kwale County Government and the Apex Valuers Limited. Under this agreement, the entire valuation assignment was to last for a period of twelve months after commencement. The petitioner was named therein as Associate/Administrator or witness.
34. The respondent also wrote to the Registrar of Titles seeking authority for claimant and others to be allowed to access their registry and carry out some duties. The authority was granted as requested. All these instances were sporadic occasions but there is no any other evidence to show that the claimant



worked for the claimant on a continuous basis save for the agreement by respondent and Kwale County witnessed by the claimant.

35. In the circumstances, the relationship between the claimant and respondent remains casual in nature. The claimant has produced a disbursement schedule for February 2018 showing he was being paid Kshs 50,000/-. The respondent witness (RW1) when cross-examined indicated that there was no indication that the claimant was being paid as a casual labourer. This however fail to confirm that the claimant worked continuously for the respondent as averred.
36. In the circumstances of this case, I find little evidence of the nature of the engagement between the claimant and respondent. The claimant failed to seek orders for respondent to produce any documents he feels were in the respondent's custody and this makes his case inconclusive.
37. The claim seems pegged on evidence not produced in court. I therefore find the claim not proved and I proceed to dismiss it accordingly. There shall be no order of costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH OF APRIL, 2025.

HELLEN WASILWA

JUDGE

