



REPUBLIC OF KENYA



**Mwenda v Climate and Energy Advisory Limited (Employment and Labour Relations Cause 1614 of 2018) [2024] KEELRC 606 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 606 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1614 OF 2018**

**MN NDUMA, J**

**MARCH 14, 2024**

**BETWEEN**

**ANGELINA NDUATA MWENDA ..... CLAIMANT**

**AND**

**CLIMATE AND ENERGY ADVISORY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 17/12/2018 against the respondent Climate and Energy Advisory Limited seeking the following reliefs:-
  - a. A declaration that the respondent's action of terminating the claimant from employment was unfair and unlawful.
  - b. Kshs. 2,929,850/= for breach of contract.
  - c. Kshs. 316,800/= as pension arrears.
  - d. Kshs. 5,022,600/= as general damages
  - e. Exemplary damages
  - f. Interest on (b) and (c) at court rates.
  - g. Cost of this suit.
  - h. Any other or further relief that this court may deem fit and just to grant.
2. The basis of the suit, which is contested by the respondent is that the respondent employed the claimant as its Technical Director/Principal Consultant for a term of one year by an employment contract dated 8<sup>th</sup> January 2018 in terms of which the employment was to commence from 1<sup>st</sup> January 2018 upto 31<sup>st</sup> December 2018.



3. The claimant adduced evidence before court that he was paid a monthly salary of Kshs. 418,550/= per month.
4. That prior to the signing of the aforesaid contract, the claimant had served the respondent since the year 2012 as a project consultant and had several contracts renewed in that respect. That from May 2017 to December 2017 the respondent deducted Kshs. 316,000/= from the claimant's earnings allegedly as pension contribution.
5. The claimant testified that the contract which commenced on 1<sup>st</sup> January 2018 to end of 31<sup>st</sup> December 2018 was one for employment and not for consultancy. That on 30<sup>th</sup> April 2018, the respondent issued the claimant with a letter of termination of contract. That the termination was unilateral, unjustified, unlawful and unfair. That no reasonable cause was provided for the termination of the contract. That the claimant had legitimate expectations that he would serve the full term of the contract and that same would be renewed upon expiry.
6. That the claimant suffered loss and damage and therefore seeks to be awarded as claimed.
7. Under cross-examination the claimant admitted that she received a letter dated 1/12/2017 in which the respondent communicated to her that there would be changes made to her renewed contract in that the claimant would cease to be an operations director to become a principal consultant.
8. That the agreement executed on 8/1/2018, was a consultancy agreement for a period of one year. That in terms of the new contract, the claimant received performance fees and not a salary.
9. The claimant admitted that he raised a fee notice at the end of every month against which the respondent paid him. The claimant agreed that the consultancy agreement could be terminated by either party giving one month termination notice.
10. The claimant admitted that at a meeting held on 30/4/2016 between him and the respondent, the claimant was made aware of the financial difficulties the respondent was undergoing. That it was after that meeting when the respondent issued to the claimant one month termination notice which the claimant got in May 2018. CW1 admitted that she engaged her lawyers regarding the matter and invoiced the respondent for payment of fees in lieu of one month notice. That this notice was issued after the discussions held on 30/4/2018.
11. The claimant testified under further cross-examination that the lawyer issued a demand notice against the respondent in October 2018.
12. The claimant admitted that upon demand, she received four (4) cheques from the respondent for a total sum of Kshs. 886,000/= and she acknowledged receipt of a cheque of Kshs. 316,800/= from British American Insurance being payment of pension dues.
13. The claimant told the court that he gave a final termination invoice to the respondent. That he had received a cheque dated Kshs. 200,000/= dated 17/8/2018. Cheque dated 31/8/2018 for Kshs. 148,399/= cheque dated 30/9/2018 for Kshs. 156,550/= and cheque dated 31/10/2018 for Kshs. 316,800/= from Britam.
14. The claimant acknowledged that the cheques were paid but was not sure if the last cheque from Britam was paid.
15. RW1 Stephen Ndere testified for the respondent that the claimant worked for the respondent as a short term consultant. That the respondent experienced financial difficulties after the clients terminated their contracts with the respondent.



16. That in order to remain a float, the respondent changed employment contracts with its employees including the claimant to short term fixed term consultancy contracts.
17. That the respondent already owed payroll tax to KRA and was struggling to pay the same in arrears.
18. That the respondent sent the claimant a letter dated 1/12/2017 informing her of the intended changes in her employment.
19. That on 8/11/2018 the respondent entered into a consultancy agreement with the claimant for a period of one year. That in terms of the agreement, the claimant was at liberty to work for other companies while she served the respondents as a consultant. That the claimant was required to fill time sheets as and when she served the respondent and was to invoice the respondent for work done.
20. That the consultancy agreement was terminated due to serious cash flow challenges. The termination notice was dated 1/5/2018 and the respondent was to pay one month fees in lieu of notice. RW1 said that the respondent at the time owed the claimant arrear fees; notice pay and pension arrears with Britam Insurance Company. That the arrears were due to financial difficulties which the claimant was made aware of.
21. That upon issuance of a demand notice, the respondent entered into a payment plan with the claimant and issued postdated cheques to her. That all the arrear fees and pension dues were paid as at the time this suit was filed. That the respondent continued to undergo financial difficulties and closed office during the COVID 19 pandemic period. That to date the respondent is paying tax arrears to KRA.
22. RW1 said he was the managing director of the respondent from the year 2016. RW1 maintained his evidence in chief during close cross-examination by Ms. Macharia for the claimant. RW1 admitted that the consultancy contract did not run its full term and that use of the word “last day of employment.” in the termination notice did not mean that the claimant was an employee of the respondent since she was well aware that she was a principal consultant of the respondent at the time and not an employee.
23. RW1 also said that payment in lieu of one month termination notice and for annual leave did not mean that the claimant was an employee as the contract was clear. RW1 said that the termination of the contract of consultancy was justified and the claimant was well explained the reasons for the eventuality which was financial difficulties.
24. That the suit be dismissed for lack of merit.

### **Determination**

25. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:
  - i. Whether the relationship between the claimant and the respondent spelt in the contract dated 8/1/2018 was that of an employer and employee or that of a short term consultant.
  - ai. Whether this termination of the said contract was lawful and fair.
  - bi. Whether the claimant is entitled to the reliefs sought.
26. At the outset, the court notes that at the time this suit was filed on 17/12/2018, the claimant had already received payment of pension dues vide a cheque from Britam Insurance Company dated 31/10/2016 in the sum of Kshs. 316,800/=. This sum ought not to have been claimed at all.
27. The court further notes that the claimant adduced evidence that she was employed by the respondent on 1/8/2018 but was not contracted as a short-term consultant in terms of the contract dated 8/1/2018



which back dated the engagement to 1/8/2019. CW1 admitted in the same vein that the respondent had a meeting with her and she had received a letter from the respondent dated 1/12/2017, in which she was informed that her engagement as an employee in the position of director would be changed in the up-coming intended contract due to the financial difficulties the respondent was experiencing.

28. That indeed at the time the claimant served the contract dated 8/1/2018, she was well aware that she was no longer to be an employee of the respondent but was to be engaged for a period of one year as a principal consultant. The claimant knew that she was no longer going to receive a salary from the respondent but was to receive invoiced fees depending on the consultancy work she did for the respondent which work was to be recorded in time sheets.
29. The claimant admitted that she invoiced for work done and was paid fees and not salary as before. The claimant did not refute the evidence by RW1 that she was at liberty during the period of the contract to work for other companies. CW1 and RW1 were in agreement that the contract entered into could be terminated by giving one month notice or by payment of one month fees in lieu of notice.
30. Indeed, the evidence before court is that the claimant invoiced for payment of one month pay in lieu of notice upon receipt of the termination notice dated 30/4/2018. The claimant only served four (4) months of the agreement and was due to serve eight months of the remaining contract.
31. The court has carefully considered the content of the agreement between the parties dated 8/1/2018 and is of the considered view that the intention of the parties was for the respondent to engage the claimant as an independent contractor and not an employee between the period 1/1/2018 and 31/12/2018. It is common cause that the respondent did not honour all the terms of the contract in that it fell in arrears of payment of invoiced fees due to financial difficulty it encountered.
32. The respondent also prematurely terminated the contract between the parties after service of only four (4) months. This in itself was a fundamental breach of the contract for service between the parties as the contract is described under clause 8.1 of the contract as follows:-

“8.1 This agreement constitutes a contract for service and not a contract of employment.”
33. These are clear and unequivocal terms in the knowledge of the claimant at the time she executed the agreement.
34. The claimant has adduced extraneous evidence to vary the terms of the contract for service urging the court to construe the contract to be one of employment and so subject to the stringent terms of termination of contract of employment set out under sections, 36, 41, 43 and 45 of the Employment Act, 2007. The claimant also seeks to be paid 12 months' salary in compensation in terms of section 49(1) (c) and (4) of the Employment Act, 2007 for the termination of the contract without valid reasons and without following a fair procedure.
35. In terms of section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya, the claimant had the onus to prove on a balance of probability that the terms of the contract between the parties were varied by the conduct of the respondent after the execution of the contract.
36. The evidence before court is that the claimant worked as a principal consult and not an employee in that she recorded work done in a time sheet and raised an invoice for the work done. That the respondent paid the claimant the invoiced fees and not a salary.
37. That the claimant was not prohibited from working for other persons during the tenure of the contract.



38. That the claimant did not have to report to office daily and was not strictly supervised to perform her work. The fact that the claimant could take annual leave from work as she alleged, does not change the scenario especially because there is no clause for taking annual leave in the contract between the parties. There is no evidence that the respondent paid the claimant for any leave taken during the period 1/1/2018 and 30/4/2018 in which the claimant served this particular contract.
39. In the case of Kenya Hotel and Allied Workers Union versus Alfajiri Villa Magufa Ltd, [2014] eKLR the court held:-
- “ An independent contractor’s contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual employment matters such as deduction of PAYE (tax on income), will not get annual leave, sick leave and so on.”
40. The court has further considered the case of Genga Kamau Nderitu and another versus Intercontinental Hotel and another [2015] eKLR where it was held that the fundamental behavior of the parties such as the form of documentation, evidence of the relationship and the mode of payment is critical. Other factors such as frequency of reporting, whether the person is subject to daily supervision; whether the person enjoys normal employment terms such as leave; pension; sick off e.t.c. act as interpretation tools did of the relationship but do not constitute conclusive evidence that the express contract has been altered by the parties especially where the express words of the contract itself do not envisage such changes by contract of the parties in the actual implementation of the written contract.
41. In Miscellaneous Application No 50 of 2020, Godfrey Mwampembwa v Nation Media Group Ltd, eKLR [2021] Nderi Nduma J affirmed the holding of the arbitrator that
- “ The parole evidence rule has survived since it was first enunciated in the nineteenth century and still applies to modern day contracts. The principle has been restated by the courts in many ways one of which is to exclude the Courts and tribunals from rewriting contracts entered into by the parties. This fact of the Principle was well stated by Marete J. in James Heather Haya v African Medical Research Foundation (AMREF) (2014) eKLR when he stated that: -
- “It is not the duty of this Court to redraw agreements by parties. The Court can only come in to facilitate an interpretation and implementation of these contracts and no more”
- “I am not persuaded by the claimant’s contention that he was an employee of the Respondent. The totality of the evidence adduced supports the inevitable conclusion that the claimant was an independent contractor and not an employee of the Respondent. It is however, worth noting that the relationship between the parties was peculiar in many ways. Some of the benefits extended to the claimant by the Respondent (for example, fully paid sabbatical leave) were akin to benefits enjoyed by employees rather than by independent contractors.”
42. In conclusion, the court is of the view and finding that the claimant was from 1/1/2018 an independent contractor of the respondent and not its employee. Accordingly the termination of the contract was not subject to the provisions of section 41, 43 and 45 of the *Employment Act*, 2007. The claimant is also not entitled to any compensation in terms of section 49(1) (c) and 4 of the Act.



## **Damages for the premature termination**

43. The evidence before court is that the claimant envisaged to work for the respondent as a principal consultant upto 31<sup>st</sup> December 2018. The contract was terminated prematurely by the respondent for reasons which were explained to the claimant at the time of the termination and evidenced by the inability by the respondent to pay the invoiced services by the claimant in time due to the financial difficulties the respondent faced.
44. The respondent continued to operate, though at a diminished level. The respondent did not invoke clause 8.5 of the agreement namely force majeure because it continued to operate. The respondent could not invoke the provisions of section 40 of the Employment Act 2007 by a declaration of redundancy because the claimant was not an employee but an independent contractor.
45. The claimant however suffered loss and damage as a result of the pre-mature termination of contract for reasons not of her own making. The circumstances of the termination are mitigated by the circumstances the respondent faced at the time including inability to pay salary and PAYE tax in respect of its employees.
46. Considering all the circumstances of the case and the fact that the independent contractor had a pre-determined fees for every 22 invoiced days in the sum of Kshs. 418,550/= the claimant lost her legitimate expectation to earn the income upto the 31<sup>st</sup> December 2018.
47. The contract between the parties did not provide for payment of the full term of the contract upon any pre-mature termination by either party.
48. Accordingly, unlike in the case of Pravin Bowry versus Ethics and Anti-Corruption Commission [2013] eKLR, where the court ordered for payment of damages equivalent to the remainder of the unserved terms, this case is different in material respects including that this contract provides for a one month termination notice at clause 2.2.
49. The termination was however not for the reasons set out under clause 2.2. which would have excluded any claim for damages by the claimant. This was a termination strictly for no fault by the claimant and he suffered loss and damage as a result thereof.
50. The court after having considered all the above circumstances of the case award the claimant the equivalent of four (4) months consultancy fee calculated at Kshs. 418,550/= per month in the sum of Kshs. 1,674,200/= for the unilateral breach and termination of the contract prematurely.
51. Judgment is entered in favour of the claimant against the respondent accordingly in the sum of:
  - i. Kshs. 1,674,200/=
    - ai. Interest at court rates from date of judgment till payment in full.
    - bi. Costs of the suit.
52. For the avoidance of doubt, all other claims by the claimant against the respondent lack merit and are dismissed.

**DATED AT NAIROBI THIS 14TH DAY OF MARCH 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

**Appearance:**



**Mr. Mungai for Claimant**

**Ms. Wandurwe for respondent**

**Mr. Kemboi Court assistant**

