



REPUBLIC OF KENYA



**Kiio v Jtg Enterprises Ltd (Cause E697 of 2021)
[2025] KEELRC 2155 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2155 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E697 OF 2021**

**JW KELI, J
JULY 18, 2025**

BETWEEN

ALEX KYALO KIIO CLAIMANT

AND

JTG ENTERPRISES LTD RESPONDENT

JUDGMENT

1. The claimant alleging that his employment was terminated on the 9th of October 2020 filed a statement of claim dated 18th August 2021 against the respondent and sought the following Orders:-
 - a. A Declaration that the Respondent's conduct in terminating the Claimant's employment amounted to a violation of the Claimant's constitutional right to fair labour practices under Article 41(1) of the Constitution of Kenya, 2010.
 - b. A Declaration that the termination of the Claimant's employment was wrongful and unfair contrary to sections 35(1)(c), 36, 45(2) and 45(4) of the Employment Act, 2007.
 - c. A Declaration that the Respondent's failure to grant the Claimant leave amounts to contravention of section 28(1)(a) of the Employment Act, 2007.
 - d. A Declaration that the Claimant is entitled to be compensated for:
 - i. Violation of his Constitutional rights as envisaged under Article 23(3) and 41(1) of the Constitution of Kenya, 2010;
 - ii. Violation of his employment and contractual rights; and
 - iii. Injury to the Claimant on account of the Respondent's breaches.
 - e. An order that the Claimant be compensated a total of Kenya Shillings One Million Two Hundred Thousand Only (Kshs. 1,200,000/-), tabulated as follows:



- i. Kshs. 420,000/- being the accumulated retainer between 11/8/2019-26/2/2020.
 - ii. Kshs. 360,000/- being the accumulated retainer between 29/4/2020-9/10/2020.
 - iii. Kshs.120,000/-being payment in lieu of notice when the Respondent terminated the Claimant's employment on 26/2/2020.
 - iv. Kshs.120,000/-being payment in lieu of notice when the Respondent terminated the Claimant's employment on 9/10/2020.
 - v. Kshs. 120,000/- being unpaid leave for 1 year
 - vi. Kshs. 60,000/- being service pay for 1 year
 - f. Interests on the amounts stated in (e) above at court rates
 - g. An order directing the Respondent to issue the Claimant with a certificate of service.
 - h. An order requiring the Respondent to deliver to the Claimant the house as per agenda 2019/11/08/003 of the minutes of the management meeting held on 11th August 2019 at Thwake Dam Offices, Wote in Makeni County.
 - i. Costs of this suit.
 - j. Any other relief this Honourable court deems just to grant.
2. The claimant in support of the claim filed his witness statement dated 18th August 2021 and list of documents dated 18th August 2021 and the bundle of documents.
 3. The Respondent entered appearance through the law firm of L. Wahome & Company Advocates and filed a statement of defence dated the 10th of November 2021, denying the allegations in the statement of claim. In support of the response, the respondent filed its list of witnesses of dated the 10th of November 2021, and witness statement of Joseph Thuo Gichuhi of even date.

Hearing and evidence

4. The claimant's case was heard on the 4th February 2025 where he testified on oath, adopted his witness statement dated 18th August 2021 and produced documents under his list of documents of even date as C-Exhibit 1-7. He was cross-examined by counsel for the respondent, Wahome.
5. The respondent's case was heard on even date. The respondent called Joseph Thuo Gichuhi, a director of the company as it witness of fact, he testified on oath as RW1, adopted as his evidence in chief his witness statement dated 10th November 2021 and was cross-examined by counsel for the claimant, Hagai.

The Claimant's case in summary

6. The Claimant herein was employed by the Respondent as a supervisor at Thwake Dam vide a contract of employment executed on 11th August 2019, at a monthly salary of Kshs.120,000/-payable as follows: Kshs. 60,000/- payable every month; and Kshs. 60,000/- retainer to be paid cumulatively at the end of the year. The Claimant avers that he discharged his duties under the employment contract without fail and with utmost diligence and faithfulness, as evidenced by inclusion among the members of staff for whom the Respondent intended to construct houses on plots subdivided to them.



7. On or about 26th February 2020, the Claimant's employment was terminated without prior notice and justifiable reason. By the time of termination, the retainer had accumulated by seven (7) months, to Kshs. 420,000/-. The Claimant was recalled on the same terms on 29th April 2020, but his employment was later once again terminated on 9th October 2020 without notice. By the time of the second termination, the retainer had accumulated by six (6) more months, by an additional Kshs. 360,000.
8. The Claimant's claim is for the outstanding retainer as well as unpaid leave days, since he was never paid or granted leave for the entire period that he worked. According to the Claimant, the denial of leave or in the alternative leave pay was a violation of his constitutional right to fair labour practices.

Respondent's case in brief

9. The Respondent denied that the claimant was its employee, and averred that it engaged him intermittently as an independent contractor to perform various tasks for which he would be paid an agreed sum. It also denied the various allegations as set out in the claim and classified them as a figment of the claimant's imagination and fantastical. It wondered how a company could agree to give land to its employees without consideration, and categorically denied holding the meeting of 11th August 2019 where it allegedly passed a motion to build houses for its members of staff. It stated that all the documents attached to the Plaintiff's suit are forgeries and do not emanate from the Respondent. Finally, it stated that the claimant's claim was fake and meant to shake down the respondent.

Determination

Issues for determination

10. The claimant identified the following issues for determination in the suit. –
 - a) Whether the Claimant was employed by the Respondent as an employee.
 - b) Whether the Claimant was unlawfully and unfairly terminated from employment by the Respondent
 - c) Whether the Claimant is entitled to the prayers sought in his statement of claim
 - d) Who should bear the cost of this claim?
11. Conversely, the respondent addressed the issue of whether the claimant was an employee or an independent contractor.
12. The court finds that the issue to be addressed first is whether the claimant was an employee or independent contractor and if an employee.
 - a. Whether the termination of employment was lawful and fair
 - b. Whether the claimant was entitled to reliefs sought .

Whether the claimant was an employee or independent contractor

Claimant's submissions

13. The Claimant asserted that he was employed by the Respondent as an employee on 11th August, 2019. He was employed as a Supervisor at Thwake Dam for a monthly salary of Kshs. 120,000/=. The Claimant was paid Kshs. 60,000/= monthly while the other Kshs. 60,000/= was to be paid at the end of each year cumulatively. In order to substantiate his employment position at the Respondent



as an employee, the Claimant has supplied the Honourable Court with Bank and M-pesa Statements to confirm payment of monthly salary to him by the Respondent. The Claimant urges the Court to consider his exhibits 1, 2 & 3; as per items 1, 2 and 3 as contained in his list of documents dated 18th August, 2021. 16. In fact, in the Co-Operative Bank Statement produced in Court, at paginated page 8 of the Claimant's documents, indicate that there was a payment done to the Claimant by the Respondent. The payment was done on 07-Oct-19 and under details it reads, "Salary Processed JTG Enterprises Ltd Comm_12 Salaries." On the same row, under CREDIT the statement indicates the sum of Kshs. 60,240/=, which is the monthly salary that was paid to the Claimant, excluding the amounts paid cumulatively at the end of the year as stated above. The above position is the same as on 07-Nov-19, 06-Dec-19, 10-Feb.-2020 and 09-Mar2020 in the Co-Operative Bank Statement, before the Respondent unlawfully terminated the Claimant's employment on 26th February, 2020. The also refers the Honourable Court to exhibit 2 on the documents produced in Court by the Claimant containing the messages from the bank indicating payments of monthly salary amounts to the Claimant by the Respondent.

14. The Claimant further submits that his position of employment with the Respondent is further confirmed in the Minutes of Management Meeting Held on 11th August, 2019 at Thwake Dam Offices, Wote-Makueni County at 14:25hours. The said minutes form exhibit 4 of the documents produced in Court by the Claimant. In the said minutes the name of the Claimant appears as SUPERVISOR at the Respondent. The Claimant submits that the Employment Act (Cap 226) Laws of Kenya, under section 2 defines an "employee" as, "a person employed for wages or a salary and includes an apprentice and indentured learner." The Employment Act under section 2 also defines a "contract of service" as, "means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies." The claimant urged the Court to find that he was employed by the Respondent under a contract of service and NOT as an independent contractor and invites the Court to consider the Employment and Labour Relations Court Case of Omusamia v Upperhill Springs Restaurant (Cause 852 of 2017) [2021] KEELRC 3 (KLR) (5 October 2021) (Judgment) as presided over by Honourable Justice Ocharo Kebira. The Court held the following concerning whether a worker is an independent contractor or an employee: "The tests that courts have employed over years, include, the control test - assessing the presence or absence of control a manager or supervisor might or might not have over their worker, the fourfold test - control, ownership of the tools, chance of profit, risk of loss, lastly the integration test, developed in Stevenson Jordon and Harrison Limited v McDonald and Evans (1952), the approach looks at whether the service being provided by the worker is an integral part of business done on behalf of the business but not integrated into the business."
15. It is the Claimant's submission that he was employed under a contract of service by the Respondent. The employment title of the Claimant (Supervisor) is clearly indicated on the minutes of 11th August, 2019, as produced in Court. The case of Omusamia, supra, also cited with authority the case of Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance which clarified the factors to consider in determining whether one was an employee and therefore under a contract of service as where: - "(i) The servant agrees to provide his own work and skill by providing services for this matter, in consideration of wages or other remuneration. (ii) The servant agrees that in the performance of that service they will be subject to the master's control. Control includes the power of deciding the things to be done, the way in which it shall be done, the means to be employed and in doing it, the time and place where it shall be done. (iii) The contract of service complies with the terms of an employment agreement. This entails complying with the statutory requirements in the Employment Act including minimum wage, provision for leave and payment of income tax." The Claimant submits



that the Respondent never produced in Court any documents to substantiate any of the allegation over the relationship between the Claimant and the respondent. No contract or documents were ever produced in Court by the Respondent. It is pertinent to point out that the Respondent as an employer is called upon under section 74 of the *Employment Act*, and in mandatory terms; to keep a written record of all its employees. Section 10 of the *Employment Act* also provides that an employer shall keep an employee's particulars as contained in a contract. However, the Respondent despite being the custodian of the Claimant's particulars and documents concerning work decided not to present any documents in Court. The Claimant humbly submits that despite the Respondent alleging that the Claimant was a contractor for service, it did not produce before Court any documentary evidence in terms of a contract agreement, invoices or any payment vouchers. Therefore, it is the humble position of the Claimant that the Respondent did not substantiate that allegation and that the same is but an attempt to cover up its unlawful and unfair termination of the Claimant.

16. The Respondent in its pleadings and testimony disputed the authenticity of the documents availed in Court by the Claimant. However, the Respondent did not avail to Court any of its alleged true copies of documents or comparison so that it could be concluded whether or not the documents presented to Court were forgeries. The Claimant submits that section 107 (1) and (2) of the *Evidence Act* (Cap 80) Laws of Kenya provide: "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Section 109 of the *Evidence Act* further provides, "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

17. The Claimant has duly provided M-Pesa statements indicating monthly payment of salary by the Respondent. In fact, the M-Pesa statement also indicates that the amounts paid monthly to the Claimant by the Respondent were salaries. This is under the transaction of 07-Oct-19. Furthermore, the minutes of 11th August, 2019 indicates the Claimant as supervisor at the Respondent. The Claimant has also produced in Court the termination notice and letter in the Respondent's letter heads, and both dated 26th February, 2020- exhibit 6 and 5, respectively. The notice of termination was signed by both the Human Resource personnel and Project Manager of the Respondent. The said letters in their wordings clearly indicate that the Claimant was employed by the Respondent as an employee. In the foregoing, the Claimant urges the Honourable Court to find that the Claimant was employed by the Respondent as an employee under a contract of service and thus their relationship was that of an employee-employer.

Respondent's submissions

18. In the case of *IEBC & Another -vs- Stephen Mutinda Mule*(2014) EKLK, the Court of Appeal stated as follows; "it is by now well settled by precedent that parties are bound by their Pleadings and that evidence which tends to be at variance with the Pleadings is for rejection. Pleadings are bedrock upon which all proceedings derive from. Any evidence, however strong, that tends to be at variance with the Pleadings, must be disregarded" In the present Claim, the Claimant, in Paragraph 3 of the claim stated as follows; The claimant avers that he duly executed a contract of employment with the Respondent on 11th August 2019" Indeed the entire claim by the Claimant is based on this alleged employment contract which he says he executed. It is the Respondent's Submissions that the aforesaid Contract of Employment did not meet the threshold set out by the *Employment Act*. The Claimant's suit must fail because the document that the Claimant intends to rely on cannot, in law be said to be a Contract



of Employment. Section 9(2) and(3) of The Employment Act is very categorical that for any Contract of Employment to be held as valid, the same must have been consented to by the employee. Such consent is signified by either the signature of the said employee or his thumb print. In the present case, the alleged contract of service was in fact not a Contract of Employment but the same was headed as "minutes of Management meeting held on 11th August 2019". In addition and more importantly, the Claimant was absent during this meeting as per the minutes. How then can it be said that the Claimant fulfilled his duties under Section 9(2) and (3) of the Employment Act? How did he consent to a meeting that he did not attend? In addition to the above such minutes were illegitimate as they were never sanctioned by the director of the Respondent. The other reason why the aforesaid Contract of Employment is illegitimate is the fact that the said minutes do not satisfy the particulars that are set out under Section 10(2) (a) to (j) of the Employment Act.

19. Section 10(2) of The Employment Act is expressed in mandatory terms. It is the Respondents Submission that the alleged Contract of Employment cannot bestow any employment rights on the Claimant and since parties are bound by their pleadings, the court has no choice but to reject the averment that the Claimant was duly employed by the Respondent. The respondent urged the court to reject the document titled "minutes of the management meeting" as a Contract of Employment and as a consequence thereof strike out the Claim with costs.
20. The Respondent also disputed the other documents filed by the Claimant and in particular the purported dismissal letters. As admitted during Cross- examination the 2 letters were not authored by any known officers of the Respondent and the letter heads on both letters materially differ. It would be unsafe to uphold the efficacy of such letters. Lastly, the Respondent's contention that the Claimant was an independent contractor is truly borne out by the fact that the Claimant received irregular payments from the Respondent. The Claimant even admitted that there was a time his services were not needed and hence no payments were done. After a pause, the Claimant, as a true independent contractor was reengaged for about 4 months. The Claimant called no evidence to displace this assertion by the Respondent.

Decision

21. An employee is defined under section 2 of the employment act to wit - "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;" The claimant stated he was employed on the 11th August 2019 as supervisor of Thwake Dam at monthly salary of Kshs. 120000 with Kshs. 60000 payable monthly and 60000 retainer to be paid cumulatively end of the year. He asserted that on 26th February 2020 the employment was terminated without reason. That he was engaged again on 29th April 2020 and terminated on the 9th October 2020. In support of the claim was minutes under letter head of the respondent dated 11th August 2019 held at Thwake Dam Offices Wote Makueni County at 14.25 hrs. The minutes records the claimant's name as supervisor. In the minutes is new salary scheme of which the name Alex(claimant) is indicated salary as pleaded. There is also minutes on purchase of land in Nairobi to construct houses for the managers as incentives. The court noted the claimant was absent. Then how could this be his employment letter when he was not present to even accept the terms? The claimant further produced notice of termination which was dated 26th February 2020. The name of the persons signing the termination letters is not disclosed((C-exhibit 5 and 6 at page 37 and 38 of the claimant's bundle). The claimant further produced his bank statement as proof of payment of his monthly salary.
22. The respondent called Joseph Thuo Gichuhi as its witness of facts who adopted his witness statement dated 10th November 2021 . He stated that he was a director of the respondent. He told the court the minutes before the court were proposals by the employees which were not accepted by the Company



- director. He denied to have signed despite the record indicating so. He stated all documents relied on purporting to be from the respondent were forgeries. He stated that the claimant was engaged on some occasion by the respondent as an independent contractor to perform various chores for which he was paid the agreed sums. The witness questioned on what basis it would have given land without consideration.
23. During cross-examination the claimants admitted that before August 2019 he was engaged by the respondent in a different capacity. At page 25 of his documents the claimant was paid by the respondent Kshs. 34477 in July 2019. The court then found it was not true that the claimant was employed on the 11th August 2019 as alleged. Indeed he was paid Kshs.31500 in August 2019, 45000 in September 2019. His statement had a gap of November 2019. The court found that the claimant was likely engaged on piece meal basis where he is was paid for work done as the pay varied month to month and there were gaps. The court on prima facie basis finds that the claimant was engaged on piece-meal worker basis and paid for work done. His claim was based on sinking sand having pleaded he was employed vide minutes of 11th August 2019 of which he was absent and there was no other contract issued. There was evidence of having been paid in July, before the alleged employment vide the alleged meeting of August 2019. The court finds that the authority relied of *Omusamia v Upperhill Springs Restaurant 2021 e KLR* on contract of service and rightly citing *Ready Mixed Concrete (South East) Ltd v Ministry of Pension and National Insurance* is distinguished for the forgoing reasons. The claimant bound himself in claiming he was engaged on 11th August 2019 which the court found was not true. The said minutes had a space for confirmation by the Director, the respondent being a company. The director had not signed. The Director is the mouth piece of the company and makes decisions on behalf of the company. The CR12 was not filed in court to prove the names of the directors of the company and that they confirmed the minutes to binding the company. The entire claim as stated earlier was based on sinking sand being the said unconfirmed minutes.
24. The court finds that there being no prove that the claimant was a term contract employee and the court having found he was a piece meal worker paid for work done as demonstrated by varied wages with gaps in months. The claimant did not explain why he was paid different for the months he was paid and why he had gaps yet he had no claim for underpayment of the alleged monthly sum of Kshs. 60000. The claimant did not prove termination on 9th October 2020. The letter of termination produced was of 26th February 2020, also disputed by the respondent. The claimant did not produce the letter of termination of 9th October 2020 or plead as to how it happened. The court finds on balance of probabilities the claimant did not prove he was an contract of service employee or the termination. The burden of proof never passed to the respondent to justify reason for the termination. The court in the circumstances, having found the claimant was a peace meal worker and that there was no prove of termination and that the minutes relied on as proof of employment and for reliefs sought were not confirmed by the Director to bind the company holds the entire claim to be without merit. The claim dismissed with costs to the respondent.
25. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY, 2025.

**J.W. KELI,
JUDGE.**

In the presence of:

Court Assistant: Otieno



Claimant: Wamae h/b Ms. Lusiela

Respondent: Luius Wahome

