



Njuguna v Geosat Solutions Limited (Employment and Labour Relations Cause 541 of 2018) [2024] KEELRC 898 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 898 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 541 OF 2018**

AN MWAURE, J

APRIL 5, 2024

BETWEEN

JAMES WAIGANJO NJUGUNA CLAIMANT

AND

GEOSAT SOLUTIONS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 10th April 2018.

Claimant's Case

2. The Claimant avers that he entered into a contract of employment on 21.06.2016.
3. The Claimant avers that on 15.12.2017, the employment contract was wrongfully, illegally and unlawfully terminated by the Respondent without due regard to the employment and labour Laws of Kenya,
4. The Claimant avers that he had worked for the Respondent for 1 year 6 months when his contract was unilaterally and unfairly terminated by the Respondent. The Respondent never issued the Claimant any notice, legitimate reasons or even grant of a fair hearing.
5. The Claimant avers that the Respondent has refused and/or neglected to respond to his request including a demand letter by his advocate to pay his terminal dues and other monies.
6. The Claimant avers that he was never paid overtime despite working 10 hours daily which is 2 hours overtime daily.
7. The Claimant avers that he never proceeded for his annual leave and neither was any salary paid to him in lieu for the entire employment period.



8. The Claimant avers that he never proceeded for his paternal leave despite the Respondent having knowledge that his wife had given birth to a child.

Respondent's Case

9. In opposition to the Claim, the Respondent filed its Reply to Memorandum of Claim dated 27th July 2018.
10. The Respondent avers that it had a contract of service with the Claimant whereby he was engaged as a lead valuer, an independent contractor on a monthly retainer and was only called on a need basis to carry out specific assignments.
11. The Respondent avers that the Claimant was never its employee but an independent contractor thus the issue of wrongful, illegal and unlawful termination of his employment does not arise.
12. The Respondent avers that out of his own choice claimant decided to stop performing contractual duties with the Respondent at the end of November 2017 when he was involved in a transaction which turned out to be fraudulent. The Respondent did not terminate the contract of service but the Claimant abandoned the contract and it reserves a right to seek legal redress.
13. The Respondent avers that the Claimant was an independent contractor and thus the issue of overtime, annual leave and paternity leave does not arise since he was in charge of his own working time.
14. The Respondent denies that the Claimant had been working overtime or that there was any unpaid salary.
15. The Respondent avers that this court has no jurisdiction to handle this matter in view of the fact that the Claimant was not an employee of the Respondent.

Evidence in Court

16. The Claimant (CW1) adopted his witness statement dated 10.04.2018 as his evidence in chief.
17. CW1 testified that he was a full-time employee of the Respondent. He did not have a contract but he kept asking for the same.
18. CW1 testified that as at 15.12.2017, he had not been paid his salary for about 3 months. When he asked for his salary, he was told they had no money, he then realised he was not going to get the money and opted to go look for other jobs.
19. CW1 testified that he had never been involved in any fraudulent transaction.
20. CW1 testified that he prays for his dues for the period worked for the Respondent. He used to be paid Kshs 40,000 cash and never paid NSSF and NHIF and he was never paid house allowance.
21. CW1 testified that he never went on annual leave or paternity leave in January 2017.
22. During cross-examination, CW1 testified that he did not attend any interview before his employment; they had a mutual working agreement.
23. CW1 testified that he never used to sign anywhere that he received the Kshs 40,000 and this was his salary and not commission.
24. CW1 testified that a Certificate of Proficiency was given by the insurance as a principal officer. He had a Certificate of Proficiency but he was not paid for providing the certificate and he gave the Respondent all the documents.



25. CW1 testified that he went to look for something as he had not been paid, he did not leave work.
26. CW1 testified that he was employed on monthly basis and he was reporting to someone. He was a principal officer and he was not being supervised.
27. CW1 testified that after he left work, he took his Certificate of Proficiency and he informed the insurance. The Respondent's business could not run without his certificate.
28. During re-examination, CW1 testified that he was salaried employee and not a contractor and the issue of certificate of Proficiency was not an issue during employment.
29. CW1 testified that he was not invited for an interview but had a one on one talk.

Respondent

30. The Respondent's witness (RW1), Dickson Mbundi Musoti adopted his witness statement dated 14.02.2022 as his evidence in chief.
31. During cross examination, RW1 testified that the Claimant offered the Respondent some service and he was earning a fixed amount of Kshs 40,000 on commission basis. He used to earn the amount depending on the services rendered.
32. RW1 testified that the Claimant was a principal valuer, he was not employed but was contracted to work with the Respondent and bring in business.
33. RW1 testified that the Claimant's reporting schedule was dependant on his work schedule. Mostly he would report at Geostat.
34. RW1 testified that the Claimant was paid in cash but he cannot tell for sure if this was always the case.
35. RW1 testified that the Respondent's people went to court to give evidence but the Claimant was acquitted.
36. RW1 testified that the Claimant was not interviewed but they had a discussion to agree on the commission. He did not report to anybody.
37. RW1 testified that a certificate of proficiency was important but the Respondent did not ask him, the Claimant registered the Respondent.
38. RW1 testified that they never paid NSSF and NHIF. The Claimant never proceeded on annual leave as he was an independent contractor.
39. RW1 testified that the Claimant had no written contract of employment. He was paid by the accountant.
40. RW1 testified that the Claimant was with the Respondent from June 2016 to 2017 when he removed his certificate.
41. RW1 testified that the Respondent never catered for the Claimant's housing. They work on Saturdays but not Sunday, the company operates 24/7 as it is a security company.
42. RW1 testified that they did not terminate the Claimant but he refused to report to work. There were some fraudulent transactions relating to persons he was working with; the transaction did not touch the Respondent.



43. RW1 testified that the Claimant stopped reporting in October -December 2017 but they have no records of when he stopped reporting. There was no work for the Claimant.
44. RW1 testified that they did not terminate the Claimant; business was low and the Respondent failed to pay him for 3 months.
45. RW1 testified that he saw the demand letter and there were several attempts to resolve the case out of court.
46. RW1 testified that he is not aware of any gross misconduct and it never gave the Claimant a Certificate of service.

Claimant's Submissions

47. The Claimant submitted that in determining whether a person has been employed under a contract of service. Section 9 of the [Employment Act](#) provides the following salient features:- (i) existence of an oral or written contract; (ii) provision of services to a natural or juristic person; and (iii) payment of wages or salary for services rendered.
48. It was submitted for the Claimant that he was indeed an employee of the Respondent. The Respondent has failed to adduce evidence in support of their claim that the Claimant was an independent contractor. If at all the Claimant was only needed by the Respondent as when there was availability of work, the Respondent has not adduced any evidence to that effect.
49. The Claimant submitted that the Claimant has demonstrated that his relationship with the Respondent meets the characteristics of an employer-employee relationship. The Claimant testified that he was employed full time as a principal officer in charge of motor vehicle assessment and valuation for one and a half years. He was under the Respondent's command as the Respondent controlled the work he did and the means which the work was accomplished.
50. The Claimant submitted that he reported to work from 8am to 5pm Monday to Friday as required by the Respondent hence he was under the command and control of the Respondent falling within the premise of employer-employee.
51. It is the Claimant's submission that there exists an employer-employee relationship as he always received a monthly salary of Kshs 40,000 paid to his account.
52. The Claimant submitted that the Respondent alleged that the Claimant had engaged in fraudulent transaction and he voluntarily left. However, the Respondent did not adduce any evidence or attempt to seek legal redress for the alleged fraudulent transaction.
53. The Claimant submitted that he was constructively dismissed as the conduct of the Respondent's failure to pay his salary constituted a breach of contract hence the Claimant was unable to discharge his duties. As much as discharge of the employment contract by breach was the only recourse available for the Claimant.
54. The Claimant submitted that payment of salary and wages goes to the root of the contract thus denial of an employee's salary by an employer constitutes a breach of contract entitling the employee to terminate the contract.
55. It is the Claimant's submission that he demonstrated in his testimony that he never received pay for October, November and December totalling to Kshs 120,000 despite reporting to work and performing duties assigned to him.



56. The Claimant submitted that having been constructively dismissed, he was not given any notice hence he is entitled to one month's pay in lieu of notice.
57. The Claimant submitted that it was the Respondent's responsibility as an employer to ensure every employee takes annual leave when due or make payment in lieu. The Respondent never gave the Claimant annual leave as required by law hence he is entitled to unpaid annual leave for the period worked.
58. The Claimant submitted that during the period of his employment, he was blessed with one child born on 29.01.2016 and he was not awarded paternity leave; this was not controverted by the Respondent.
59. The Claimant submitted that he was never paid housing allowance for the entire period worked. The Respondent did not adduce any evidence showing that the unpaid house allowance was incorporated in the monthly salary of the Claimant.
60. The Claimant submitted that he was never paid NSSF and NHIF dues and neither was it incorporated in his salary for the period worked. The Respondent did not adduce any evidence that they indeed remitted any monies for NSSF and NHIF.
61. The Claimant submitted that he was never issued a Certificate of Service upon termination which is a clear violation of the employment and labour laws. He is therefore entitled to cost associated with non-issuance of the Certificate of Service.

Respondent's Submissions

62. It is the Respondent's submission that from the four-fold test set in *Omusamia v Upperhill Springs Restaurant* (Cause 852 of 2017) [2021] KEELRC 3(KLR) (5 October 2021) (Judgment), it is clear that the Claimant was an independent contractor as he owned his own tools of work including a certificate of proficiency and he would come to work any time and day he wished. The Respondent did not control the manner in which the Claimant was working, therefore, he was not an employee of the Respondent.
63. The Respondent submitted that the he who alleges must prove, the Claimant has failed to adduce any evidence in support of his claim that he was an employee of the Respondent. There is no employment contract or payslip provided.
64. The Respondent submitted that the Claimant has not provided any evidence that he was terminated. The Claimant confirmed that he withdrew his certificate of proficiency after realising the Respondent was not making profit during covid 19. It was the Respondent's evidence that the Claimant chose to withdraw the Certificate of Proficiency and deserted his duties, he was not dismissed as alleged.
65. It is the Respondent's submission that the Claimant could not be dismissed as he was not an employee of the Respondent but an independent contractor. Therefore, the Respondent could not give the Claimant reasons for termination as he chose to desert his duties and withdrew the certificate of proficiency at the detriment of the Respondent.
66. The Respondent submitted that the Claimant is not entitled to the reliefs sought as he has failed to prove that he was an employee of the Respondent. Throughout the hearing of the suit it became evident that he is an independent contractor of the Respondent; the Claimant has no single document to show he is an employee and all he is relying on is his witness statement.



Analysis and Determination

67. Having considered the pleadings, witness statements, submissions and the evidence on record, the first issue for determination is whether the Claimant was an employee of the Respondent or an independent contractor.

68. In *Omusamia v Upperhill Springs Restaurant* (Cause 852 of 2017) [2021] KEELRC 3 (KLR) (5 October 2021) (Judgment), the court held:

“In determining if a worker is an independent contractor or an employee the court must search for the total relationship of the parties. I say this alive of the fact that over years courts have developed various tests to aid in the determination. What test applies in what case would depend on the peculiar circumstance of each case. On this, the Supreme Court of Canada, in *Ontario v Sagaz Industries Canada Inc.* stated: -

“it is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves useful purpose The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all the factors will be relevant in all cases or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated the determining one.”

The tests that courts have employed over years, include, the control test – assessing the presence or absence of control a manager or supervisor might or might not have over their worker, the fourfold test – control, ownership of the tools, chance of profit, risk of loss, lastly the integration test, developed in *Stevenson Jordon and Harrison Limited v MCDonald and Evans* (1952), the approach looks at whether the service being provided by the worker is an integral part of business done on behalf of the business but not integrated into the business.

In *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* clarified the factors to consider in determining whether one was an employee and therefore under a contract of service as where: -

- i. The servant agrees to provide his own work and skill by providing services for this matter, in consideration of wages or other remuneration.
- ii. The servant agrees that in the performance of that service they will be subject to the master’s control. Control includes the power of deciding the things to be done, the way in which it shall be done, the means to be employed and in doing it, the time and place where it shall be done.
- iii. The contract of service complies with the terms of an employment agreement. This entails complying with the statutory requirements in the *Employment Act* including minimum wage, provision for leave and payment of income tax.”

69. Further, the court in *Mungai v Avion Limited* (Cause 972 of 2016) [2023] KEELRC 399 (KLR) (16 February 2023) (Judgment) held:

“Under the control test, the degree of control that the consumer of the service exerts over the service provider determines whether the contract is one of service or for services. The



more the control that is exerted by the consumer of the service, the more likely it is that the relation between the parties is one of a contract of service. The converse is true for a contract for services.

The level of control is usually measured through parameters such as whether the client determines: the hours, time and place of work; the manner of executing the task at hand; and provides the tools for executing the task. In contracts of employment, the employer has a greater say in deciding where and when the employee works and the manner in which the work will be executed. In addition, the employer would more often be in charge of provision of work implements. The converse applies to contracts for services (*Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [2010] BTC 49).

What emerges from the foregoing is that in determining whether parties are working under a contract of service or a contract for services, the duration of their engagement may be of little relevance. Further the method of recruitment of the service provider may not be very material. As George Ogembo mentions in his book, "Employment Law Guide for Employers, Revised Edition", it does not really matter whether the service provider was appointed, head-hunted, or elected to the position he occupies. What is material is whether the ingredients in the degree of control test mentioned above can be discerned from the arrangement."

70. The court in *Omusamia v Upperhill Springs Restaurant* (supra) continued:

"Importantly, it is the Respondent who asserts that the Contract between the parties was one for services. It is correct to observe that it is the duty of the Claimant to prove that the parties had an employer-employee relation. However, once the Claimant provides evidence, on a balance of probabilities, tending to establish that the contract was one of employment, the evidential burden of proof shifts onto the Respondent in terms of section 109 of the [Evidence Act](#) to prove that the relation was one of independent contract.

From the record, the Claimant has been able to provide prima facie evidence that the contract between the parties was one of service. He has stated that the Respondent: directed the hours, time and place of work; and paid him a periodic wage.

With this evidence, the evidential burden shifted to the Respondent to controvert the Claimant's case by providing evidence pointing to existence of an independent contract. With respect, I have not seen this evidence. In the premises, it is my finding that the parties were operating under a contract of employment as opposed to one of an independent contractor."

71. In the instant case, the Claimant claims that he was employed as a principal officer in charge of assessment and valuation of motor vehicles and was paid a monthly salary of Kshs 40,000. Neither the claimant nor the respondent produced any documents to prove if their relationship was employer/employee or was contractual. This makes it very awkward for the court without a single document for reference.

72. However, the Respondent asserted that the Claimant was an independent contractor. He was in possession of the certificate of proficiency which was essential to the Respondent's business. Further, the Claimant used to determine his working schedule and was not under the supervision of any person. This was confirmed by the Claimant's testimony during hearing. He said he used to receive his salary but there were no remittances to the NHIF and NSSF.



73. Further to the above, the Claimant was paid Kshs 40,000 monthly for the services rendered and this amount was not subjected to any statutory deductions as already stated above hence there is no payslips or PAYE documents.
74. Considering the pleadings, evidence and submissions of the respective parties the court is persuaded the claimant did not have an employer/employee relationship with the respondent and he was a contractor who had offered his professional certificate of proficiency to enable the respondents to be registered and he just pulled it out without involving the respondent when he chose to. That therefore affirms all the more that the claimant was not employee but an independent contractor.
75. In view of the above the claim against the respondent fails and is dismissed.
76. However since the respondent witness admitted they did not pay the claimant for three months they are ordered to pay him kshs 120,000/- plus interest at court rates from date of filing this suit till full payment.
77. Each party will however pay their respective costs of the suit
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

