



**Muheesi v Tuffsteel Limited (Employment and Labour Relations Petition  
E055 of 2023) [2024] KEELRC 909 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 909 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E055 OF 2023**

**MN NDUMA, J  
APRIL 25, 2024**

**BETWEEN**

**ESTHER MUHEESI ..... PETITIONER**

**AND**

**TUFFSTEEL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petitioner filed suit on 24<sup>th</sup> March 2023 against the respondent seeking an order in the following terms:-
  - a. A declaration that the decision by the respondent to terminate the petitioner’s employment was substantively unjustified and procedurally unfair.
  - b. A declaration that the termination of the petitioner’s employment was wrongful, unfair and/or unlawful.
  - c. A declaration that the respondent breached the petitioner’s fundamental rights as enshrined in the Bill of Rights, in particular her rights under Articles 25, 27, 28, 29, 30, 41 and 47 of the *Constitution*.
  - d. A declaration that the respondent contravened sections 10(1), 10(2), 10(3) (a), and 10(3) (c) of the *Employment Act* by failing to supply the petitioner with an employment contract.
  - e. Upon allowing prayer (d) above, the court to proceed and penalize the respondent pursuant to sections 16(2) and (4) of the *Employment Act* 2007.
  - f. A declaration that the respondent contravened section 45 of the Kenya Citizen and Immigration Act by failing to procure and furnish the petitioner with a work permit.



- g. General damages for breach of the petitioner's fundamental rights under Articles 25, 27, 28, 29, 30, 41 and 47 of the Constitution

### **Facts and Grounds of the Petition**

2. The petitioner sets out the facts on which the petition is premised at paragraph 3 to 19 of the petition the summary of which is that, the respondent employed the petitioner on 19<sup>th</sup> October 2022 as a Sales Manager Executive at a monthly salary of Kshs. 250,000/=.
3. That it was part of the agreement that the respondent would obtain a work permit for the petitioner since she was a Ugandan national. That the petitioner commenced work based on the promise by the respondent to secure a work permit for her. The petitioner was paid a salary for October and November 2022.
4. That on 23<sup>rd</sup> December 2023, the petitioner opted to visit the respondent's director's office in a bid to inquire about the issue of work permit. Upon inquiry, the director, Mr. Mukesh Patel proceeded to verbally terminate the petitioner's employment.
5. The petitioner states that the respondent revealed to the petitioner prior to the termination that the respondent had no intention whatsoever to issue the petitioner with a written employment contract.
6. That the verbal termination was made in the presence of petitioner's colleagues including Vincent Mutuku, in-house Legal Counsel, Spacey Maina, personal assistant to Mr. Mukesh Patel. Hardik Bhavsar, Internal Auditor and Eugene Chasia of IT department much to the general embarrassment of the petitioner.
7. The petitioner wrote to the respondent a letter dated 24/12/2023 protesting against the abrupt termination and withholding of the petitioner's salary for December 2022.
8. By an email dated 28/12/2022, Mr. Parth Trivedi, requested the petitioner to visit the office to collect her dues which she did in the company of a representative of her choice, Anitah Mbahazi.
9. During the meeting the internal auditor informed the petitioner that her terminal dues in the sum of Kshs.173,070/= would only be paid once the petitioner consented to voluntarily resign from the employment.
10. On 13/1/2023, the external counsel for the respondent reiterated that the petitioner could collect her final dues provided she consented to resign voluntarily.
11. The petitioner declined the offer of Kshs.173,070.00 because the amount was not reasonable compensation for the services she rendered to the respondent under the false pretenses by the respondent that they would get a work permit for her. The petitioner declined to resign and instructed her advocate who wrote a demand letter dated 16/1/2023 to the respondent. The respondent did not respond to the demand letter to date.
12. The petitioner states that the decision to terminate her services was malicious and a violation of her rights under Articles 10, 25, 27, 28, 30, 41, 47 and 50 of the Constitution.

### **Constitutional foundation**

13. The petitioner cites Articles 2(1); 2(6); 19(1); 20(2); 27(1); 28; 29; 41; 47 and 50 as the Constitutional basis of the petition.



## **Violations:**

14. The petitioner avers that the respondents subjected her to servitude in violation of Article 30 of the Constitution for getting her to provide services to the respondent under the pretext that the respondent would obtain work permit for her. That although the petitioner worked in December 2022, she has not been paid any salary to date and that the respondent failed to provide the petitioner with an employment contract with the intention of subjecting her to enslavement.

## **Article 41**

15. The petitioner states that she was subjected to unfair labour practices in violation of Article 41 of the Constitution by failure by the respondent to give her an employment contract; to pay her December 2022 salary; by coercing the claimant to resign as a pre-condition to be paid her terminal dues and by failing to obtain a work permit for her.

## **Article 50**

16. The petitioner states that her right to a fair hearing was violated by the verbal termination without any notice or hearing in violation of Article 50 of the Constitution.

## **Article 47(1) and section 4 of Fair Administrative Action Act, 2015**

17. The petitioner further avers that her right to fair administrative action was violated by the respondents in the circumstances of the case.

## **Article 28**

18. The petitioner states that she was subjected to human indignity by withholding her December 2022 salary which action exposed her to hardship and suffering as she was unable to provide basic amenities such as food and rent to herself and had to seek help from friends and relatives back home in Uganda in order to survive in Kenya.

## **Article 25(a)**

19. That the termination was carried out in a cruel and degrading manner in front of her colleagues, without notice, hearing and or payment of terminal dues in violation of Article 25(a) of the Constitution and

## **Article 27**

20. That failure to provide the petitioner with a contract of employment and work permit while other employees were provided with the same denied the petitioner equality before the law and equal protection of the law in violation of Article 27 of the Constitution and the respondent discriminated against the petitioner.
21. The petition is buttressed by a supporting affidavit of the petitioner and written submissions duly filed and various attachments relevant to the suit attached to the petition including email correspondence and attendance register duly signed by the petitioner.

## **Replying affidavit**

22. The suit is opposed vide replying affidavit of Jacob Baraza Siunwa, the Human Resource Manager of the respondent.



23. He deposes that the petitioner was recruited as a temporary replacement of one Lily Lan, a Chinese nationality who offered translation services to the respondent's Chinese customers on a need basis. That Lily Lan had taken leave days in December 2022 to January 2023 and the respondent required someone to take her place.
24. That the respondent settled on the petitioner who had previously turned down an offer from the respondent to take a business development position. That the Chinese translator offered training to the petitioner for the month of October and November while she prepared to hand over her duties to the petitioner.
25. That the petitioner was already offering translation consultancy services to some stakeholders in the Kenyan manufacturing/construction sector. Therefore, she came in highly skilled recommended and was the most competent to handle the translation role. That it is not true that the petitioner relocated to Kenya specifically for the new role.
26. That the respondent did not make any misrepresentations to the petitioner upon giving her the offer for the temporary role. That the respondent had no direct control/supervision of the petitioner. The petitioner was an independent contractor using her discretion to deal with the respondent's clients.
27. That the respondent had only given the petitioner a company phone and had not integrated the petitioner into its business. That the petitioner in consideration of the services rendered was paid a net daily fee of Kshs.9,615.00 or Kshs.250,000.00 paid at the end of each month. The petitioner was expected to provide her tax payer registration to enable the respondent remit withholding tax.
28. That as a consultant, the petitioner was not entitled to receive other benefits like leave/holiday pay, pension, sick pay, company car, access to loans, medical or notice pay as alleged by the petitioner or at all. The work was for a short duration and the respondent did not impose any exclusivity on the petitioner's services. The petitioner could therefore offer services to more than one company at the same time. The petitioner also was at liberty to work remotely from the respondent's premise.
29. That the petitioner was not assigned any personal number or required to be physically present at the office. The petitioner had no line manager or supervisor.
30. The petitioner was requested to provide her KRA details for purpose of remitting withholding tax but she did not provide the same to the accountant. The petitioner was orally disengaged upon expiry of her term as orally agreed and subsequently invited to collect the pending dues.
31. That the petitioner was not an employee of the respondent. That as in all exit scenarios, the respondent informed the petitioner that she had to sign a waiver before her final dues were paid. The waiver was not a resignation as alleged by the petitioner.
32. That no constitutional issues are disclosed in the petition. That same be dismissed with costs.

#### **Further affidavit**

33. The petitioner joined issues with the respondent and reiterated her case as set out in the petition. She says that Lily Lan was employed as a sales executive and not a translator as the respondent alleges. That the deposition by the respondent is contradictory stating on one hand that Lily Lan was a permanent employee and on the other stating that she was employed on a need basis. That on one hand the respondent states that the petitioner was a highly skilled translator while on the other they say Lily Lan trained the petitioner in October and November 2022.



34. The petitioner points at admissions made by the respondent which indicate that she was an employee including that she was hired by Lily Lan. She was paid Kshs.250,000.00 fixed monthly sum; was provided with a company phone; and was entitled to final dues inter alia.
35. The petitioner reiterates that she was employed as a sales manager and not a translator. That she was required to sign staff attendance register. That it is false that she was employed as a temporary translator from December 2022 to January 2023. The petitioner reiterates that her employment was abruptly terminated by Mr. Mukesh Patel unlawfully and unfairly.
36. That under section 45(2) of *Kenya Citizenship and Immigration Act* no. 11 of 2012, it was the duty of the employer to procure a work permit for the petitioner and was the duty of the employer to draw her contract in terms of the *Employment Act*, 2007.
37. That in her work, she procured sales, sourced new customers, delivered tenders to clients, followed upon payment; received cheques and cash upon deliveries being made. That she was provided with office space and tools. That it is false that she was paid a daily wage of Kshs.9,615.00 but was paid a fixed salary of Kshs.250,000.00 per month. That Lily Lan had no personnel number like herself.
38. That the petition raises real issues amounting to violation of constitutional rights. That the petition be allowed as prayed.

### **Determination**

39. The parties filed written submissions which the court has carefully considered together with the deposition by the parties. The issues for determination are:-
  - (i) Whether the petition has merit
  - (ii) Whether the petitioner is entitled to the reliefs sought.
40. It is common cause that the petitioner provided services to the respondent. The issue in dispute is whether the petitioner was an independent contractor or was an employee of the respondent during the time she provided services to the respondent. Matters in dispute include the nature of services provided to the respondent by the petitioner, the petitioner stating that she was employed as a sales manager whereas the respondent states that the petitioner was granted temporary translation services as a reliever of one Lily Lan while Lily was on leave.
41. The respondent insists that the translation was sought on a needs basis and the petitioner was not an in-house employee; did not receive a salary, was not under any direct supervision of the respondent and was providing services to other persons during temporary tenure of service with the respondent.
42. The court observes that the petitioner was not given any letter of engagement either as an employee or an independent provider. It is however not in dispute that the petitioner started providing service to the respondent in October 2022 and served the respondent in November 2022 until 23<sup>rd</sup> December 2022.
43. It is not in dispute that the petitioner was paid Kshs.250,000.00 for the month of October and November 2022.
44. The petitioner claims payment of Kshs.250,000.00 in respect of December 2022 and damages for violation of rights set out in the petition.
45. The petitioner further claims one month salary in lieu of notice in the sum of Kshs.250,000.00.



46. The petitioner provided various documents attached to the petition including attendance register at the respondent's premises which indicates that she signed in for work on 8<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> December 2022 at around 8:15 a.m. in the morning. The register does not provide any conclusive indication as to whether the petitioner was an employee of the respondent or not. It only shows that the petitioner attended the office of the respondent on stated dates.
47. It is also common cause that the petitioner did not have a work permit to work in Kenya as an employee or an independent service provider. The question arises as to whether the petitioner can enforce payment in respect of services provided in Kenya under an oral contract, that is illegal on the basis that the respondent could only provide work lawfully to a foreign national who possessed a work permit to do the work regardless of whether the work is provided to the respondent as an employee or an independent service provider.
48. The court notes that in the letter of demand dated 16/1/2023 written to the respondent by Obura, Mbeche & Company Advocates for the respondent, the petitioner only demanded payment of a salary for the month of December 2022 in the sum of Kshs.250,000.00 and one month's salary in lieu of notice in the sum of Kshs.250,000.00
49. The advocates did not allege any violation of constitutional rights of the petitioner by the respondent as set out in the petition in the letter of demand. It would appear that these allegations came as an afterthought in the filed petition dated 23<sup>rd</sup> March, 2023.
50. The court is satisfied that the petitioner provided services to the respondent during the period October 2022 to 23<sup>rd</sup> December 2023. The court's finding is that the respondent had no legal capacity to offer employment to the petitioner, who was not of Kenyan origin, without first obtaining a work permit for the petitioner.
51. The court further finds that the petitioner had a personal obligation to obtain a work permit for any independent professional services she provided to the respondent or any third parties in Kenya be it as a translator or as a sales manager.
52. The petitioner bears the onus of firstly establishing on a balance of probability that she had the capacity provide lawful services to others in Kenya.
53. There is no evidence that the respondent brought the petitioner from Uganda to Kenya directly or through a lawful agent procured by the respondent. The court is satisfied that the petitioner has failed to prove that the respondent had a legal obligation to procure a work permit for her to live and work in Kenya.
54. The petitioner brought herself to this country and had an obligation to ensure that she remained and worked in the country lawfully. The principle of legitimate expectation does not avail her in the circumstances of this case
55. The court finds that the petitioner has failed to prove that the respondent violated any of the constitutional rights set out in the petition. The case of *Communications Commission of Kenya & 5 others versus Royal Media Services Ltd & 5 others* (2014) eKLR has clearly set out the law. The Supreme Court justices held that:-

‘From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue.



Later on, the court stated ‘An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation’.

56. The respondent has however not denied that it owed and did not pay the petitioner a sum of Kshs.173,000.00 owed to the petitioner in respect of twenty (20) days service offered by the petitioner to the respondent. The court will not let the respondent benefit from its failure to ensure that the petitioner satisfied legal requirements to provide professional services of whatever nature to the respondent in Kenya.
57. However, the court finds that the case for unlawful termination of employment contract or contract of service by the respondent has not been proved on a balance of probability.
58. In the final analysis, the court enters judgment in favour of the petitioner against the respondent for a sum of Kshs.173,000.00 in respect of services rendered for twenty days in the month of December 2023.
59. The sum is paid with interest at court rates from date of filing suit till payment in full. The respondent to meet the costs of the suit.
- 60.. For the avoidance of doubt all other prayers sought by the petitioner against the respondent lack merit and are dismissed.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL, 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Mr. Otieno for petitioner

Ms. Adhiambo for respondent

Mr. Kemboi, Court Assistant

