



**Kiverenge v Mbarire & another (Cause E881 of 2021)  
[2024] KEELRC 1216 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1216 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E881 OF 2021  
DKN MARETE, J  
APRIL 24, 2024**

**BETWEEN**

**TIMOTHY KIHAMBA KIVERENGE ..... CLAIMANT**

**AND**

**HON. CECILY MBARIRE ..... 1<sup>ST</sup> RESPONDENT**

**DENIS HEDMOND APAA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This matter was brought to court vide the claimant’s Amended Memorandum of Claim dated 24th February, 2023. The issues in dispute are therein cited as;
  1. Discrimination and stigmatisation on medical grounds.
  2. Indignity, degradation and cruelty in requiring the Claimant to take compulsory and mandatory COVID-19 tests without his consent.
  3. Unprocedural, unilateral, unfair and unjustifiable termination of the Claimant.
  4. Failure to pay terminal dues.
2. The 1st Respondent in a Respondent’s statement of Response dated 13th October, 2022, denies the claim and prays that it be dismissed with costs.
3. The 2nd Respondent in a Statement of Response of even dates prays that the court declines to issue any order against him in this suit.
4. The claimant’s case is that the Respondents are sued as such employers of the claimant within the meaning of Sections 2 of the *Employment Act* 2007, the *Labour Relations Act* 2007 and the *Industrial Act*, 2011.



5. The claimant's case is that on an oral contract, he was employed as a gardener/caretaker and paid Kshs.15,000.00 per month. This was mostly paid through Mpesa. He was also to be paid a house allowance which is a further 15% of salary for his housing. This was however not paid, or at all.
6. The Claimant's further case is that during his stint of employment no NSSF or NHIF remttions were made. He also worked during holidays and never took leave.
7. The Claimant's other case is that sometime on 16th November, 2020 or thereabout he reported back to work and worked until the 20th November 2020 when the employer required all employees working at their home in Karen to undergo mandatory COVID-19 test at Kenya Medical Research Institute (KEMRI.)
8. His further case is that on 22nd November, 2020 he received a call for positive COVID 19 and hence should not return to work. He did not have any symptoms and self isolated himself at home for two weeks after which he called the Respondents informing them that he wanted to return to work.
9. The Claimant further avers that the 2nd Respondent organized for a further mandatory test at Kenyatta University Teaching and Referral Hospital on 11th December, 2020 for about 9 employees who worked at the Respondent's hotel in Karen and himself. His result was negative but he was directed not to report to work until he was so notified.
10. On 4th January, 2021 he texted the 2nd Respondent enquiring on a response to the issue now that one month had lapsed since his last day at work. This message was not responded to. On 12th January, 2021, he visited the Respondent's home and while at the gate texted them again. The 2nd Respondent appeared and requested him to wait at the garage as he engaged the 1st Respondent. He was later informed that the 1st Respondent was asleep and therefore he should leave and await their call in the future. This was followed by various other texted which all were fruitless.
11. The Claimant's further case is that despite serving the Respondents with utmost diligence and royalty, the Respondents refused to take him back to employments which amounted to a unilateral decision to terminate employment. This is further buttressed by the fact that from December, 2020, he did not receive his salary.
12. The Claimant's other case is that he was singled out for termination, treated less favourably, unfairly and stigmatized based on his temporarily COVID -19 illness. This amounted to undignified and degrading treatment and unfairly labour practice through compulsory, mandatory and forced Covid -19 testing.

He claims thus;

- a. One month's pay in lieu of notice = Kshs.15,000.00
- b. Annual leave  $(15,000/30 \times 21 \times 1.42 \text{ yrs}) = \text{Kshs.}14,910.00$
- c. Public Holidays  $*(15000/30 \times 14 \text{ days}) = \text{Kshs.}7,000.00$
- d. House allowance  $(15\% \times 15,000 \times 17 \text{ mths}) = \text{Kshs.}38,250.00$
- e. Damages for failure to issue a written contract = Kshs.100,000.00
- f. Service pay  $(15,000/30 \times 15 \times 1,42 \text{ yrs}) = \text{Kshs.}10,650.00$
- g. Compensation for unfair termination  $(12\text{mths} \times 15,000.00) = \text{Kshs.}180,000.00$

TOTAL =Kshs.365,810.00

He prays as follows;



1. A declaration that the act of the Respondents in requiring the Claimant to take compulsory and mandatory COVID-19 tests without his consent and subsequently terminating the Claimant on the basis of his temporary health status/medical condition amounts to acts of discrimination, indignity, degradation and unfair labour practices thus offends Articles 10, 27, 28 29f) and 41 of the Constitution and Section 5(3) of the Employment Act.
  2. A declaration that the termination of the Claimant's employment and/or dismissal was unfair and in breach of the Claimant's contract of employment.
  3. A declaration that the Respondents fundamentally breached their statutory obligations under the Constitution of Kenya and the Employment Act, 2007;
  4. An order directing and/or compelling the Respondents to pay the Claimant Kshs.365,810.00 as particularized in Paragraph 41 of the statement of claim with interest at court rates from the date of filing of this suit.
  5. An order be issued for compensation of Kshs.5,000,000 on constitutional rights violation under Articles 10, 27, 28, 29f) 41 and 47 of the Constitution of Kenya;
  6. An order be issued for exemplary and general damages.
  7. An order that the court does issue any other direction, declaration and/or orders that serve the cause of justice;
  8. Costs of the suit.
13. The Respondent's case is a denial of the claim.
  14. They also raise an issue as relates to the 2nd Respondent, i.e Denis Hedmond Apaa and wishes to add that she is only aware of Denis .e. Apaa who is not a party to this suit.
  15. The 1st Respondent denies discrimination and avers that the claimant was not discriminated against or stigmatized on medial grounds as pleaded or at all.
  16. It is her further case that the Claimant was not entitled the terminal dues as pleaded.
  17. The 1st Respondent's other case is that any relationship she had with the claimant was one of an independent contract client and that at no time was she an employee as defined in the Acts aforementioned.
  18. The 1st Respondent's case is that the claimant was employed as an independent contractor and only on a need by need basis and would come in for two days in a week for Kshs.15,000.00. She therefore denies any breach of section 31 of the Employment Act, 2007 or any other breach or at all.
  19. The 1st Respondent in toto denies the alleged COVID-19 tests or any agreement with the Claimant for NSSF and or NHIF contribution remission in respect of the Claimant.
  20. The Claimant's further case is a denial of the jurisdiction of this court in managing his matter and further that;
    - a. The Claimant was not an employee of the 1<sup>st</sup> Respondent but was an independent contractor whose services was required on a need-by-need basis.
    - b. There was never an oral contract of employment between the Claimant and the 1<sup>st</sup> Respondent.



- c. That the services of the 1<sup>st</sup> Respondent were not always required and there was no obligation for the services to be procured solely from him.
  - d. That the health status of the Claimant was an irrelevant issue and, in any event, the Claimant's health status was not known to the 1<sup>st</sup> Respondent.
  - e. That an independent contractor is not entitled to the benefits that accrue to an employee employed under the Employment Contract.
  - f. That at no time did the 1<sup>st</sup> Respondent demand from any of her independent contractors of employees mandatory COVID-19 testing.
  - g. That this Court lacks the jurisdiction to hear and determine any dispute that does not fall within the ambit of an Employment Contract governed by the Employment Act and all other applicable provisions of the Law.
21. The 2nd Respondent Denis Edmond Apaa in defence merely denies the claim and avers that he is not a party to these proceedings in as much as the name is similar to that of 2nd Respondent.
22. It is his further case that the Claimant was requested to amend his Statement of Claim to reflect this but however declined to do so.

#### **The issues for determination**

- 1. Whether there was a termination of employment of the Claimant by the Respondent.
  - 2. Whether the termination of employment of the Claimant by the Respondent, if all, was wrongful, unfair and unlawful.
  - 3. Whether the Claimant is entitled to the relief sought.
  - 4. Who bears the cost of this cause.
23. The 1st issue for determination is whether there was a termination of employment of the Claimant by the Respondent. The Claimant in written submission dated 25th December, 2023 reiterate his case and submits unfair termination of employment.
24. The Claimant denies that he was an independent contractor or employee bases on an oral contract of service. He vehemently denies this and seeks to rely on authority of Omusamia v upperbill Springs Restaurant (Cause 852 of 2017)[2021] KEELRC 3 (KLR) (October 2021) (Judgment):

The respondent took a firm position that the contract between the parties, was a contract for service and therefore the claimant was an independent contractor and the relationship inter se was that of contractor-client. That was just a bold assertion. One expected the assertion to be backed up by documents. That did not happen. From the onset, while responding to the claimant's memorandum of claim, the respondent crafted its defence, while knowing that the bedrock of its case was the characterization of the relationship as a contractor-client one. Its witness was to testify to it and indeed did. The respondent had not laid a basis for its allegation.



25. Further, the Claimant sought to rely on authority of *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] eKLR where the court held thus;

There was no evidence that the Claimants paid with-holding tax. Instead, the Respondent paid Mburu a 'net salary.' It is the obligation of an employer to enforce statutory deductions such as PAYE, NSSF and NHIF contributions. By paying 'net salary' the presumption would be that the Respondent had factored in this obligation. The fact that no evidence was presented showing payment of these employee deductions is not an indication that there was no employer-employee relationship.

26. The Respondent submits a case of no employment relationship inter partes. It is their case that in the circumstances of the case, this has to be deciphered from the circumstances of the case. On this they seeks to rely on authority of *Maurice Oduor Okech v Chegguered Flag Limited* [2013] eKLR where the court held thus;

"In determining the existence of an employment relationship, the court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the *Employment Act* 2007 actually exists."

27. Further, in *Obonyo v Britam Life Assurance Co (K) Ktd* [2023] eKLR the court noted that various jurisdictions have dealt with the issue at hand and cited an Appeal filed in Hong Kong which spelt out what the Court ought to consider to establish whether a person was an employee. It held that;

"The court indicated that to establish whether a person was an employee, it was necessary to consider the extent of the respondent's control over how the claimant performed his work; whether the claimant had a fixed salary or whether it fluctuated; whether the claimant was an integral part of the organisation or business; whether the respondent had the obligation to provide the claimant with work or he had to look for own business and clients; whether the respondent had an obligation to provide the claimant with an office or equipment; payment of tax and the traditional structure of the trade,"

28. The claimant has failed to establish a case of termination of employment in the circumstances. Whereas the Respondent has presented and submitted a case of no employment between the parties, the claimant in toto fails to bring out a case of a contract of employment inter partes.

29. The Respondent's case is that the claimant was employed as an independent contractor on a need-by-need basis. This did not amount to contract of service but a contract for service. He cannot therefore deem this as employment in the strict sense of the word, fact and law. Moreover, he has not established a case of employment on a balance of probabilities or even preponderance of evidence.

30. Overall, the Respondent's case takes sway and overwhelms that of the Respondents. It is the more probable of the two. I therefore find a case of no termination of employment in the circumstance of this case and hold as such. The conduct of the parties is not indicative of a contract of employment capable of termination.

31. The 2nd issue whether the Claimant is entitled to the relief sought. He is not. Having failed on a case of termination of employment, he becomes disentitled to the relief sought.

32. I am therefore inclined to dismiss the claim with orders that each part bears their costs of the same.



**DELIVERED, DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**D. K. NJAGI MARETE**

**JUDGE**

**Appearances:**

1. Mr. Mwariri instructed by John Mwariri Advocates for the Claimant.
2. Miss Mabango holding brief for Andrew and Steve Advocates for the Respondent.

