



Kensalrise Limited v Abukuse (Employment and Labour Relations Appeal E011 of 2023) [2025] KEELRC 1253 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1253 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E011 OF 2023
MA ONYANGO, J
APRIL 4, 2025**

BETWEEN

KENSALRISE LIMITED APPELLANT

AND

NAHASHON MUTINDI ABUKUSE RESPONDENT

*((Being an appeal against the Judgment and Decree of Honourable
Christine Menya (SRM) delivered on 9th September 2022 in Chief
Magistrates Court at Eldoret in CMELRC No. 126 of 2020))*

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 126 of 2020 wherein the Respondent had sued the Appellant vide a Statement of Claim dated 11th August 2020 seeking compensation and terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 9th September 2022 in favour of the Claimant awarding him Kshs. 11,920 as one month's pay in lieu of notice and Kshs. 166,400 as 12 months compensation for unfair termination. The Claimant was also awarded costs of the suit and interest at court rates.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 23rd May 2023 on the following grounds of appeal:
 - i. The learned magistrate erred in law and in fact by holding that the Claimant was an employee of the Respondent and awarding him compensation of Kshs. 239,195
 - ii. The learned magistrate erred in fact and in law by failing to take into account that there was no employment contract between the claimant and the Respondent



- iii. The learned magistrate erred in law and in fact by disregarding the agreement between Kensalrise Limited and Saipo Ventures, who was an independent contractor providing manpower services to the Appellant Company.
 - iv. The learned magistrate erred in law and in fact by disregarding the evidence in court showing that the Notice to Show Cause letter dated 18th June 2020, minutes of the disciplinary meeting held on 29th June 2020 and the subsequent termination letter dated 2nd July 2020 was issued by Saipo Ventures and not the Respondent.
 - v. The learned magistrate erred in law and in fact by disregarding the evidence in court showing that NSSF contributions remitted in favour of the Respondent were paid by Saipo Ventures who was the employer and not the Respondent
 - vi. The learned magistrate erred in law and in fact by disregarding the Statement of the Respondent's witness that they had no control over the Claimant and that the Respondent paid all monies for services provided to who would in turn pay its employees
 - vii. The learned magistrate erred in law by relying on Order 1 Rule 15 of the Civil Procedure Rules and finding that the Respondent should have taken out a 3rd party notice yet they had no claim against Saipo Ventures.
 - viii. The learned magistrate erred in law and in fact by disregarding the evidence tendered in court by the Appellant relating to the relationship with the Respondent.
4. Consequently, the Appellant prayed for the following orders that:
- a. This appeal be allowed
 - b. The judgment and orders of the honourable magistrate delivered in CMELRC No. 126 of 2020 be set aside in its entirety and the Appellant's appeal be allowed.
 - c. The costs in the Appeal and the trial court be borne by the Respondent.
5. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 7th May 2024 while the Respondent's submissions are dated 28th April 2024.

Analysis.

- 6. This being a first appeal, this court is guided by the principles espoused in several decisions among them, *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968) EA 123, to the effect that an appellate court is under obligation to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into account the fact that this court had no opportunity of hearing or observing the demeanor of the witnesses as they testified.
- 7. Vide his Statement of Claim dated 11th August 2020, the Claimant (now the Respondent) averred that he was employed by the Appellant as a driver of a medium sized vehicle on 21st December 2017 and that at the time of termination of his employment, he was earning a gross salary of Kshs 24,351.
- 8. The Claimant averred that he served the Respondent with loyalty, diligence and commitment until 2nd July 2020 when the Respondent wrongfully, orally and unlawfully terminated him from employment and refused to pay his terminal benefits. He stated that he was terminated on account that he was suspected of carrying unauthorized goods in the Respondent's motor vehicle, which suspicion was according to him, unfounded.



9. It was the Claimant's case that the Respondent terminated his employment without following the right procedure as laid down in the *Employment Act*.
10. The Claimant therefore contended that owing to the alleged unfair termination of his employment, he was entitled to terminal benefits which he itemized as follows:
 - i. One month pay in lieu of noticeKshs. 21,175
 - ii. Unpaid house allowance Kshs 95,280
 - iii. Unpaid overtime Kshs 410,460
 - iv. Severance pay Kshs 21,175
 - v. May 2020 salary not paid Kshs 21,175
 - vi. Underpayment of wages Kshs 95,250
 - vii. Unpaid leave for 2 years Kshs 52,937
 - viii. 12 months compensation for unfair termination Kshs 292,212

Total Kshs. 1,009,664
11. The Respondent prayed for the following reliefs:
 - i. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstances the Claimant is entitled to compensation as prayed
 - ii. The sum of Kshs. 1,009,664 as set out in paragraph 10 above.
 - iii. Certificate of service
 - iv. Costs of this suit and interests at court rates from time of filing suit until payment in full
 - v. Any other, further and better relief the honourable court may deem just and fit to grant
12. The Appellant (Respondent then) on its part filed a Response to the Statement of Claim dated 21st December 2020, denying that the Claimant was its employee. The Respondent maintained that at no time was the Claimant employed by the Appellant as he was in fact an employee of Saipo Ventures Limited. It was the Appellant's contention that Saipo Ventures Limited was responsible for employment of manpower and control of the same. That the Appellant was not liable whatsoever for the employees of the said company as clearly indicted in business venture contract between Kensalrise Limited and Saipo Ventures Limited.
13. The Respondent sought for the dismissal of the Claimant's claim with costs.

The Evidence adduced.

14. At trial Vivian Cheronon Maritim, the spouse of the late Nahashon Mutindi Abukuse testified as CW1. She adopted the late Nahashon Mutindi Abukuse's witness statement recorded on 11th August 2020 as her evidence in chief. In her testimony, CW1 contended that her late husband worked for the Respondent as a driver.



15. The Appellant's counsel prayed for the adoption of the Respondent's defence in CMELRC No. 123 of 2020. The Respondent's case was closed upon adoption of the defence and the trial court directed parties to file written submissions.
16. The trial court delivered its judgment on 9th September 2022 in favor of the Claimant, awarding him the following: -
 - i. One month's pay in lieu of notice Kshs. 11,920
 - ii. 12 months compensation for unfair termination Kshs 166,400
 - iii. Certificate of service be issued within 30 days of the judgment
 - iv. Costs of the suit and interests at court rates until payment in full
17. It is the said judgment that is now the subject of this appeal.

Appellant's submissions.

18. The Appellant crystallized the grounds of appeal into the following two issues:
 - i. Whether the trial court erred in disregarding material evidence produced before court and consequently holding that the Respondent was an employee of the Appellant company
 - ii. Whether the trial court erred in relying on Order 1 Rule 15 of the Civil Procedure Rules
 - iii. Whether the appeal is merited
 - iv. Who is entitled to costs.
19. On the first issue, the Appellant submitted that the main issue for the court's determination was whether there was a subsisting employment relationship between the Appellant and the Respondent to warrant the grant of the orders sought by the Respondent. The Appellant maintained during cross examination, that the Respondent expressly acknowledged that he was paid his salary by Saipo Ventures and not the Appellant. The Appellant further contended that from the NNSF statement adduced by the Respondent, it is clear that the Respondent's employer was Saipo Ventures.
20. According to the Appellant, the staff identity card produced by the Respondent was a card issued for purposes of granting the Respondent access to the Appellant's premises. It is the Appellant's submission that the learned magistrate failed to take into account the import of the prevailing contract for services between the Appellant and Saipo Ventures which was for provision of manpower services to the Appellant by Saipo Ventures.
21. It is the Appellant's further submission that the Respondent did not tender any contract of employment between himself and the Appellant in utter disregard of section 107 of the *Evidence Act* and the principles set out in the case of *Transport Workers Union v Euro Petroleum Products & Another* (2019) eKLR as quoted in the case of *Zarika Adoyo Obondo v Tai Shunjun & Another* (2020) eKLR.
22. Further, it was submitted by the Appellant that the disciplinary process contemplated under the provisions of section 41, 43 and 44 of the *Employment Act* requires employers to strictly comply with the said provisions to ensure that the tenets of fair labour practices are adhered to. In this regard, the Appellant submitted that it reported to Saipo Ventures Limited that the Respondent was carrying unauthorized goods in the Appellant's vehicle as a result of which Saipo Ventures initiated the disciplinary process against the Respondent.



23. It is the Appellant's submission that there was overwhelming evidence before the trial court pointing to the nature of the employment relationship between Saipo Ventures and the Respondent which the trial court failed to consider and evaluate. The Appellant thus urged the court to hold that Saipo ventures was the Respondent's employer and that the award of Kshs 239, 195 as compensation for unfair termination against the Appellant was without any factual or legal basis.
24. On whether the trial court erred in relying on Order 1 rule 15 of the Civil Procedure Rules, the Appellant submitted that it has no claim for contribution, indemnity or howsoever against Saipo Ventures Limited and thus contrary to the holding of the learned magistrate, third party proceedings could not issue.
25. On the last issue, the Appellant submitted that the Appeal is merited and urged the court to allow the Appeal as prayed. The Appellant prayed for costs of the Appeal.

The Respondent's submissions.

26. On his part, the Respondent submitted that from the Memorandum of Appeal, the only bone of contention is whether the Respondent was an employee of the Appellant. According to the Respondent, in his evidence before the trial court, he produced a Staff Identity card, a property of the Appellant. The Respondent contended that the staff identity card was not challenged in evidence.
27. In response to the averment by the Appellant that it had subcontracted Saipo Ventures Limited to provide it with manpower, the Respondent drew the court's attention to the contract between Saipo Ventures and the Appellant and asserted that the contract was effective from 1st January 2020 and that by January 2020, the Respondent was already working for the Appellant.
28. In response to the issue of third-party proceedings raised by the Appellant in ground 7 in its Memorandum of Appeal, the Respondent contended that if the Appellant had been dragged to court by the Respondent, the Appellant would have sought to enjoin Saipo Venture as a 3rd party in the proceedings before the subordinate court. In support of this position, the Respondent cited the case of Cheruiyot Edwin Mutai v Cyrus Ngaruiya (2020) eKLR.
29. On the last issue, the Respondent submitted that the Appeal is not merited and urged the court to dismiss the Appeal. The Respondent prayed for costs of the Appeal.

Analysis and determination.

30. I have considered the Appellant's Record of Appeal and the submissions on record. The many grounds of appeal may be summarized as follows:
 - i. Whether the Learned Magistrate erred in holding that the Respondent was the Appellant's employee,
 - ii. Whether the compensatory damages awarded to the Respondent by the trial court should be set aside, and,
 - iii. What orders should issue.



Whether the Learned Magistrate erred in holding that the Respondent was the Appellant’s employee

31. On the first issue for determination, the onus of proving employment under a contract of service lies with the person who alleges that he was so employed. Under section 2 of the *Employment Act* an employee has been defined as:

“ A person employed for wages or salary and includes an apprentice and indentured learner.”

32. An employer is defined as:

“ any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”

33. 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”

34. The Respondent in his evidence at the trial court produced a staff identity card which indicated that it was the property of Kensalrise Limited. In its defence, the Appellant averred that the staff identity card was its property and it served the purpose of allowing workers into its premises and did not infer the existence an employment relationship.

35. The Respondent further produced the notice to show cause and the minutes of the disciplinary hearing relating to his disciplinary process as well as the termination letter issued to him. It is clear from the documents that the documents emanated from Saipo Ventures Limited as evidenced by the stamps thereon. The Respondent also attached NSSF Statement of Account to his list of documents dated 11th August 2020 which shows that the remittance remunerated by Saipo Ventures Limited.

36. From the above analysis, there is no doubt that the Respondent was not an employee of the Appellant in view of section 2 of the *Employment Act*. The holding by the trial court that the Appellant was liable for the unfair dismissal of the Respondent was therefore erroneous.

37. In the absence of an employer-employee relationship between the Appellant and the Respondent, the second issue for determination becomes moot.

38. Consequently, the appeal herein succeeds. The judgment of the trial court delivered on September 9, 2022 is hereby set aside, and substituted with an order dismissing the Respondent’s suit filed in the trial Court.

39. Each party shall bear its own costs of both the appeal and proceedings in the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 4TH DAY OF APRIL 2025.

MAUREEN ONYANGO

JUDGE

