



**Kebo v Elburgon Stores Ltd (Cause 93 of 2016)
[2025] KEELRC 1887 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1887 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 93 OF 2016**

**K OCHARO, J
JUNE 26, 2025**

BETWEEN

GIDEON EKITELA KEBO CLAIMANT

AND

ELBURGON STORES LTD RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated 26th January 2016, the Claimant instituted the claim herein against the Respondent seeking the following reliefs;
 - a. A declaration that the claimant's dismissal from employment was unlawful and unfair.
 - b. An order for the Respondent to pay the Claimant his due terminal dues and compensatory damages as pleaded.
 - c. An order for the Respondent to pay the Claimant his terminal benefits and compensatory damages totalling KShs. 732,674.
 - d. Interest on [c] above from the date of filing suit till payment in full.
 - e. Costs of this suit plus interest thereon.
2. The Memorandum of the Claim was submitted alongside the Claimant's witness statement and documents he intended to rely on as documentary evidence in support of his case.
3. Upon being served with the summons to enter appearance, the Respondent filed a Statement of Response dated May 30, 2016, wherein it denied the Claimant's claim in toto.



4. Following the closing of pleadings, the matter was heard in inter partes. The Claimant's case was heard on 7 June 2022, with the Respondent's on 10 July 2024.

The Claimant's case.

5. During the hearing of his case, the claimant urged the Court to adopt the contents of his witness statement as part of his evidence in chief, and the documents he filed herein were, by consent, admitted as exhibits.
6. The Claimant testified that the Respondent employed him on 12th March 2011 as a Night Guard. He worked continuously, with due diligence and to the satisfaction of his employer, the Respondent. During his tenure, he usually worked for twelve hours [6.00 pm to 6 am] or vice versa. In a week, he could work all 7 days. He worked on public holidays. He was never compensated for the overtime and public holidays worked.
7. His last salary was KShs 6,000 per month, an amount that was way below the prescribed minimum wage of KShs. 10,911. Prior to 1st May 2013, the relevant minimum wages were for the period 1st May 2012 to 30th April 2013, KShs. 9,572, 1st May 2011 to 30th April 2012, KShs. 8,463, and 1st May 2010 to 30th April 2011, KShs. 7,523.
8. On 20th February 2024, after years of working without leave, he applied for leave, which the Respondent granted. While on leave, the Respondent's Director, Mr. Stephen Ndung'u Kingara, called him and instructed him not to return to work as his employment had been terminated.
9. He argued that the Respondent's action amounted to dismissing him summarily from employment. However, he had not committed any misconduct that could justify such action, nor had he been issued with a show cause letter and given an opportunity to address any allegations the Respondent might have had against him. The summary dismissal, therefore, contravened the principles of natural justice and fair labour practice and was unlawful.
10. Cross-examined by Counsel for the Respondent, the Claimant stated that he didn't have any formal contract of employment as he was verbally employed by the Respondent's Director, mentioned above.
11. The demand letter that his Counsel issued had two addressees. He was an employee of one employer, the Respondent. He doesn't know the other person named on the demand letter.
12. The Accountant, Peter Njubi, could usually pay his salary through M-Pesa, and the statement from Safaricom is a testament.

The respondent's case

13. The Respondent presented Ms. Sabina Gachui to testify on its behalf. The witness adopted the contents of her witness statement filed herein as part of her evidence in chief. At the hearing, he highlighted the statement, clarifying on areas therein that required clarification.
14. The witness testified that the Claimant was not at any time employed by the Respondent as a security guard or at all. At all material times, the security guards and other employees of the Respondent were under written and duly executed contracts.
15. Additionally, the Respondent didn't at any time pay the Claimant a salary as its employee.
16. As such, the contention that the Respondent summarily dismissed him from employment, and that he is entitled to the reliefs sought in his pleadings, is unfounded.



17. The purported demand letter was never served on or received by the Respondent.
18. Cross-examined by Counsel for the Claimant, the witness stated that the Respondent never employed the Claimant.
19. She further stated that, to her knowledge, the respondent's directors were neither Stephen Ndung'u nor Lucy Wangoi. Peter Njubi was not their accountant, but Susan Wangeci.
20. The employees' record, which the Respondent hasn't filed before this Court, does not bear the name of the Claimant as one of its employees.
21. At the material time, the Respondent had outsourced Security services. When she joined the Respondent, the outsourcing agreement was in place.

The Claimant's Submissions

22. In his submissions, the claimant strongly emphasised the factual details of his case as presented in his pleadings and evidence. According to him, he was unfairly dismissed without any just or valid reason.
23. The Respondent failed to discount the Claimant's case that he was their employee. Sections 10[6] and [7] of the *Employment Act* place a duty on the employer, not the employee, to produce employee records. This is what the Respondent didn't do. To buttress this submission, the Claimant cited the decision in *Asakhulu vs West Kenya Sugar Company Limited*, [2024] KEERLC 705[KLR].

The Respondent's Submissions

24. The Respondent's Counsel submitted that whether or not the Claimant was an employee of the Respondent is an issue of fact, law and evidence. The Claimant didn't place forth any evidence to prove that the Respondent ever employed him. Under section 107[1] of the *Evidence Act*, the onus was on the Claimant to prove that he was in the employment of the Respondent. To support this point, he relied on the case of *Kenfriegt [EA]Ltd vs. Benson K. Nguti* [2016] eKLR.
25. The Court was urged to note that the demand letter dated 29th July 2015, issued by the Claimant's Counsel, was addressed to Elburgon Stores and Crawford General Contractors. This supports the fact that the Claimant was not an employee of the Respondent.
26. The Claimant's submissions that the Respondent had the duty to present the employee's record in court have no legal foundation. Any such insistence could amount to shifting the burden of proof to the Respondent quite improperly.
27. In conclusion, the Claimant's claim should be dismissed with costs.

Analysis and Determination

28. From the material placed before this Court by the parties, the following issues present themselves for determination:
 - [a]. Was the Claimant an employee of the Respondent?
 - [b]. If the answer to [a] above is in the affirmative, did the Respondent dismiss the Claimant unfairly?
 - [c]. Whether the claimant is entitled to the reliefs sought.



Was the Claimant an employee of the Respondent?

29. In an employment claim where the parties hold diametrically opposed views on whether an employer-employee relationship existed at the relevant time or at all, the primary obligation for the Claimant is to prove that he or she was an employee of the Respondent, thereby placing themselves under the jurisdiction of the court, and to access the remedies provided by law, if they also prove the other aspects of the case.
30. Although the Claimant claimed he was an employee of the Respondent at all material times, a careful review of the evidence presented before this court clearly shows that the Claimant did not discharge the legal duty mentioned earlier. It is evident that he believed the M-Pesa statement could help him prove two points: first, that he was employed and earning a monthly salary paid via the MPesa platform; and second, that the Respondent paid his wages through its employee, the accountant. Unfortunately, the statement of account was not admitted into evidence, as he failed to secure a witness from the telecommunications company to testify about the document.
31. I am of the clear view that even if he succeeded in having the document admitted as evidence, it still wouldn't have been helpful to him, as the evidence before me doesn't in any way show that Paul Njubi was an accountant of the Respondent
32. I am certain that the demand letter dated 29th July 2015, from counsel for the Claimant, was written and issued under the instructions of the Claimant. The letter is addressed to Stephen Ndungu Kingara, c/o Elburgon Stores and Crawford General Contractors. It appears to suggest that Mr. Ndungu was the Claimant's employer. This, considered alongside the pleadings by the Claimant, portrays him as a party who was not sure about the material facts of his case, or who was, with great respect, attempting to make a lottery out of the court process.
33. The Claimant, having failed to overcome this hurdle, I have no hesitation in reaching the inevitable conclusion that his case must now fail. It would be an unwise use of the limited and valuable judicial time to proceed to examine the other issues identified for determination.
34. In the upshot, the Claimant's case is hereby dismissed with costs.

READ, DELIVERED AND SIGNED THIS 26TH DAY OF JUNE, 2025.

OCHARO KEBIRA

JUDGE

