



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mvungu v Wambua & 2 others (Cause E732 of 2022)
[2025] KEELRC 1539 (KLR) (21 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1539 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E732 OF 2022**

**HS WASILWA, J
MAY 21, 2025**

BETWEEN

HENRY MURIITHI MVUNGU CLAIMANT

AND

SAMUEL WAMBUA 1ST RESPONDENT

CATHERINE CHEBET 2ND RESPONDENT

HALCYON LOUNGE & GRILL LIMITED 3RD RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Memorandum of Claim dated 16th September 2022 on grounds that his employment was unlawfully and illegally terminated by the Respondent. He prays that his court awards him:
 - a. Kshs. 1,970,000.00 as particularized in paragraph 11 of the Claim.
 - b. Certificate of service.
 - c. Costs of this suit claim plus interest.Any other relief that this Honourable court may deem fit.

Claimant's Case

2. The Claimant avers that in the year 2019, the Respondents retained him as a General Manager/ Consultant Operations vide a management agreement earning a monthly retainer of Kshs. 130,000 and a stipend of Kshs. 10,000.



3. The Claimant avers that the Respondents verbally terminated his service in the year 2020. Subsequently, in January 2020, the Respondents illegally refused and/or failed to pay him his dues for accumulated leave days.
4. It is the Claimant's case that the Respondents actions were actuated by malice with the intent to deny him his due and injure his reputation and character. Therefore, his termination was unlawful and illegal and he is entitled to payment of damages, pending salary and statutory dues.
5. The Claimant avers that demand has been served on the Respondent but it has refused and/or failed to pay him his dues.

Respondents' Case

6. In opposition to the Claim, the Respondents filed a Statement of Defence dated 22nd July 2024.
7. The Respondents deny that it retained the Claimant as an employee at any given time and therefore avers that the issue of verbal termination does not arise.
8. The Respondents aver that the it has never received any notice of intention to sue as alleged as the 3rd Respondent has never received the demand notice dated 12th February 2020.
9. It is the Respondents' case that the cause of action herein does not fall within the jurisdiction of this court and they shall raise a preliminary objection to the effect that this court lacks jurisdiction to hear and determine this claim.

Evidence in Court

10. The Claimant (CW1) adopted his witness statement dated 16th September 2022 as his evidence in chief and produced his list of documents dated 16th September 2022 as exhibits 1-2 respectively.
11. CW1 testified that the duration of his employment was 3 months.
12. CW1 testified that one evening, Sammy Wambua called him to his office where he informed him that there was something he needed to investigate and he should take leave. However, 2 months later, there was no communication and no disciplinary proceedings was conducted against him.
13. During cross-examination, CW1 testified that he entered into a Management Consultancy Agreement with the Company as a consultant, receiving a monthly retainer of Kshs. 130,000 and a stipend of Kshs. 10,000.
14. CW1 testified that he never used to sign in at work like the rest. He used to work 6 days a week; he used to report at 8 am and leave at his discretion.
15. CW1 testified that the employer did not pay for his NSSF and NHIF and he was to pay his own taxes.
16. The Respondent's witness (RW1) Samuel Wambua, adopted his witness statement dated 22nd July 2024 as his evidence in chief.
17. RW1 stated that he is the 1st Respondent herein and he will be representing the 2nd Respondent who is his wife and the 3rd Respondent, which is a club they operated together.
18. RW1 testified that they engaged the Claimant as a consultant as evidenced by the Agreement dated 7th October 2019.



19. During cross-examination, RW1 testified that the contract was for 12 months, however, this period did not expire before termination of the contract.
20. RW1 testified that they did not serve the Claimant with a notice of termination and that he was paid for the two months worked for the company.
21. RW1 testified that the Claimant was never sent to any training and they did not have a marker to gauge his performance.
22. Upon re-examination, RW1 testified that they did not pay the Claimant his terminal dues because he was not entitled to the same on grounds that he was not an employee. On this same ground, the Respondents had no obligation to take him for training.

Claimant's Submissions

23. The Claimant submitted three issues: whether the Claimant was an employee of the Respondent; whether the termination of the Claimant's employment was unfair, unprocedural and unlawful; and whether the Claimant is entitled to the reliefs sought.
24. On the first issue, the Claimant the nature of the relationship between the parties was that of an employer-employee and not of a consultancy. He relied on the definition of an employee and employer under Section 2 of the *Employment Act* as follows: "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner and "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.
25. The Claimant submitted that what determines whether an individual is an employee or an independent contractor is the substance of the working relationship rather than the terms of a contract.
26. It is the Claimant's submission that there was significant control exercised by the Respondent over the way, manner and time in which the work was performed which is consistent with an employment relationship rather than a consultancy. The Claimant avers that the Respondent dictated the working hours, location and manner which the work was done; he was expected to report to a superior, follow company procedure and attend team meetings regularly; and he was not free to determine his own schedule and method of completing tasks as in the case of a consultancy agreement.
27. The Claimant submitted that he was required to perform tasks integral to the Respondent's business as evidenced under paragraph 3 of contract between the parties which stipulates: 'Whereas the Company desires to engage Mr. Henry Muriithi Mvungu of ID No. 9819819 in the management consultancy as General Manager Operations.' This is a strong indicator of an employee relationship.
28. It is the Claimant's submission that his tasks in the contract was within the core activities of the Respondent's business and not independent to the Respondent's operations. Additionally he was subjected to performance reviews characteristic of an employer-employee relationship.
29. The Claimant submitted that he did not bear the financial risks associated with a consultancy agreement; the Respondent was responsible for payment of his salary without regard to the profitability of the business. Consultants typically bear financial risks such as being paid for work done and providing their own resources.
30. It is the Claimant's submissions that the he was paid a regular salary and received benefits associated with employment such as administrative and marketing stipend of Kshs. 10,000, incentive



compensation, annual management equity bonus of 5% of the audited P&L accounts and medical insurance. He was also provided with resources and office space to carry out his work. These are gestures of an employee relationship as opposed to a consultancy.

31. It is the Claimant's submission that the form of the contract is not determinative of the nature of the true nature of the relationship. The fact that he was required to work under conditions characteristic of employment supports his case that he was an employee and not a consultant.
32. On the second issue, the Claimant submitted that from the evidence tendered before Court, he was not taken through the procedure set out under Section 41 of the *Employment Act* before termination of his employment. There was no official communication of his termination other than the verbal dismissal.
33. On whether he is entitled to the reliefs sought, the Claimant submitted that Section 50 of the *Employment Act* provides that the court is expected to consider the circumstance of termination and award remedies similar to the recommendations that a labour officer would recommend under Section 49 of the Act.

Respondents Submissions

34. The Respondents submitted that the claim falls outside this Court's jurisdiction as it pertains to a commercial consultancy agreement rather than an employment contract. The evidence herein establishes that the Claimant operated as an independent contractor not an employee of the 3rd Respondent.
35. The Respondents submitted that the parties had a consultancy relationship as the Agreement clearly outlined specific deliverables and target points to be achieved by the Claimant therefore his obligations were result oriented rather than process oriented. He further had no supervisor and exercised complete autonomy in how achieved these outcomes.
36. The Respondents further laid the foundation of the consultancy relationship by highlighting that the Claimant was an expert in the entertainment industry offering specialised services rather than general employment and the consultancy was structured as a 12-month engagement with renewal based on evaluation of agreed deliverables.
37. It is the Respondents' submission that the Claimant himself testified that he was not enrolled in employee statutory deductions and that he managed his tax obligations. Further he had no fixed working hours or subjected to the 3rd Respondent's sign in/sign out procedures.
38. I have examined the averments and submissions of the parties herein. It is agreed by both parties that what is before court is the termination of a consultancy agreement and not an employment.
39. The Respondents therefore aver that this court does not have jurisdiction to handle the matter. The jurisdiction of this court has been discussed in various fora as provided for in section 12 of the ELRC Act. That notwithstanding the SCOK in *Kenya Tea Growers Association & 2 others vs. NSSF and Others 2024 (KESC 3) KLR* held that the jurisdiction of this court is not narrowly limited to an employer – employee relationship but goes beyond to any matter that may affect an employer or an employee.
40. I have also looked at the nature of the engagement (b) the Claimant and Respondent herein wherein the Claimant was working for Respondent and being paid a monthly retainer of KShs.130,000/= and a 10,000/= stipend and was retained as GM/Consultant Operations. He was actually managing the Respondents club which they had set up and for all purposes and intends he was an employee of the



Respondent despite being called a consultant. I therefore find that this court has jurisdiction to handle this matter.

41. The Claimant's relationship with the Respondent was then terminated 2 months into the agreement without regard to the said agreement which provided that the same could be terminated for reasons valid herein including misconduct, dishonesty.
42. The Claimant was never accorded any notice or hearing and therefore termination of the service agreement was unfair and unjustified.
43. In the circumstances, I find for the Claimant and direct he be paid 1 month salary in lieu of notice - 140,000/=.
Plus 5 months salary as compensation for the unfair termination of the agreement - $5 \times 140,000 = 700,000/=$
Total = 840,000/= less statutory deduction.
44. The Respondent to pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST OF MAY, 2025.

HELLEN WASILWA

JUDGE

