



**Ngui v Termi-Lever Services Limited (Cause 2108 of 2017)  
[2024] KEELRC 96 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 96 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2108 OF 2017  
JK GAKERI, J  
JANUARY 31, 2024**

**BETWEEN**

**BONIFACE MUMO NGUI ..... CLAIMANT**

**AND**

**TERMI-LEVER SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 18<sup>th</sup> October, 2017.
2. The claim was subsequently amended on 1<sup>st</sup> February, 2023 and filed on 3<sup>rd</sup> February, 2023.
3. It is the Claimant's case that he was employed by the Respondent on 1<sup>st</sup> August, 2007 as an exterminator at a gross salary of Kshs.18,000/= and served diligently and his employment was terminated by word of mouth on 30<sup>th</sup> January, 2016.
4. The Claimant avers that the termination of employment was unfair.
5. The Claimant also alleges to have been declared redundant.
6. The Claimant prays for;
  - i. 12 months' salary Kshs.216,000.00
  - ii. Severance pay Kshs.72,000.00
  - iii. Pay in lieu of leave Kshs.108,000.00
  - iv. Service pay Kshs.72,000.00
  - v. Salary in lieu of notice Kshs.18,000.00Total Kshs.486,000.00



- vi. Certificate of service.
- vii. General damages for breach of contract.
- viii. Costs and interest.

### **Respondent's case**

7. In its response to the Statement of Claim, the Respondent avers that it was not in existence on 1<sup>st</sup> August, 2007 when the Claimant alleges to have been employed.
8. That the Claimant was a casual labourer hired on a need basis at Kshs.400/= per day and worked for 7 days in both 2012 and 2016 and Respondent did not hire the Claimant on public holidays and weekends and prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

9. On cross-examination, the Claimant maintained that he was employed in 2007 and did not know when the Respondent company was incorporated.
10. It was his testimony that Mr. John Kinyenje paid him in cash or by MPESA and had no written contract of service.
11. Finally, the Claimant testified that he received a call informing him that he was no longer an employee of the Respondent.
12. On re-examination, the Claimant testified that salary was payable on a monthly basis and had attached Mpesa records of his salary.
13. It was his testimony, that Mr. John Mbugua was the owner of the company.

### **Respondent's case**

14. Mr. John Mbugua, on cross-examination confirmed that his company dealt with fumigation and pest control.
15. That he engaged the Claimant on casual basis when work was available, for instance 14<sup>th</sup> and 15<sup>th</sup> December, 2016 and 5 days in January 2016 and payment was at the end of the day and no taxes were paid as his employees were casual.
16. The witness testified that the work schedule for December was prepared on 6<sup>th</sup> December, 2016 and the Claimant had confirmed availability.
17. That the Claimant and Mbugua lived in the same locality at Kabete before December 14<sup>th</sup> 2012 and the Claimant was not engaged from 2012 to 2016.
18. On re-examination, the witness confirmed that he had availed documentary evidence of the days the Claimant worked.

### **Claimant's submissions**

19. As regards the terms of employment of the Claimant, counsel submitted that the Claimant worked for over 8 years and the Respondent did not give him an employment letter or provide an attendance register. That the work-visit schedules were for security reasons only for banks and were not required elsewhere.



20. Counsel submitted that the Respondent had no casuals register for 2007 to 2016 as it was Mr. Mbugua's duty to provide records as held in *Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR.
21. That the Respondent had no explanation to show that the Claimant worked in 2012 and 2016 only and RWI had no credible explanation on how he met the Claimant and engaged him.
22. According to the Claimant's counsel, the inference is that the Claimant was working for the 4 years but had no documentation to prove it yet the Respondent paid him in 2015 as evidenced by the Mpesa statements for 2015 and 2016.
23. Counsel urged that the Claimant's employment converted to term by virtue of Section 37 of the *Employment Act, 2007*.
24. On termination of employment, counsel relied on the provisions of Section 45 of the *Employment Act, 2007* to urge that the Respondent's allegation that it was downsizing was tantamount to redundancy as held in *Jackson Muiruri Mwangi v Sinohydro Corporation (K) Ltd* [2016] eKLR.
25. Counsel urges that the Secretary's communication to the Claimant had the effect of down-sizing of the Respondent's work force.
26. That the Respondent did not comply with the provisions of Section 40 of the *Employment Act, 2007*.
27. As regards the reliefs sought, counsel submitted that the Claimant was entitled to 12 months compensation, untaken leave, severance pay and salary in lieu of notice.
28. Counsel appear to have abandoned the prayer for service pay.

### **Respondent's submissions**

29. Counsel for the Respondent reiterated the Respondent's denial of the claim stating that the Respondent company was incorporated on 20<sup>th</sup> May, 2009 and thus could not have employed the Claimant on 1<sup>st</sup> August, 2007.
30. Counsel further submitted that the Claimant worked for the Respondent as a casual labourer as records showed.
31. That the Claimant and the Respondent lived in the same neighbourhood and the payments on his Mpesa statement were not salaries.
32. Counsel urged the court to find that the Claimant was not an employee of the Respondent.

### **Findings and determination**

33. From the evidence on record, it is evident that the Claimant worked for the Respondent on specific dates from 2012 to 2016 and was paid certain sums of money by the Respondent through Mpesa in 2015 and early 2016.
34. It is also common ground that the Claimant had no appointment letter.
35. The issues for determination are;
  - i. Whether the Claimant was an employee of the Respondent and on what terms.
  - ii. Whether the Claimant was declared redundant or his employment was unfairly terminated.



- iii. Whether the Claimant is entitled to reliefs sought.
36. As to the nature of employment, the Claimant testified that he worked continuously for the Respondent from 2007 to 2016, a duration of over 8 years but the documentary evidence on record reveals that he did some work in 2012 and 2016 and was paid some money in May, June, July, August, September, November and December 2015, a remunerative sum of Kshs.46,970/=. Payments for 2016 totalled up to Kshs.32,620/=.
37. If the Claimant's testimony that his salary was Kshs.18,000/= per month is to be believed, then he ought to have sued for salary arrears as the sum of Kshs.18,000/= was paid only once on 6<sup>th</sup> February, 2016 while in the course of the same month, he had received Kshs.14,620/= on diverse days.
38. In July 2015, he received Kshs.18,200/= while the amounts paid in May, June, August, September, November and December vascilated between Kshs.400/= and Kshs.7,100/= and there was no payment before May 2015 and October 2015.
39. Since the amounts received by the Claimant lack uniformity in any respect save for the variation, a possible inference is that he may have been a casual employee after all. The least amount paid to him is Kshs.400/= which according to the Respondent was his daily rate.
40. Equally, Mpesa records show that the Claimant received a single payment of Kshs.400/= in May 2015, one in June and July 2015, two in August and September 2013, one in November 2015 and three in December 2015.
41. In January 2016, the Claimant received a total of 5 payments on 2<sup>nd</sup>, 5<sup>th</sup>, 25<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup> and a single payment on 6<sup>th</sup> February, 2016.
42. As the amounts paid varied from month to month and did not add up to Kshs.18,000/= for any month except February 2016 when the sum of Kshs.18,000/= was paid at once, it is inferable that the Claimant had no monthly salary as alleged in his written statement.
43. Had the Claimant availed all his Mpesa statements for 2013, 2014 and 2015, it would have been clear if he had a monthly or was paid for the days he had worked as the trend would have been more clearer than the present where he availed records for 2015 and January 2016 only.
44. In the courts view, the mode and style of payments by the Respondent would appear to suggest that the Claimant was being paid for the days worked as opposed to a salary which is consistent with the argument that he was a casual employee engaged on a need basis consistent with the definition of casual employee in Section 2 of the *Employment Act*, 2007.
45. The evidence on record is patently insufficient for an inference that the Claimant was a permanent and pensionable employee of the Respondent. It has the hallmarks of casual employment as alleged by the Respondent.
46. Similarly, RWI testified that he knew the Claimant before 2012 as they were living in the same neighbourhood at Kabete and gave him work when it was available.
47. Relatedly, the Claimant's documentary evidence shows that on 14<sup>th</sup> and 15<sup>th</sup> December, 2012, he was scheduled to render services at the National Bank, Hill Plaza Hospital, TSC Upperhill, Wilson Airport, Rongai and Eastleigh.
48. The undated job card reveals that the Hospital branch was not fumigated.



49. Finally, in 2016, evidence shows that the Claimant fumigated 7 branches only from 25<sup>th</sup> to 28<sup>th</sup> January, 2016 and was paid on 25<sup>th</sup> in two tranches of Kshs.2,100 and Kshs.6,000/= and on 29<sup>th</sup> July Kshs.4,000/=.
50. From the evidence on record, the court is satisfied and finds that the Claimant did not render services on a continuous basis and was paid for the days worked.
51. There is no shred of evidence to demonstrate that the Claimant rendered any service or was paid anything from 2013 to 2014. There is no evidence to connect him with the Respondent.
52. Closely related to the foregoing is the Claimant's date of employment in respect of which parties have different positions.
53. While the Claimant alleges he was employed in August 2007, the Respondent states that he gave him work in 2012.
54. Other than the Claimant's statement that he was employed in 2007, there is nothing to support the allegation.
55. The Respondent on the other hand provided a copy of the Certificate of Incorporation of the Respondent dated 20<sup>th</sup> May, 2009.
56. Based on the Certificate of Incorporation, it is clear that the Respondent did not exist on 2007 and could not have contracted with the Claimant or have an agent. (See *Kelner v Baxter* [1866] unless the Respondent after incorporation entered into a new contract to the same effect as the previous agreement as held in *Mawogola Farmers & Growers Co. Ltd Kayanja & others* [1972] EA 272.
57. There is no evidence on record to suggest that the Claimant entered into an employment contract with Mr. John Mbugua as an agent of the company (in formation) and the company entered into a similar contract after incorporation.
58. In the absence of evidence of payment or services rendered before 2012, the court is satisfied that the Claimant has failed to prove that he was employed by the Respondent company in 2007 or any other time before 2012.
59. As regards separation, whereas the Claimant testified that he was called by the Respondent's Secretary and told to return company items as the company was downsizing, and thus was declared redundant, the Respondent denied that it terminated his employment
60. Both the original and amended Statements of Claim make reference to unfair dismissal from employment.
61. Was the Claimant's employment unfairly terminated by the Respondent or was he declared redundant?
62. Needless to belabour, redundancy is a legitimate method of separation where an employee loses his job, career or occupation at the instigation of the employer and without the employee's fault.
63. In his original statement dated 17<sup>th</sup> October, 2017, the Claimant made no reference to a call by the alleged secretary or downsizing. These are facts the Claimant recalled almost 5 years later which the court finds curious. I will revert to the alleged call shortly.
64. Similarly, the original statement and the amended statement have different dates of termination of employment as are the statements of claim.



65. It is evident that the statement was amended to suit a particular narrative in light of the Mpesa statements for 2015 and January 2016.
66. Relatedly, the Claimant tendered no evidence as to why he received Kshs.18,000/= after his employment was allegedly terminated on 30<sup>th</sup> or 31<sup>st</sup> January, 2016.
67. As regards the alleged call by the Respondent's nameless secretary, the Claimant tendered no material as evidence of any communication between him and the secretary.
68. Relatedly, having worked for the Respondent for the years alleged, the Claimant knew or ought to have known the Respondent's secretary by name and ought to have used her name. Such detail would have given credence to the alleged telephone call.
69. Intriguingly, the Claimant tendered no evidence as to what he did after the call was made. Why did he not call the employer to confirm the status of his employment? Did he return the alleged company property, when and what transpired thereafter?
70. In the absence of such crucial information, it is difficult for the court to appreciate the circumstances in which the alleged termination or redundancy took place.
71. Section 47(5) of the *Employment Act*, 2007 provides that;  

“For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of wrongful dismissal shall rest on the employer”.
72. Admittedly, it behooved the Claimant to place sufficient material before the court to establish that the separation by redundancy or otherwise was unfair.
73. The Claimant failed to do so as there is no record or evidence to establish any semblance of a redundancy or unfair termination of employment.
74. The totality of the evidence on record is that the Claimant has failed to prove on a preponderance of probabilities that he was declared redundant by the Respondent or his employment was unfairly terminated.
75. As regards the reliefs sought, the court proceeds as follows:
  - i. 12 months' salary
76. Having found that the Claimant has failed to prove redundancy or unfair termination of employment, the prayer for compensation is unsustainable and it is dismissed.
77. The same applies to the prayers for severance pay, service pay and pay in lieu of notice.
  - ii. Pay in lieu of leave
78. Having found that the Claimant has failed to establish that he was a permanent and pensionable employee of the Respondent, the prayer for untaken leave days does not arise. It is declined.
  - iii. General damages for breach of contract
79. The Claimant placed no material before the court to justify the award of general damages.
80. It is trite law that the remedy of general damages is unavailable in contracts of employment.



iv. Certificate of service

81. The Claimant is entitled to a Certificate of Service by dint of Section 51 of the [Employment Act](#), 2007.

**Disposition**

82. Having found that the Claimant failed to prove that he was a permanent and pensionable employee of the Respondent and having further found that the Claimant has failed to prove that his separation with the Respondent was on account of redundancy or unfair, it is clear that the Claimant's suit is unsustainable and it accordingly dismissed.

83. Respondent to issue a Certificate of Service within 30 days.

84. Parties shall bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of [the Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

