



REPUBLIC OF KENYA



**Ombajo v Kenya Ports Authority (Cause E094 of 2021)  
[2024] KEELRC 37 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 37 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E094 OF 2021  
AK NZEI, J  
JANUARY 25, 2024**

**BETWEEN**

**PHILP ONYANGO OMBAJO ..... CLAIMANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a statement of claim dated 18/10/2021 and pleaded that at all material times, he was an employee of the Respondent, having been engaged by the Respondent herein as a full-time coach with KPA Women Basketball Team from 1<sup>st</sup> July 2016 until 7<sup>th</sup> July 2021, and that having rendered exemplary performance, his remuneration terms were reviewed vide a letter dated 4/11/2019, placing the Claimant at Job Group “HM4”. That the Claimant was entitled to a monthly earning of ksh. 201,000, attached to the designated job group, plus monthly and weekly bonuses according to the tournament calendar/diary.
2. The Claimant further pleaded:-
  - a. that on 7/7/2021, the Respondent verbally, summarily and unceremoniously brought the Claimant’s employment to an end. That the Claimant was subsequently served with a termination letter dated 7/7/2021, terminating his employment immediately on baseless, unfounded and malicious allegations against the Claimant, and which were dismissed for lack of sufficient evidence.
  - b. that the dismissal lacked justifiable grounds, and was unlawful, unprocedural and unfair as the Respondent did not accord the Claimant a right to notification and to be heard prior to the dismissal on grounds of misconduct pursuant to Article 47 of *the Constitution* of Kenya 2010 and Section 41 of the *Employment Act*.



- c. that despite the Claimant being entitled to monthly salary plus weekly and monthly bonus as per his Job Group HM4, the same were never remitted to him, as he never received any monthly salary, while his bonuses were paid in instalments after attending matches. That the Respondent's act of remunerating other staff in the Claimant's Job group and failing to remunerate the Claimant was discriminatory, and a malafide.
  - d. that while normal working hours according to the Claimant were 8 hours per day, the Claimant worked from 7.00am to 10.00pm per day, which was approximately 7 hours overtime without compensation. That the Claimant also worked over the weekends and on public holidays; and the Respondent failed to pay for the same, contrary to Sections 5 and 6 of the Regulation of Wages (General) Order 1982.
  - e. that the Respondent failed and/or refused to pay NSSF pursuant to Section 19(1) of the NSSF Act and Article 43(1) of *the Constitution* of Kenya 2010, for a period of 5 years (from 2016 to 2021).
  - f. that the Respondent also failed to pay for NHIF as stipulated under Section 15(2) and 16 of the *NHIF Act*, for an aggregate period of 5 years (from 2016 to 2021).
  - g. that the Claimant was not given a copy of his contract, and was subjected to unfair labour practice; and that the Respondent contravened Sections 41, 44, 45 and 49 of the *Employment Act*.
  - h. that the Claimant was not issued with a certificate of service pursuant to Section 51 of the *Employment Act*.
3. The Claimant sought the following reliefs:-
- a. a declaration that the Claimant's dismissal from employment was wrongful and unlawful.
  - b. unpaid salary in the sum of ksh. 210,000 per month X 60, being the total number of months worked = ksh. 12,600,000
  - c. service pay (1/2 of stipulated salary X 60 months) 210,000 X 60 = ksh. 1,860,000
  - d. unpaid leave (one-month salary X 5 years worked. 205 X 60 months = 6,300,000.
  - e. house allowance (one month salary X 15% X 60 months = ksh. 1,890,000.
  - f. overtime (stipulated monthly salary for the overtime hours X No. of months worked)- 171,500 X 60 months = ks. 10,290,000  
Total ksh. 33,150,000
  - g. Certificate of service.
  - h. general damages for unlawful termination.
  - i. costs.
  - j. any other relief the Court may deem fit and just to grant.
4. Other documents filed by the Claimant alongside the statement of claim were the Claimant's written witness statement which replicated the averments made in the statement of claim, and a list of documents dated 18/10/2021 listing 5 documents. The listed documents were a letter dated



- 4/11/2019, a letter dated 7/7/2021, Advocate's demand letter dated 21/8/2021, response to the demand dated 8/9/2021 and an account statement from Bandari Sacco.
5. Pursuant to the Court's leave granted on 24/1/2022, the Respondent entered appearance and filed response to the Claimant's claim on 7/2/2022, denying the Claimant's claim. The Respondent denied having employed the Claimant, and pleaded that the Claimant had been engaged as a coach to the Kenya Ports Authority Ladies Basketball Team, to which the Respondent was the sponsor. That the team was registered with the Kenya Basketball Association.
  6. The Respondent further pleaded:-
    - a. that in the absence of a notice of appointment issued to the Claimant, there existed no employment relationship between the Claimant and the Respondent; and that the terms of engagement were subject to *the constitution* of Kenya Basketball Federation as read together with the Respondent's Sports Policy; both of which govern the remuneration due to members and officials of the Kenya Ports Authority Ladies Basketball Team.
    - b. that the Respondent was not privy to the Claimant's duties prior to 2016.
    - c. that the Claimant was remunerated through games allowances and subsistence allowances, only due when the Claimant was engaged in tournaments/matches, not as an employee but as a coach to the Kenya Ports Authority Ladies Basketball Team. That the terms of engagement between the Claimant and the Respondent did not accord with monthly salary from the Respondent.
    - d. that there was no termination of employment as alleged by the Claimant.
    - e. that the Claimant was suspended from his position as a coach on grounds of sexual harassment, and that the suspension was carried out in line with procedures outlined in *the Constitution* of Kenya Basketball Federation in tandem with the Respondent's Sports Policy.
    - f. that the Respondent was a stranger to the Claimant's allegations of extra working hours necessitating payment of overtime allowance.
    - g. that the Respondent was not obligated regarding the alleged NSSF and NHIF benefits as there did not exist any employment and the Claimant did not benefit from any salary paid by the Respondent, and did not occupy any designation within the Respondent's grading or Organisation structure, a fact that is evidenced by lack of a payslip. That there did not exist any employment contract.
    - h. that there were no dues owing to the Claimant in reference to the terms of engagement.
    - i. that the Respondent disputes this Court's jurisdiction as the Claimant was not employed by the Respondent; and that his engagement was governed by the Kenya Basketball Federation constitution, hence this Court has no jurisdiction. That the Respondent raises a legal objection on grounds of law.
    - j. that the Claimant is not entitled to the reliefs sought.
  7. Other documents filed by the Respondent alongside its response to the claim were a witness statement of Christopher Ogutu dated 4/2/2022 and an evenly dated list of documents listing 7 documents. The listed documents included:-
    - a. the Respondent's letter dated 4/11/2019 addressed to the Claimant.



- b. the Claimant's letter dated 7/7/2021 addressed to the Secretary General, Kenya Basketball Federation.
  - c. the Respondent's letter addressed to the Claimant dated 7/7/2021.
  - d. a letter dated 8/7/2021 by Kenya Basketball Federation expelling the Claimant from basketball activities.
  - e. an article published by Maurice O. Ondole on 16/9/2021.
  - f. the Kenya Ports Authority Sports Policy 2016.
  - g. *the Constitution* of Kenya Basketball Federation.
8. The Claimant filed reply to the Respondent's response on 17/2/2022 and an evenly dated supplementary list of documents, listing a police report and the Claimant's account statements from Bandari Sacco.
  9. Trial commenced before me on 13/6/2022 when the Claimant testified and adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraphs 4 and 8 of this judgment; except an alleged police report listed on his supplementary list of documents, which was the subject of an objection by the Respondent, and which the Court marked for identification. The document was eventually produced in evidence by the Claimant's witness. The Claimant further testified that he initially coached the Respondent's team as a voluntary coach from the year 2000, while he worked for the Nation Media Group as a Journalist, until 2004. That the Respondent approached him in 2016 to go back to KPA as a coach for the women team, and to continue coaching as the Respondent waited for its Sports Policy to be approved by the KPA Board; and was being paid under Job Group HG3. That this arrangement was verbal.
  10. It was the Claimant's further evidence:-
    - a. that between 2016 and 2019, he was working at KPA and that his salary was between ksh. 85,000 and ksh. 86,000 after deductions; and that he was paid allowances at the rate of ksh.s 14,000 whenever he went out, though this depended on the town he went to.
    - b. that on 4/11/2019, the Claimant received a letter from the Respondent (Claimant's exhibit no. 1) placing him under Job Group HG4 and reviewing his remuneration terms (to ksh. 210,000 per month), though he was not given a contract. That he was told to wait.
    - c. that on 7/7/2022, the Claimant received a letter (from the Respondent) removing him from the post on the basis of some untrue allegations (against him) made by a Stranger (one Joy Mupalia), who was not the Respondent's employee; and without being subjected to any disciplinary process or being given an opportunity to be heard.
    - d. that the Claimant stopped receiving his salary and allowances that were being paid whenever he went out, upon receiving the letter.
    - e. that the accusation of sexually molesting the Claimant's accuser was reported to Kamukunji Police Station (Nairobi) by Basketball stakeholders through the accuser (Joy Mupalia) and was investigated, upon which the police wrote a report.
    - f. that the Claimant was not paid overtime and house allowance by the Respondent, though he was entitled to the same. That at times, the Claimant worked upto 8.00pm.
    - g. that the Claimant's dues were being paid in bits, and that he was discriminated against.



11. Cross-examined, the Claimant stated that he had no document to demonstrate engagement with the Respondent, that the letter dated 4/11/2019 talked of reviewing an agreement, that he did not have any payslips, that his salary was being paid through Bandari Sacco, and that the proof of that payment was the Claimant's Bandari Sacco account statements. That the statements showed varying amounts paid at different months.
12. The Claimant admitted that he was removed from the technical bench of KPA Basketball Team, and that it was on the basis of this removal that he was asked to hand over the equipment that he had. That he did not hold a KPA Gatepass as the Basketball Team used to train in an open gymnasium, to which the Claimant had a car sticker.
13. The Claimant's witness (CW-2) was a police officer from Kamukunji Police Station, who testified that the Claimant was never charged in Court over the complaint made to the police against him, and that the file was closed on instructions of the ODPP (Office of the Director of Public Prosecution) as there was no sufficient evidence. The ODPP's recommendation was produced in evidence (Claimant's exhibit no. 7).
14. The Respondent called one witness, Christopher Ogutu Owiti (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 7 of this judgment. RW-1 further testified that the Claimant was not the Respondent's employee, but had been requested to assist the head coach in coaching KPA Basketball Team and in recruitment of players. That the Claimant's engagement was basically voluntary, and he was assigned the KPA Ladies Basketball Team. That the Claimant's engagement was not on full time basis, that he would be engaged whenever the team had league matches, locally or internationally, and would be paid games allowances; and subsistence allowances when the team was training. That the Claimant was not paid monthly salary. That the Claimant was asked to step aside when the Respondent learned of sexual abuse/harassment allegations that were associated with the Claimant.
15. It was RW-1's further evidence that for one to be engaged as a coach, he had to be a certified coach registered with Kenya Basketball Federation and Kenya Basketball Coaches Commission. That the Claimant wrote and requested to step aside from all basketball activities. That he sought to step aside from KPA (Basketball) Technical Bench. That vide a letter dated 8/7/2021, the (Kenya Basketball) Federation expelled the Claimant from all basketball activities. That in view of this, the Claimant could not continue coaching KPA Basketball Team. That even before expulsion, the Claimant had offered to step aside. That the Respondent was not obligated to engage the Claimant's services, and that all the Claimant's allowances had been paid.
16. Cross-examined, RW-1 maintained that the Claimant was not the Respondent's employee. That on 7/7/2021, the Claimant wrote a letter resigning from all basketball activities. That the Respondent also wrote to the Claimant on the same date. That the Federation's letter (expelling the Claimant on 8/7/2021) came a day later.
17. RW-1 further testified (under cross examination) that not being an employee of the Respondent, the Claimant was not subject to KPA Human Resource Manual/Rules.
18. Having considered the pleadings filed and evidence adduced by both parties herein, issues that emerge for determination, in my view, are as follows:-
  - a. whether the Claimant was an employee of the Respondent.
  - b. whether this Court is seized of jurisdiction to determine the Claimant's claim herein.
  - c. whether the Respondent unfairly terminated the Claimant's employment



- d. whether the reliefs sought are deserved.
19. On the first issue, the Respondent pleaded that there never existed an employment relationship between the Claimant and the Respondent. That the Claimant was engaged with Kenya Ports Authority Ladies Basketball Team, to which the Respondent was a Sponsor, as a coach, and that the terms of engagement were subject to the terms of Kenya Basketball Federation and the Respondent's Sport's Policy. That the Claimant was paid games allowances and subsistence allowances only when he engaged in tournaments/matches.
20. The Claimant did not present any evidence in rebuttal of the foregoing position. He admitted in evidence that he voluntarily coached the aforementioned Basketball Team, which was registered with Kenya Basketball Federation, and that he was a member of the team's technical bench. It was a common ground that after the Claimant was accused of sexual harassment by a third party, he wrote a letter to the Secretary General of Kenya Basketball Federation on 7/7/2021 and stated as follows:-
- “It has come to my attention that I have been accused of inappropriate behavior by one Joy Mohari, a matter that I am yet to be directly accused of. These are serious allegations that touch on my integrity as a coach, a technical official and as a parent. In view of the aforementioned, I would like to willingly step aside from all basketball activities as:
1. A member of the Kenya Basketball Federation Executive Committee.
  2. A member of Kenya National Team Technical Bench.
  3. As a member of Kenya Ports Authority Technical Bench.
  4. As the coach of Keya Tiwi Secondary School.
- This I do in the interest of ensuring that investigations can take place and give me a chance to clear my name of the allegations levelled against me.”
21. The Claimant's said letter was copied to the Respondent, among others. On the same date (7/7/2021), the Respondent wrote to the Claimant and stated, in part:-
- “....In light of the above arising from the serious nature of the allegations of abuse and violation of an individual's rights against you; in addition to the potential massive damage that this weighty matter can have against the Authority's image since you have been associated with KPA Ladies Basketball Team, you are hereby REMOVED from being a member of the Team's Technical Bench with immediate effect for inappropriate behavior and actions....”
22. Both the Claimant and the Respondent stated in evidence that the Claimant's engagement with KPA Ladies Basketball Team was voluntary. This position is echoed in the aforementioned two letters. Further, although the Respondent's letter to the Claimant dated 4/11/2019 stated that the Claimant would be given a two years renewable contract, no contract was shown to have been signed, and no terms of any such contract were demonstrated by the parties herein.



23. The Claimant was not shown to have been the Respondent's employee as at 7/7/2021 when he voluntarily stepped aside from all basketball activities. The Black's Law Dictionary (Tenth Edition) defines an employee as:-

“Someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”

On the other hand, the *Employment Act* 2007 defines an “employee” as

“a person employed for wages or a salary and includes an apprentice and indentured learner.”

24. Under ILO International Labour Standards, there are specific indicators which point to existence of employment. These include a clear demonstration that the worker carried out duties in accordance with the employer's instructions, was under the employer's control, was integral in the employer's organisation/enterprise, performed work solely or mainly for the benefit of the employer, carried out duties within specific working hours at a specified work place agreed to by the employer, carried out the work personally, received periodic payment of remuneration which constituted his sole or principal source of income, and had entitlements like weekly rest, holidays and annual leave.

25. The foregoing indicators were largely not demonstrated in the Claimant's case. He was shown to have been clearly beholden to the Kenya Basketball Federation, under whose control he is shown to have been. He coached several other teams at the same time, and sat in several technical benches at the same time. This is clear from the Claimant's letter dated 7/7/2021 addressed to the Secretary General, Kenya Basketball Federation, and copied to the Respondent, among several other entities. Vide this letter, the Claimant willingly stepped aside from all basketball activities, including KPA technical bench, and was expelled from all basketball activities by the Federation vide the letter dated 8/7/2021.

26. The account statements from Bandari Sacco that were produced in evidence by the Claimant did not, in my view, point to existence of an employment relationship between the Claimant and the Respondent. The payments shown to have been made by the Respondent into the Claimant's said account were not consistent, both in terms of time and amounts. They were of differing amounts that did not accord with the pleaded “salary” and that stated by the Claimant in evidence. The Respondent pleaded and testified that the Claimant was being paid games allowances and subsistence allowances based on tournaments and matches. This position, in my view, appears to accord with the said Sacco account statements.

27. There is, for example, some ksh. 525,380 shown to have been paid into the Claimant's Sacco account on 16/6/2021, which is shown to have been for players allowances. The use of the word “sal” in some parts/entries on the said account statements cannot, in my view, be construed to imply the existence of an employment relationship/contract between the Claimant and the Respondent, in view of the evidence presented by both parties herein.

28. In view of all the foregoing, I find and hold that there was no employment relationship between the Claimant and the Respondent as at 7/7/2021 when the Claimant willingly stepped aside from all basketball activities.

29. Having made that finding, it follows that this Court is not seized of jurisdiction to determine any other issue in this suit, or to make any awards. Jurisdiction is everything, and without it the Court cannot



make one more step. This is what the Court of Appeal stated in the case of Owners Of Motor Vessle Lilian “s” -vs- Caltex Oil [kenya] Limited – Civil Appela No. 50 Of 1989, where the Court stated:-

“...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

30. I must down my tools. The Claimant’s suit is hereby dismissed. Each party will bear its own costs of the proceedings herein.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> JANUARY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

