



**Magambo v Manipal International Printing Press Ltd (Cause  
846 of 2017) [2024] KEELRC 176 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 176 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 846 OF 2017  
K OCHARO, J  
FEBRUARY 9, 2024**

**BETWEEN**

**LILIAN ATIENO MAGAMBO ..... CLAIMANT**

**AND**

**MANIPAL INTERNATIONAL PRINTING PRESS LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Contending that at all material times, she was an employee of the Respondent, who suffered a workplace injury on 13<sup>th</sup> May 2016, and was retaliatorily dismissed from employment, the Claimant has in this suit sued it contending that the dismissal was unfair and sought a raft of reliefs for unfair termination, and general damages for pain and suffering.
2. The Respondent filed a Response to Memorandum of Claim dated 31<sup>st</sup> January 2018. It strongly denied the Claimant's assertion that she was its employee and her entitlement to the reliefs she has sought.
3. At the hearing, the Parties urged this Court to adopt the witness statements filed herein by them as part of their evidence in chief, and the documents admitted as their documentary evidence. By consent, they were adopted and admitted as such respectively.

**Claimant's case**

4. The Claimant's case is that she first came into the employment of the Respondent, initially as a casual labourer and later on became its permanent and pensionable employee. That the Claimant served the Respondent faithfully and diligently, until on or about the 13<sup>th</sup> of May 2016, when she got involved in a workplace accident, leading to an amputation of one of her fingers.



5. The Claimant stated that on the 13<sup>th</sup> of May 2016, the Claimant reported to the Respondent's premises for work, when the Manager assigned her a task of machine operator and assigned her machine operation duties. She was unfamiliar with the machine. She had very limited knowledge of its operational features. This notwithstanding, she was tasked to operate the machine, without being allowed to familiarize herself with the same or trained on how to operate it. Further, she was not afforded protective gear.
6. That as she operated the machine, her left ring finger was chopped off by the Machine. As a consequence, she was taken to Nairobi South Hospital for treatment. A procedure of amputating the finger was carried out at the Hospital.
7. While being discharged from the hospital, the Claimant was advised to avoid any activities that would strain her left hand to enable a speedy recovery. She could therefore not conduct her normal duties at the Respondent's premises and did not attend work, until August 2016. On or about 31<sup>st</sup> August 2016, she was verbally informed that her employment had been terminated and cautioned not to visit the Respondent's premises thenceforth.
8. The Claimant avers that she only received two weeks' salary for May 2016, and did not receive any pay for June to August 2016. Further, she did not receive any payment for leave days earned for the duration of her employment i.e. 2014-May to August 2016.
9. The Claimant's position is that the Respondent terminated her employment without any legal justification. The termination was on the basis that she had sustained an injury while in the course of her employment at the Respondent's premises. Further, the termination of employment was discriminatory as it was a result of her disability. The termination was unfair and unlawful.
10. Her efforts seeking reinstatement, or payment of her final dues, didn't realize any fruit.
11. She claims from the Respondent statutory deduction for NHIF and NSSF for the period of her employment, as the Respondent never remitted the same to the relevant authorities. She claims general damages for the injuries she sustained as a result of the Respondent's negligence, particulars whereof as set out on page 4 of her Memorandum of Claim dated 9<sup>th</sup> May 2017. She also claims special damages in the form of medical expenses incurred by her as a result of her injuries.
12. Cross examined by Counsel for the Respondent, the Claimant stated that all employment documents remained in the possession of the Respondent at all material times. She was not given any.

### **Respondent's case**

13. The Respondent's case was presented by Sylvanus Ouko. The witness testified that the Claimant was never employed by the Respondent either as a casual labourer or permanent and pensionable employee at any time.
14. He contended that the Respondent maintains an elaborate record of all its employees. At all times, it gives its employees appointment letters and job descriptions, assigns them employment numbers, and captures details for individual employees in its database and Payroll. The Respondent does not have any record of these concerning the Claimant, in its records.
15. The Respondent's witness asserted that the Claimant was an employee of an outsourced entity that could supply employees to the Respondent on an "as-need arises basis" under an outsourced agreement dated 1<sup>st</sup> September 2012.



16. It was further contended that on the 13<sup>th</sup> of May 2016, the Claimant never informed her instructor that she was not familiar with the machine. Further, she never asked to be allowed to acquaint herself with the same before starting to use it.
17. The witness further contended that all the Respondent's employees go through mandatory training at the onset of their employment. If indeed the Claimant had worked for the Respondent for two years as she alleged, then she was reasonably expected to have learnt how to operate the machine. Any injuries suffered must have been a result of her negligence.
18. The witness asserted that the Claimant's claim lacks merit as she was not an employee of the Respondent. The reliefs sought cannot be availed to her.
19. Cross examined by Counsel for the Claimant, the witness testified that he joined the service of the Respondent in 2019, way after the alleged incident had occurred. He could not testify with certainty concerning the training or otherwise of the Claimant, therefore. The Respondent didn't have her record.
20. He further testified under cross examination that the outsourced company employed staff and had them outsourced by the Respondent. Therefore, documents relating to the Claimant were at all material times in the custody of the outsourced company. The witness however admitted that the Respondent didn't tender any document in evidence to show that the Claimant was engaged by the other Company.
21. He further testified that it was the responsibility of the other Company to employ, and supply trained personnel to the Respondent. From the record in possession of the Respondent, the Claimant was an employee of the outsourced company.
22. The witness stated that he was not able to elaborate on how the outsourced company could forward the outsourced staff to the Respondent.
23. In his further evidence under cross examination the witness testified that the Claimant got injured whilst working within the premises of the Respondent. In the course of discharging her duties within the premises, she was all through under the supervision of the outsourced company's supervisor.
24. He refuted Counsel's suggestion that the outsourcing contract was solely prepared to aid the Respondent escape liability in this matter.

### **Claimant's Submissions**

25. The Claimant's Counsel identified three issues that in his view emerge for determination in this matter, thus; whether the Claimant was unlawfully and unprocedurally declared redundant and or summarily dismissed; whether the Claimant is entitled to the reliefs sought; and who should bear the costs of this suit?
26. Counsel submitted that the burden of proving unfair termination of employment rests on the employee, while that of justifying the grounds for termination rests on the employer. The twin burden is provided for under Section 47[5] of the *Employment Act*. The Respondent failed to demonstrate any reason for the termination of the Claimant's employment. It didn't discharge the burden.
27. It was further submitted that despite taking the position that the Claimant was an employee of a third party, the Respondent did not at all avail any documents from which it can be discerned that she was such an employee. It was the duty of the Respondent to put forth a contract of employment whether between it and the Claimant or the third party and the Claimant.



28. The Claimant was an employee who was entitled to a termination notice and payment of all her dues. These, the Respondent didn't avail to her.
29. Section 41 of the *Employment Act*, 2007 required that the Claimant be given a hearing before the termination of her employment. She was not heard. The termination was procedurally unfair.
30. That the claims by the Respondent that the Claimant was not their employee are blatant lies, deception and untrue and meant to mislead this Honourable Court.
31. It was further submitted that the Claimant sustained injuries whilst at her workplace within the Respondent's premises. Liability should attach against the Respondent at 100%. According to the opinion of Dr. Wakabi, the Claimant suffered a disability of 2% (two per cent). Citing, the case of *Pietro Canobbio vs Joseph Amani Hinzano*, Civil Appeal No. 48 of 2019, Counsel suggested that an award of KShs. 750,000 as general damages shall suffice in the circumstances of this matter. The special damages sought by the Claimant were specifically proved by the production of receipts. She should be awarded KShs. 66,100.
32. Counsel submitted that having proved that her dismissal was unfair, the Claimant should be awarded one month's pay in lieu of notice. Further, section 74 of the Act, enjoins the employer to keep the records of its employees. The Respondent didn't place before the Court any record or document to discount the Claimant's claim for unpaid salary. Therefore, the Court should grant her the salary sought for July, August and October 2016.
33. Considering the inhumane manner in which the Claimant was dismissed from her employment; the fact that she had worked for the Respondent for 3 years; and that the dismissal was because of the workplace injury, she is entitled to the compensatory remedy contemplated under Section 49[1] of the Act, twelve [12] months' gross salary, KShs. 177,072.
34. It is clear that the Respondent did not make any remittances to the relevant authorities for the Claimant's NSSF and NHIF accounts. It was bound to remit KShs. 400 per month to each account. Therefore, the cumulative unremitted sum amounted to KShs. 28,800.
35. Lastly, a certificate of service is a legal entitlement for an employee. This Court should direct the Respondent to issue the certificate to the Claimant.

### **Respondent's Submissions**

36. The Respondent's Counsel submitted that two issues emerge for determination in this matter, that is; Whether the Claimant was an employee of the Respondent; and whether the Claimant is entitled to the prayers sought.
37. He submitted that Section 7 of the *Employment Act* decrees that no person shall be employed under a contract of service except in accordance with the provisions of the Act. Further, Section 9 of the Act, requires contracts of employment to be in writing. The basis for the Claimant's suit is that there existed an employee/employer relationship between her and the Respondent. She is the one who was making the allegation. Resultantly, she was required under the provisions of Sections 107 and 109 of the *Evidence Act*, to prove the fact. She failed to.
38. It was further submitted that the evidence of the Respondent's witness to the effect that the Respondent had an elaborate manner of engaging its employees and a record system, was not rebutted by the Claimant. The Claimant failed to tender any employment document issued by the Respondent to show the existence of the relationship. Consequently, her case should fail on this point. To support these submissions, reliance was placed on decisions in *Transport Workers Union vs Euro Petroleum*



Products and Pabari Distributors [2019] eklr and Casmir Nyankuru Nyaberi vs Mwakikar Agencies Limited [2016] eklr.

39. That it was the Respondent's Witness testimony that it occasionally outsourced human resources from KAMO GENERAL SERVICES, as can be discerned from the Respondent's Exhibit 1. At best, the Claimant was an employee of the outsourced Company.
40. From the material placed before this Court, it can safely be concluded that the workplace injury that was suffered by the Claimant was a result of her own negligence. She had worked at the Respondent's premises for more than two years, she cannot be heard to allege that she was not acquainted to the machine that crushed her finger.
41. Lastly, it was submitted that the Claimant failed to prove that she was an employee of the Respondent. None of the reliefs sought can be availed to her, therefore.
42. That the Claimant's suit should be dismissed.

### **Issues for Determination**

43. I have reviewed the pleadings, oral and documentary evidence, and submissions and authorities filed by both parties, and the following issues emerge for determination;
  - a. Whether the Claimant has proved that she was an employee of the Respondent;
  - b. Whether this Court has jurisdiction to grant compensation for work injuries;
  - c. Whether the Court should grant the prayers sought by the Claimant.

#### **a. Whether the Claimant has proved that she was an employee of the Respondent**

44. From the onset it is imperative to state that in its pleadings, the Respondent was not forthright on two vital matters that arose from the Claimant's memorandum of claim. The Claimant had pleaded that on 13<sup>th</sup> May 2016, she was within the Respondent's premises as her workplace and that she sustained injuries following a workplace accident. The Respondent in a sketchy way denied these two averments.
45. The Respondent filed a witness statement by Sylvans Ouko [RW1] dated 5<sup>th</sup> May 2022. Imperative to state that the statement was adopted as part of the witness's evidence in chief. In my view, the witness statement and therefore his evidence in chief radically departed from the Respondent's pleadings. The presence of the Claimant within the Respondent's premises was now admitted though faintly and in an evasive manner. Her presence was explained, she was an outsourced worker, from MAO Manpower Handling Services.
46. The Court notes that there was an earlier witness statement that was filed contemporaneously with the response to the memorandum of claim, a witness statement by one Kelly Wambua, the Respondent's Human Resource Manager. Just like the Respondent's pleadings [ the Response to the Memorandum of Claim], the witness statement did not mention at all that there was an outsourcing arrangement between the Respondent and a 3<sup>rd</sup> Party. Important to point out that the two documents were filed on the 1<sup>st</sup> of February 2018, three and a quarter years before the witness statement by Sylvans, was filed. Further, the Respondent's pleadings were not amended at any time to bring on board the pivotal matter of the outsourcing contract and outsourced workers within the workplace of the Respondent. This Court has not lost sight of the fact that the latter statement was filed way after pleadings had closed, and two months prior to the hearing of 23<sup>rd</sup> February 2022.



47. Maybe the Respondent needs to be reminded of the cardinal rule of pleadings, “when in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he or she shall not do so evasively, but shall answer the point of substance.”
48. The fact of the alleged outsourcing in my view, was a material fact that needed to be pleaded. It wasn't *facta probantia* [evidence of a material fact]. On this point, this Court is inspired by the holding in the case of *North West Salt Co Ltd v Electricity Alkali Co Ltd* [1913] 3KB 422 at 425, CA where the following was stated:
- “If a party relies on a fact, and will fail in his claim or defence unless at the trial that fact is proved, that fact will be a “material fact” or “factum probandum”. However, where the fact relied on is such that if the party fails to probe it at the trial he may nevertheless succeed in his claim or defence, that fact will in general not be material, but only evidence of a material fact. Facts of this kind are known as ‘*facta probantia*’ and should not be pleaded.’
49. A material fact refers to every fact which would be necessary for a party to prove if traversed, to support his right to a judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact that is necessary to be proved.
50. It is here that this Court must state the purpose of pleadings both to the Court and the Parties. The object of pleadings is to define the issues for the other party and the Court. A party is under a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a party to plead a particular case and seek to establish a different case at the trial.
51. In the case of *IEBC & Anor vs Stephen Mutinda Mule & 3 Others (COA)* [2014] EKLK citing *The Supreme Court of Nigeria in Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries PLC SC 91/2002*, the Court held:–
- “..... It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
52. By reason of the foregoing premises, I come to an inescapable conclusion that nothing turns on the belated attempt by the respondent to place reliance on the fact of outsourcing for its defence and that the fact as raised was an afterthought.
53. I have keenly considered the outsourcing agreement tendered by the Respondent as evidence. The agreement was filed on 5<sup>th</sup> February 2022, alongside the witness statement of Rw1. The agreement doesn't set forth, the date when it was entered into by the parties. Further, I note that under clause 3, Terms of the Contract, the contract was to run from the first day of September 2012, for one year. The Respondent didn't place before this Court any evidence to show that the contract was ever extended beyond the one year if at all it existed.
54. Further, this Court notes that the Respondent didn't place any material before it to demonstrate that the Claimant was availed to the Respondent under the alleged outsourcing agreement. I don't think I am off the mark to state that if the Claimant was availed as an outsourced worker, nothing could have been easier than the Respondent producing a register for outsourced workers under the agreement and documents in proof of monthly payments to the outsourced company for the workers. A true, and reasonable employer could do it.



55. In conclusion, I am persuaded by the Claimant that the agreement was an afterthought. It was crafted only for this matter.
56. The Claimant's position that she was an employee of the Respondent, found fortification in the evidence of her two witnesses, Evans Oloto and Safari Zake. In my view, their evidence was not challenged by the Respondent.
57. In the upshot, I hold that the Claimant was at all material times an employee of the Respondent. Her evidence was not rebutted.

**b. Whether this Court has jurisdiction to grant compensation for work injuries**

58. The Claimant's claim contained in her Memorandum of Claim dated 9<sup>th</sup> May 2017 is twofold: an unfair termination claim based on an employee/employer relationship; and a claim grounded in the tort of negligence for compensation for work injuries.
59. From the onset, I return that this Court does not have primary jurisdiction to determine matters relating to work injuries. Regarding claims for workplace injuries, I hold that this Court has only an appellate jurisdiction. The provisions of the Work Injuries Benefits Act, 2007 are instructive.

**c. Whether the Court should grant the prayers sought by the Claimant.**

60. As indicated hereinabove, the Claimant's claim is twofold; for unfair dismissal, and compensation for the injuries suffered at the workplace. The reliefs sought are therefore upon this basis. The Court can only render itself on those reliefs sought concerning the alleged unfair dismissal only after determining whether or not the dismissal was unfair.
61. A fair termination of an employee's employment is one where the decision is based on a fair and valid reason[s], and which decision has been preceded by a fair procedure. This is what section 45 of the *Employment Act*, 2007 contemplates by providing that:-

Unfair termination

- (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 employees 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.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.



- (4) A termination of employment shall be unfair for the purposes of this Part where—
  - (a) the termination is for one of the reasons specified in section 46; or
  - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider—
  - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
  - (b) the conduct and capability of the employee up to the date of termination;
  - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
  - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
  - (f) the existence of any previous warning letters issued to the employee.

62. It is therefore not difficult to conclude that a termination of an employee's contract of service can be substantively justified but be pronounced unfair on the premise that it suffered from destituteness in procedural fairness.
63. Section 41 of the *Employment Act*, 2007 which is couched in mandatory terms, provides a procedure that an employer contemplating to terminate an employee's employment must adhere to, otherwise the termination shall be deemed unfair by dint of the provisions of section 45[2] of the Act. The procedure entails; notification/information, the employer must notify the employee of its intended action and the grounds spurring the intention; the hearing, the employer must give the employee an adequate opportunity to prepare and make a representation on the grounds. Conjoined with this duty, is the duty on the part of the employer to allow the employee the right of accompaniment [ to be accompanied by a colleague of his own choice or a trade union representative] when making the representation; the consideration, the employer must consider the representation made by the employee and or the person accompanying him before taking a decision.
64. The onus is always on the employer to prove that the termination was full of procedural fairness. In the instant matter, I think owing to the position taken by the Respondent, which position I have hereinabove found to be unconvincing, it failed to lead evidence to demonstrate that the dismissal of the Claimant was in adherence with the canons of procedural fairness.



65. The Claimant's assertion that she was terminated without being accorded an opportunity to be heard remained uncontroverted. Further, therefore, the Respondent failed to discharge the burden of demonstrating that the dismissal was fair.
66. Section 43 of the [Employment Act](#) speaks to substantive fairness in the termination of an employee's employment. The Provision places a legal burden on the employer to prove the reason for the termination. However, it is not enough for the employer to merely assert that the employee's employment was terminated for this reason or the other, Section 45, places a further burden on him or her to demonstrate that the reason[s] was fair and valid.
67. The Claimant contended that the Respondent didn't have any fair and valid reason to dismiss her from her employment. The dismissal was retaliatory. Again, influenced by the position it took, that the Claimant wasn't its employee, the Respondent didn't adduce evidence to demonstrate that the dismissal of the Claimant was substantively justified. This leads me to the conclusion that the dismissal of employment was substantively unfair.
68. Lastly, it is important to state that based on the material placed before me, I am persuaded that the separation in employment between the Respondent and the Claimant occurred in the manner described by her. Hence the findings herein above.
69. I now turn to consider whether the Claimant is entitled to the reliefs she has sought. The Claimant sought inter alia general and special damages for the injuries suffered as a result of the workplace accident. Having found as I have hereinabove that this Court lacks the original jurisdiction to entertain work injury claims, the remedy is declined.
70. The Claimant further sought a compensatory award under section 49[1][c] of the [Employment Act](#) for unfair dismissal. This Court takes cognizance of the fact that an award of compensatory damages under this provision is discretionary. Whether the award should be given or not, and if it has to be made, to what extent, heavily depends on the circumstances of each case. I have considered the fact that; the dismissal of the Claimant was retaliatory; she didn't contribute in any manner to the separation; the Respondent without any justifiable cause failed to adhere to the statutory cannons on substantive and procedural fairness; and the length of the period she was in the service of the Respondent, and conclude that the justice of this case dictates a grant of the compensatory relief and to an extent of 10 months' gross salary.
71. The Claimant contended that she was entitled to notice pay, but which she was not availed with. Having found that her dismissal from employment was unfair, I find no difficulty in finding that she is entitled to notice pay under section 35 of the [Employment Act](#) as read with Section 36 thereof. Her employment was terminable by a twenty-eight days' notice, which notice was not issued.
72. In the circumstances of this matter, the Claimant's claim for unpaid salary for June, July and October 2016, and the 14 days she worked in May, was not sufficiently challenged. I have no hesitation in concluding that she is entitled to be paid the same. It is so ordered.
73. The Claimant Contended that the Respondent failed in its duty of remitting monthly contributions of KShs. 400 to the National Social Security Fund. I note, that the Respondent didn't not assert that it at all material times discharged this statutory obligation or that for one reason or the other, it was exempted from making the remittances. Consequently, under section 14 of the [National Social Security Fund Act](#), the Claimant's claim under this head was justified. I hereby award her the Sum of KShs. 14,400.



74. By parity of reasoning, I award the Claimant the Kshs. 14,400 sought as unremitted National Health Insurance Fund contributions.
75. In the upshot, judgment is hereby entered for the Claimant in the following terms;
- i. A declaration that at all material times, the Claimant was an employee of the Respondent.
  - ii. A declaration that the dismissal of the Claimant was both substantively and procedurally unfair.
  - iii. Compensation under Section 49[1][c] of the *Employment Act*, Kshs. 147, 560.
  - iv. One Month's salary in lieu of notice, KShs. 14,756.
  - v. Unremitted NSSF and NHIF contributions, KShs. 28,800.
  - vi. An order that the Respondent does within 30 days of this judgment issue the Claimant with a certificate of service.
  - vii. Costs of this suit.
  - viii. Interest on the awarded sums at court rates from the date of this judgment till full payment.

**READ, DELIVERED AND SIGNED THIS 9<sup>th</sup> DAY OF FEBRUARY, 2024.**

**OCHARO K EBIRA**

**JUDGE**

**In the presence of:**

Mr. Lumbazi holding brief Mr. Simiyu for Claimant

Ms Wakoli for the Respondent

**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 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.

A signed copy will be availed to each party upon payment of Court fees.

.....

**OCHARO KEBIRA**

**JUDGE**

