



**Mwikali & 2 others v Jam Hotels Limited & another (Cause
1135 of 2015) [2024] KEELRC 57 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 57 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1135 OF 2015
JK GAKERI, J
JANUARY 29, 2024**

BETWEEN

**RUTH MWIKALI 1ST CLAIMANT
JONATHAN MUSYOKA KYUMA 2ND CLAIMANT
NICHOLAS ONDIEKI MOSE 3RD CLAIMANT**

AND

**JAM HOTELS LIMITED 1ST RESPONDENT
JAM RESCUE RESTAURANT LIMITED 2ND RESPONDENT**

JUDGMENT

1. Mr. Nicholas Ondieki Mose and Jonathan Musyoka Kyuma filed separate claims on 28th October, 2015. The claims were subsequently consolidated with Cause No. 1137/2015 Ruth Mwikali Muia V Jam Hotels Ltd, which became the lead file.
2. The suit by Ruth Mwikali Muia was heard by Rika J. who delivered a judgement dated 15th October, 2021.
3. For unexplained reasons, Nicholas Ondieki and Jonathan Musyoka did not prosecute their case yet the issue in dispute and the reliefs sought were substantially the same.
4. Strangely, Ruth Mwikali Muia came to court again and testified as CWI yet she had a judgement under her name. Consequently, the instant judgement excludes her case in totality.
5. Both Nicholas Ondieki and Jonathan Muia allege unlawful termination of employment and seek payment of terminal dues and compensatory damages.
6. Nicholas Ondieki alleges that he joined the Respondent on 5th February, 2008 as a cook at Kshs.12,000/= per month.



7. The Claimant avers that a scuffle on 13th February, 2015 with one Mr. Musyoka on service to Mr. Kinoti culminated in his being sent on compulsory leave on the same day for one month and when he resumed, he was told to proceed home and awaited the Respondent's call. That he declined the one year service pay and was dismissed on 23rd June, 2015.
8. The Claimant prays for;
 - a. A declaration that the dismissal from employment was unfair and unlawful and entitlement to terminal dues and compensatory damages.
 - b.(i) One month's pay in lieu of notice Kshs.12,000/=
 - (ii) Pay in lieu of untaken leave 2008, 2009, 2013 & 2014 Kshs.48,000/=.
 - (iii) Unpaid/untaken public holidays Kshs.62,160/=.
 - (iv) Overtime (2008 – 2012) Kshs.315,063/=
 - (v) Overtime for 2013 Kshs.94,500/=
 - (vi) Overtime for 2014 Kshs.52,500/=
 - (vii) Overtime for 2014 Kshs.65,677/=
 - (viii) Overtime for 7 hours daily Kshs.94,500/=
 - Total Kshs.888,400/=
9. The Claimant's statement rehashes the contents of the Memorandum of Claim.
10. The Claimant testified that he did not proceed on leave during his employment and attached a document with the Respondent's stamp, signed by one "Stephen Ndaiga GM".
11. Neither the written statement nor the oral testimony make reference to the receipt.
12. A copy of the National Social Security Fund statement shows that Mr. Ondieki joined on 18th November, 2013.
13. The statement does not indicate who the employer was.
14. Mr. Jonathan Musyoka Kyuma, on the other hand alleges that he was employed by the Respondent on 8th April, 2014 as a cook at Kshs.10,000/= per month. That on 12th April, 2015, one Mr. Peter accused him of not taking his duties seriously and on the following day, the security guard locked him out of the Respondent's premises on instructions of Mr. Peter and was dismissed by Peter one month later when he resumed duty, for no valid reason.
15. Jonathan claims for
 - i. A declaration that the dismissal from employment was unfair and entitlement of terminal dues and compensatory damages.
 - ii. Terminal benefits and damages amounting to Kshs.252,610/=.
16. In his oral evidence, the witness testified that the Respondent changed its name from Jam Rescue Restaurant to Jam Rescue Hotels Ltd.
17. That he worked for about one (1) year.
18. That he was suspended by one Mr. Peter and did not report to the Manager.



19. To support his case, the witness attached a copy of the National Social Security Fund statement for 2012 to 2015. The statement is silent on who the employer was. He also attached an employee's card under the name Jam Hotels Ltd.

Respondent's case

20. In Jonathan's case, the Respondent avers that the Claimant was employed from 8th April, 2014 to 12th April, 2015 when he was dismissed for misconduct and was accorded one (1) month's notice and the Claimant was heard.
21. In Ondieki's case, the Respondent denies that it employed him as a cook in February 2008 until 2nd February, 2015.
22. It is the Respondent's case that the Claimant was employed by the 1st Respondent a different legal entity as shown by the stamp on the copy of the document.
23. The Respondent did not tender evidence.

Claimant's submissions

24. As regards employment, counsel urged that the Claimants were employed as alleged.
25. On termination, the sentiments of the court in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR, *National Bank of Kenya V Anthony Njue John* (2019) eKLR and *Boniface Musyoka Kyambo V DPL Festive Ltd* (2021) eKLR were relied upon to emphasize the essence of a fair termination of the employment contract and urge that the Respondent did not adhere to the law.
26. On reliefs, counsel urged that the Claimants are entitled to the reliefs sought.

Respondent's submissions

27. The Respondent's counsel urged that the Respondents were distinct legal entities as held in *Salomon V Salomon & Co. Ltd* (1897) AC 22 to urge that it was the duty of the Claimants to prove that the companies were one and the same.
28. Counsel urged that the Claimants tendered no evidence of their employment with the 1st Respondent and cited the sentiments of *Onyango J. in Shadrack Dei Kinyili V National Cash Registers* (2018) eKLR to reinforce the submission.
29. Counsel submitted that the Claimants had not shown that they were employees of the 1st Respondent.
30. On the reliefs sought, counsel submitted that the Claimants had not tendered evidence of having worked overtime or were entitled to unpaid leave as provided by Section 107, 109 and 112 of the [Evidence Act](#).

Determination

31. The issues for determination are;
- i. Whether Nicholas Ondieki and Jonathan Musyoka were employees of the 1st or 2nd Respondent or both.
 - ii. Whether termination of their employment was unfair.
 - iii. Whether they are entitled to the reliefs sought.



32. As regards the 1st issue, it is trite law that the Claimant is duty bound to establish the existence of employment relationship between him/herself and the employer failing which the action fails.
33. In the case of Nicholas Ondieki and Jonathan Musyoka, the Memorandum of Claim makes no reference to the real employer. The claim appears to treat the two entities as one as it makes reference to the Respondent as opposed to the Respondents and does so not less than 16 times.
34. The written statement follows a similar pattern.
35. In his oral testimony, Mr. Ondieki stated that he sued both companies as he was employed by Jam Rescue and it became Jam Rescue Hotels Ltd in 2014 but furnished no documentary evidence.
36. Counsel for the Respondent urged that the Employment Card of the Claimant showed that he was an employee of Jam Rescue Safari Grill different from the 1st Respondent.
37. Although counsel's argument that the two entities are separate legal entities, is very persuasive, it camouflages the reality that the Claimant worked at the same place and changes occurred in his employment until his employment was terminated and there was merit in suing both companies or entities as their legal status remains unclear to the court.
38. The court is thus reluctant to apply the principle in Salomon's case (Supra) as it would enable the Respondents evade existing legal obligations more so, because courts have qualified the rule in Salomon's case to prevent such an eventuality and there is judicial authority for the modifications to the rule.
39. The court is persuaded that the names refer to the same business organization and the Respondents were employers of Nicholas Ondieki.
40. Jonathan Musyoka's employment card is explicit that he was an employee of the 1st Respondent.
41. This finding is further reinforced by the fact that, while the 2nd Respondent did not file any response to the claims, the 1st Respondent did but adduced no evidence to controvert the Claimant's case.
42. For the foregoing reasons, it is the finding of the court that the Claimants were employees of the 1st and 2nd Respondent.
43. As regards termination of the Claimant's employment, the law is settled that for a termination to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employment and did so in accordance with a fair procedure as held in *Walter Ogal Anuro V Teachers Service Commission (Supra)* and many other decision of this court and the Court of Appeal.
44. In this case, the Respondent tendered no evidence to prove that it had a substantial justification for the termination or guaranteed procedural fairness.
45. The Respondents did not contradict the Claimant's evidence on termination and the court is satisfied that the Respondent has failed to discharge the burden of proof under Section 43(1), 45(2) and 47(5) of the *Employment Act, 2007*.
46. Having found that the Respondent has failed to prove that the termination of the Claimant's employment was unfair, the Claimants are entitled to such reliefs as they have evidentiary established as follows;
Nicholas Ondieki
 - i. One month's salary



47. The Respondent led no evidence of having paid one (1) months in lieu of notice.
The same is awarded, Kshs.12,000/=.
- ii. Unpaid/untaken leave
48. The Claimant's evidence that he had 58 pending leave days was uncontroverted.
The prayer is awarded.
- iii. Public holidays
49. The Claimant adduced no evidence to prove that he worked on any public holiday. The prayer is dismissed for want of proof.
- iv. Overtime
50. The Claimant led no shred of evidence to establish that he worked overtime and/or was entitled to payment.
The prayer lacks particulars and is dismissed.
- v. Compensation for unlawful termination
51. Having found as above, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act, 2007](#).
52. The Claimant worked for the Respondent for a duration of about 7 years which is long. The Claimant contributed to the termination of employment by reason of the scuffle he admitted and did not appeal the decision or express his wish to continue in the Respondent's employment.
53. The court is satisfied that the equivalent of 4 months' salary is fair.
Jonathan Musyoka
- i. One month's salary in lieu of notice
54. The Respondents adduced no evidence of having accorded the Claimant the requisite notice or pay in lieu of notice.
The prayer is awarded, Kshs.10,564/=.
- ii. Untaken/unpaid leave
55. Since the Respondent admits that the Claimant worked for about 1 year and tendered no evidence to show that he proceeded on leave. The prayer for one (1) year leave is awarded.
- iii. 13 days worked in April 2015
56. Mr. Musyoka adduced no evidence to prove that he worked for the 13 days claimed.
The prayer is declined for want of proof.
- iv. Unpaid/untaken public holidays
57. The Claimant adduced no evidence of the public holidays during which he worked.
The claim lacks the necessary particulars and is dismissed.
- v. Underpayment, Kshs.7,746/=



58. The Respondent led no evidence to prove that it did not underpay the Claimant. The prayer is merited and is awarded Kshs.7,746/=.
- vi. Overtime
59. The Claimant adduced no evidence of the relevant particulars. The prayer is dismissed for want of proof.
- vii. Compensation
60. Having found as above, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act, 2007*.
61. The Claimant was an employee of the Respondent for 1 year only, adduced no evidence of having appealed the decision of the Respondent or demonstrate his desire to remain in the Respondents employment.
62. In the circumstances, the equivalent of 2 months' salary is fair.
63. In the upshot, judgement is entered in favour of the Claimants against the Respondents jointly and severally as follows;
- a. Declaration that termination of Nicholas Ondieki Mose and Jonathan Musyoka Kyuma was unfair.
- b.
- (i) Nicholas Ondieki Mose One month's salary Kshs.12,000/=58 pending leave days, Kshs.23,200/=Equivalent of 4 months' salary, Kshs.48,000/=
- Total Kshs.83,200/=
- (ii) Jonathan Musyoka Kyuma One month's salary Kshs.10,564/=21 days leave, Kshs.7,394.8/=Underpayment Kshs.7,746/=Equivalent of 2 months' salary, Kshs.21,128/=Total Kshs.46,832.80/=
- c. Costs of this suit.
- d. Interest at court rates from the date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH 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 15th March 2020 and subsequent directions of 21st 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

