Adhiambo v Eidu Education Limited (Cause E582 of 2021)
[2025] KEELRC 2276 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2276 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E582 OF 2021

L NDOLO, J

JULY 31, 2025

BETWEEN

CYNTHIA ANYANGO ADHIAMBO ..... CLAIMANT

AND

EIDU EDUCATION LIMITED ..... RESPONDENT

JUDGMENT

1. "In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the *Employment Act*, 2007 actually exists."

2. This Court wrote the above dictum in its decision in Maurice Oduor Okech v Chequered Flag [2013] KEELRC 891 (KLR). The present dispute turns on this very issue. The Claimant was initially engaged by the Respondent as an employee but shortly thereafter, her engagement instrument was changed to a consultancy agreement. The primary question for determination is whether this change placed the Claimant outside the protection offered by the *Employment Act*.

3. The Claimant states her case in a Memorandum of Claim dated 12th July 2021 and the Respondent responds by a Memorandum of Defence dated 13th September 2021.

4. The matter went to full trial where the Claimant testified on her own behalf and the Respondent called its Head of Growth Africa, Dr. Max Dohna. The parties also filed written submissions.

The Claimant's Case

5. The Claimant states that she was employed by the Respondent on 18th August 2018, in the position of Product Manager, earning a gross monthly salary of Kshs. 140,000.

6. The Claimant further states that from 1st September 2018, the Respondent changed the employment contract to a consultancy agreement, while retaining the Claimant's job description and title.

7. The Claimant claims to have worked forty (40) hours per week in the office, under the supervision of the Respondent. According to the Claimant, the Respondent was responsible for providing guidance on the technical aspects of her work. She adds that the Respondent evaluated her performance on a weekly basis.

8. The Claimant worked for the Respondent until 20th June 2019, when she received a termination letter, informing her that the consultancy agreement would be terminated on 21st June 2019.

9. The Claimant's claim against the Respondent is for compensation for unlawful and unfair termination of employment. She further claims notice pay, service pay and leave pay, in addition to a certificate of service, plus costs of the case and interest.

The Respondent's Case

10. In its Memorandum of Defence dated 13th September 2021, the Respondent states that the Claimant was briefly employed as a Product Manager under an employment contract dated 18th August 2018.

11. The Respondent avers that immediately thereafter, it approached and engaged the Claimant in discussions for the conversion of her employment into a consultancy. This led to the conclusion of a consultancy contract, which the Claimant accepted on 1st September 2018. According to the Respondent, this effectively terminated the employment relationship. The consultancy agreement was to run for a period of three years, effective 1st September 2018.

12. The Respondent terms the Claimant's role as a consultant as comparable to that of an independent contractor, maintaining that there was no employer-employee relationship between the parties.

13. The Respondent contends that the Claimant was not subject to its control, except to the extent admitted in the consultancy contract. The Respondent claims that the Claimant had discretion over her working hours.

14. Regarding the averment that the Claimant's performance was evaluated, the Respondent states that in undertaking this role, it was merely performing a contractual obligation under Article VI of the consultancy contract.

15. The Respondent admits terminating the consultancy contract effective 21st June 2019. The Respondent asserts that the Claimant was paid all outstanding service fees and contends that owing to the nature of engagement, there was no requirement for substantive justification or procedural fairness in terminating the consultancy contract.

Findings and Determination

16. There are three (3) issues for determination in this case:

    a. The nature of the Claimant's engagement with the Respondent;

    b. Whether the Claimant has proved a case of unlawful termination of employment;

    c. Whether the Claimant is entitled to the remedies sought.

Nature of Claimant's Engagement

17. In its defence to the Claimant's claim, the Respondent takes the position that there was no employment relationship between itself and the Claimant. In advancing this position, the Respondent relies on a consultancy contract signed by the parties on 1st September 2018.

18. The salient features of the consultancy contract were as follows:

    a. Period of performance: 1st September 2018 to 1st September 2021;

    b. Consultancy: Product Management Consultancy

    c. Hours per work day: eight (8) hours per day, with discretion to the consultant on maximum number of work hours;

    d. Consultancy fee: Kshs. 140,000 per month paid on the last day of the month;

    e. Country Director to play a key role in ensuring success of the work.

19. Section 2 of the *Employment Act* defines an employee as:

> " a person employed for wages or a salary and includes an apprentice and indentured learner"

20. The same provision defines an employer as:

> " 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"

21. The question is whether the contract between the Respondent and the Claimant fell within the foregoing definitions despite the terminologies employed by the parties.

22. In her submissions dated 3rd April 2025, the Claimant cited the decision in Everret Aviation Limited v Kenya Revenue Authority [2013] eKLR where Kimondo J stated the following:

> " There are...various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the employer's business...The greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service...That test is however not conclusive... There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration; the method of payment; any obligation to work only for that employer; stipulation as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools

and equipment; and who, ultimately bears the risk of loss and the chance of profit. In some cases, the nature of the work itself may be an important consideration…"

23. The Claimant further referred to the decision in Krijnen v NAS Airport Services Ltd [2023] KEELRC 2390 (KLR) where a distinction between a contract of service and a consultancy agreement was made in the following terms:

> "…a contract of service puts an employee under the control of the employer, and such control is based on the terms and conditions of the contract; which also sets out the scope of an employee's employment. In the contrast, a consultant is an expert and/or is deemed to be an expert whose manner of working or scope of duties is not defined or dictated by any one. A consultant is expected to give professional/expert advice based on his expertise, and based on the needs of his client, and falling within the expert's/consultant's expertise. A consultant is an independent contractor, is not involved in the day to day running of his client's business, staff, supervision, customer relations, procurement and infrastructure …and other day to day functions."

24. In its submissions dated 5th May 2025, the Respondent made reference to the decision in Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] KEELRC 860 (KLR) where it was held that:

> "…the hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual employment matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13th cheque and so on."

25. In its decision in Wambugu v Foresight Ventures Limited [2024] KEELRC 2515 (KLR) this Court stated thus:

> "…the Claimant was employed in the central position of Managing Director, albeit in an acting capacity. In this capacity, the Claimant was at the centre of the Respondent's core business and it cannot be said that his role was peripheral. It seems to me therefore that the relationship between the Claimant and the Respondent was one of employer/employee and the fact that the contract was termed as a consultancy agreement did not alter this fact. The answer to the question whether there was an employment relationship between the parties is therefore in the affirmative."

26. The case before me is straightforward; the Claimant was first employed as a Product Manager, by an employment contract dated 18th August 2018. She retained the same job and monthly salary under the subsequent consultancy agreement dated 1st September 2018, her working hours were defined and regulated, meaning that she could not take up any other assignment, and she was supervised by the Respondent's Country Director.

27. Moreover, the provision that the Claimant would not be entitled to pension and medical insurance featured in both the employment contract and the consultancy agreement. Further, the Respondent did not adduce any evidence to show deduction of withholding tax from the Claimant's monthly pay, as would be expected in a pure consultancy arrangement.

28. Applying the definition of an employee in Section 2 of the *Employment Act*, alongside case law on the factors to be taken into account in determining the nature of engagement between parties in a work relationship, I have no doubt in my mind that the relationship between the Claimant and the Respondent, throughout the engagement period, was one of employer/employee.

The Termination

29. I will now examine the termination of the Claimant's employment. This was communicated by a terse letter dated 21st March 2019 addressed to the Claimant by the Respondent as follows:

> " Letter Of Termination
>
> Dear Ms Anyango
>
> We hereby inform you that your services as a consultant to EIDU Education Ltd will no longer be needed after June 20th,2019. Thus, we terminate the consultancy agreement with you from June 21st, 2019.
>
> We thank you for your services and wish you all the best for the future
>
> (signed)
>
> Dr. Max Dohna
>
> Country Director"

30. Under the *Employment Act*, every termination of employment must be supported by a valid reason. In this regard, Section 43 of the Act provides as follows:

    1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair with the meaning of section 45.

    2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

31. Section 45(1) and (2) of the Act proscribes unfair termination of employment in the following terms:

    1. No employer shall terminate the employment of an employee unfairly.

    2. A termination of employment by an employer is unfair if the employer fails to prove-

        a. that the reason for the termination is valid;

        b. that the reason for the termination is a fair reason-

            i. related to the employee's conduct, capacity or compatibility; or

            ii. based on the operational requirements of the employer; and

        c. that the employment was terminated in accordance with fair procedure.

32. The fair procedure referred to in Section 45(2)(c) is codified in Section 41 of the Act, which sets the following standard:

    1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to

the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

33. In Duncan Mbathi Mulevi v Wanandege Cooperative Savings & Credit Society Limited [2018] KEELRC 281 (KLR) it was held that:

> " Under section 45(2) of the *Employment Act*, termination of an employee's contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason(s) and that it was done after following a fair procedure. A valid and fair reason is one that relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand is one that accords justice and equity and basically it relates to according the employee a fair hearing before terminating his services."

34. The termination letter issued to the Claimant in the present case does not disclose any reason for the termination. It is also evident that the Claimant was not subjected to any pre-termination disciplinary process. The termination was therefore substantively and procedurally unfair.

Remedies

35. Consequently, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the fact that she did not in any way contribute to the termination.

36. Additionally, I have taken notice that the Respondent did not disclose any reason for the termination and that the Claimant was not afforded an opportunity to be heard. I have further considered the Respondent's failure to provide the Claimant with a pension benefit.

37. Although the termination letter is dated 21st March 2019, the Claimant's position is that she did not receive it until 20th June 2019. The Respondent did not adduce any evidence to contradict this position. Consequently, I find and hold that the Claimant was not given notice and is therefore entitled to notice pay.

38. Having worked for less than a year, the Claimant did not earn service pay. She is however entitled to prorata leave for the period of service.

39. Finally, I enter judgment in favour of the Claimant as follows:

    a. 3 months' salary in compensation.....Kshs. 420,000

    b. 1 month's salary in lieu of notice.....140,000

    c. Prorata leave for 10 months (140,000/30*1.75*10).....81,667

    Total.....641,667

40. This amount will attract interest at court rates from the date of judgment until payment in full.

41. The Claimant is also entitled to a certificate of service plus costs of the case.

42. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2025

LINNET NDOLO

JUDGE

Appearance:

Ms. Mutuku h/b for Ms. Milimo for the Claimant

Ms. Wameyo h/b for Mr. Deya for the Respondent