



**Wandimi v Farmpro EA Limited & another (Cause 1937 of 2016)
[2024] KEELRC 1120 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1120 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1937 OF 2016
JK GAKERI, J
APRIL 30, 2024**

BETWEEN

DAVID NJUGUNA WANDIMI CLAIMANT

AND

FARMPRO EA LIMITED 1ST RESPONDENT

CHARLES MBUTHIA 2ND RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Statement of Claim filed on 20th September, 2016 alleging unfair termination of employment by the Respondent.
2. The Claimant avers that he was employed by the 2nd Respondent in October 2014 as a Salesman and Store Manager at Kshs.12,500/= but was not given a written contract and the 2nd Respondent incorporated the 1st Respondent and he served diligently in supplying animal feeds and products to clients of the Respondents and the work involved substantial travelling and all proceeds went to the 2nd Respondent.
3. That on 10th February, 2016, the Claimant was involved in an accident along Thika Road on his way to Thika and notified the 2nd Respondent but was denied the right to proceed to hospital and was hospitalized for 3 months to May 2016 and incurred a bill of Kshs.145,000/= which was not refunded by the 2nd Respondent and when he resumed duty, the 2nd Respondent informed him that his services were no longer required and employment was terminated.
4. The Claimant faults the termination for want of reason and fair hearing and prays for;
 - i. A declaration that termination of employment by the Respondent was unfair.
 - ii. 12 months' salary compensation.



- iii. Salary in lieu of notice.
- iv. Unpaid salary for 14 months.
- v. Unpaid house allowance from October 2014 to May 2016 at 15% for 24 months.
- vi. Service pay at 30 days per year.
- vii. Compensation for medical expenses.
- viii. Leave days for 24 months.
- ix. Overtime at 2 hours per day.
- x. Certificate of service.
- xi. Interest at court rates from date of filing the suit.
- xii. Costs of the suit.

Respondent's case

5. The 2nd Respondent denies having been a director of the 1st Respondent. He states that he knew the Claimant as a supplier of raw materials to the 1st Respondent for whom he was a consultant and that's how he met the Claimant and was not the only supplier.
6. That the 2nd Respondent occasionally paid the 1st Respondent's suppliers including the Claimant.
7. The 2nd Respondent denies that the Claimant was an employee of the 1st or 2nd Respondent but an independent supplier and the Claimant often used the 2nd Respondent to supply the 1st Respondent but he had no driving licence and was involved in self-caused accidents.
8. The 2nd Respondent avers that he had agreed to pay the Claimant 10% commission on total sales and denies knowledge of the alleged accident on Thika Road and no liability could attach on the 2nd Respondent as he was not an employee.
9. The 2nd Respondent prays for dismissal of the claim with costs.

Claimant's evidence

10. On cross-examination, the Claimant admitted that he had no record of employment or payment of salary but had filed MPESA statements but had not shown the salary.
11. The witness admitted that he had not agreed with the 2nd Respondent on employment.
12. The witness confirmed that he had no record of the alleged accident on Thika Road and it was not reported to the police.
13. Strangely, the witness admitted that he was riding on a motorbike.
14. That he received monies from many persons including the 2nd Respondent and denied having been a supplier of animal feeds.
15. It was the Claimant's testimony that the invoices on record were from different companies and had no witness to testify on them and had no evidence to show that the amount stated was paid to the 1st Respondent and had no copy of the Local Purchase Order or Cheques paid by the suppliers and had



neither the National Social Security Fund nor National Health Insurance Fund statements as evidence of employment by the Respondents.

Respondents' evidence

16. RWI, Mr. Charles Mbuthia, the 2nd Respondent confirmed on cross-examination that he manufactured animal feeds for his chicken and had a factory and did not sell farm produce and was unaware of Testimony Farm Foods.
17. On re-examination, the witness testified that he did not sell animal feeds to anyone and denied that the business card on record was his.

Claimant's submissions

18. Counsel submitted on whether the Claimant was an employee of the Respondent, termination and the reliefs sought.
19. On employment, counsel submitted that there was an employment relationship between the parties, the Claimant having been employed in October 2014 as a Salesperson and Store Manager.
20. Reliance was made on the provisions of Section 2 of the *Employment Act*, 2007 and the sentiments of the court in *Christine Adot Lopeyio V Wycliffe Mwachhi Pere* (2013) eKLR on the tests applied by courts to determine whether an employment relationship existed to submit that the Claimant was an employee and his Mpesa Statements from October 2015 to February 2016 evidenced the relationship.
21. That he would procure animal feeds and products from the Respondents' suppliers on behalf of the Respondent and receive documents on their behalf and received goods too and was therefore part of the business.
22. Counsel urges that the 2nd Respondent appeared to know so much about the 1st Respondent and was possibly its director.
23. On termination of employment, counsel submitted that the prescribed requirements were not complied with as neither the provisions of Section 41, 43(1) or 45(2) of the *Employment Act*, 2007 were complied with.
24. Reliance was also made on the decisions in *Daniel Kiplagat Kipkeibut V Smep Deposit Micro Finance Ltd* (2016) eKLR, *Lydia Moraa Obara V Tusker Mattresses* (2021) eKLR and *Charles Muthusi Mutua V Kathi No Kakoka Services Ltd* (2022) eKLR among others to urge that termination of the Claimant's employment was unfair.
25. On reliefs, counsel submitted that the Claimant was entitled to all the reliefs sought and cited the decision in *Transport Workers Union V African Safari Diani Adventure* (2013) eKLR on the certificate of service.

Respondents' submissions

26. By 7th March, 2024 when the court retired to prepare this judgment, the Respondent had not filed submissions.

Findings and determination

27. The issues for determination are;
 - i. Whether the Claimant was an employee of the 1st or 2nd Respondent or both.



Depending on the answer to (i) above,

- ii. Whether the Claimant's employment was unfairly terminated.
 - iii. Whether the Claimant is entitled to the reliefs sought.
28. On employment, the Claimant alleges that he was employed by the 2nd Respondent in October 2014 as a Salesman at Kshs.12,500/= per month but on cross-examination admitted that he had no document as evidence of the employment relationship or salary payment save for copies of the 5 receipts, 1 delivery note and 4 invoices and Mpesa Statements for 2015/2016.
 29. The Claimant confirmed that he and the 2nd Respondent had not sat down to agree on the terms of engagement.
 30. The invoices are dated 4th February, 2016, 27th November, 2015 and 27th March, 2015 and a delivery notes dated 27th November, 2015 and 16th February, 2016. The receipts from J & J Veterinary Options are dated 30th April, 2015, 1st July, 2015 and 2nd July, 2015.
 31. While the invoices, delivery notes and receipts show some connection between the Claimant and the two Respondents, they do not suggest an employment relationship or establish its existence and involve only 5 businesses over a period of about one (1) year.
 32. The MPESA statement for the period 15th October, 2015 to 29th February, 2016 reveal that the Claimant received monies from various persons including the 2nd Respondent.
 33. It is discernible that from 15th October, 2015 to 29th February, 2016, a duration of about 4¹/₂ months, the Claimant received monies from the 2nd Respondent at least 70 times ranging from Kshs.500/= to Kshs.50,000/= and at no time did he receive the sum of Kshs.12,500/= his alleged salary per month.
 34. Equally, the Claimant received regular payments from one Godfrey Ndungu for the entire duration.
 35. The Claimant tendered no evidence to demonstrate that the sums received from the 2nd Respondent was his salary.
 36. Typically, sales persons receive payments from buyers yet the Claimant was receiving more funds from the 2nd Respondent, amounts which exceeded the salary by far and regularly and is claiming unpaid salary for 14 months without disclosing the duration.
 37. Using the Mpesa Statement on record, the two dealt with each other for only about 4¹/₂ months in some relationship other than employment.
 38. Although salary or wage is a central pillar of the employment relationship, it presupposes regularity and near similar amount paid by the employer. In November 2015 for instance, the Claimant received monies from the 2nd Respondent 25 times. In October, he received money 12 times over Kshs.100,000/=.
 39. The fact that the Claimant was receiving monies from other persons on a regular basis such as Godfrey Ndungu would appear to suggest he was not the 2nd Respondent's Salesman as alleged.
 40. Relatedly, the 2nd Respondent confirmed on cross-examination that he was a manufacturer of animal feeds for his chicken and did not sell farm produce.
 41. Finally, although the Claimant testified that he was the Manager and Supervisor of the business when the owner was not there, which would suggest he had access to the company documents or other



information, he appeared unaware of what the business entailed and appeared to have been the only employee of the Respondents.

42. Section 2 of the *Employment Act*, 2007 defines an employee as;

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

43. The Act further defines a contract of service as;

“an agreement, whether oral or in writing and whether express or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership . . .”

44. From the evidence on record, the court is not persuaded that the Claimant has demonstrated that there was an implied contract of employment between him and any of the Respondents as none was expressed, a fact he admitted on cross-examination.

45. Similarly, the Claimant has failed to demonstrate that he was receiving a wage or salary from the 1st Respondent or 2nd Respondent as the amounts received from the 2nd Respondent did not amount to a salary as he was receiving similar amounts from one Godfrey Ndungu among others.

46. On the alleged employment, the Claimant cited the month of October 2014 as opposed to the actual date of engagement and furnished no evidence that would connect him with the Respondents before 2015.

47. Contrary to the Claimant’s counsel’s submissions that the Claimant, as a sales person was expected to remit proceeds of sale to the 2nd Respondent, it is the Claimant who was receiving the funds from the 2nd Respondent as evidenced by his Mpesa statement for October 2015 to February 2016.

48. A significant issue the court noted in this case is the absence of authentication of the documents relied upon by the Claimant in support of his case.

49. The most glaring relate to the alleged accident along Thika Road on 10th February, 2016, an accident the 2nd Respondent denied being aware of.

50. The Claimant testified that the accident was not reported to any police station and admitted in court that he was riding a motor cycle as a pillion passenger.

51. In his written statement, the Claimant stated that he was proceeding to Thika for a delivery and when he informed the 2nd Respondent about the accident, the 2nd Respondent insisted that the delivery was urgent and had to be made.

52. It is unclear whether the delivery was being effected by a motor cycle.

53. A police report on the accident and the persons involved and the Claimant’s employer as necessary would have reinforced the Claimant’s case substantially.

54. Evidence of hospital Bills paid would have been another reinforcement. Such documents would have greatly enhanced the credibility of the Claimant’s case against the Respondent.

55. More puzzling, the documents relied upon by the Claimant as evidence of treatment lack authentication and appear to the naked eye to have been written by the same hand and possibly on the same date but dated differently.



56. For unexplained reasons, the Claimant allegedly went to hospital on 21st February, 2016 yet the accident had taken place 11 days earlier.
57. Similarly, a closer examination of the four documents copied on a single A-4 page reveals that they were not written by a person with qualifications in the medical field and only one has a single name “Dennis” and none has the designation of the writer.
58. In the court’s view, these documents lack authenticity and lack evidential value.
59. Needless to emphasize, Section 107 of the Evidence Act provides that;
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. Where a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
60. In addition, Section 109 of the Act relates to proof of any particular facts. In this case, the burden of proof lay on the Claimant.
61. It was incumbent upon the Claimant to evidentiary demonstrate that he was an employee of one or both Respondents.
62. In the court’s view, the materials presented by the Claimant fall below the prescribed threshold.
63. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove on a preponderance of probabilities that he was an employee of the 1st or 2nd Respondent.
64. Having found as above, the issue of termination of employment and entitlement to reliefs have no ground to stand on.
65. In the upshot, the Claimant’s suit against the Respondents is dismissed for want of proof.
66. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF APRIL 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

