



**Korir v Mosonik (Employment and Labour Relations Cause
006 of 2023) [2024] KEELRC 2051 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2051 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE 006 OF 2023
DN NDERITU, J
JULY 31, 2024**

BETWEEN

KIBET ARAP KORIR CLAIMANT

AND

SAMSON K MENJO MOSONIK RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 15th February, 2023 filed in court on 23rd February, 2023 through G.M. Maengwe & Co Advocates. As it is the procedure, the memorandum of claim is accompanied with a verifying affidavit sworn by the claimant, a witness statement by the claimant, a list of documents and a bundle of copies of the listed documents.
2. The claimant is seeking for the following reliefs –
 - a. Gratuity at the rate of 30 days per years worked for 47 years.
 - b. Payment in lieu of leave 30 days per year worked for 47 years.
 - c. Payment for NSSF for 47 years.
 - d. Medical Cover for 47 years.
 - e. The Respondent pay to the claimant cost and interest of (a) above.
3. On 20th April, 2023 the respondent appointed Litunda & Co. Advocates to act for him in the cause and filed a response to the claim on 31st October, 2023 wherein the claim is denied and the court urged to dismiss the same with costs for want of merits.
4. Alongside the response to the claim the respondent filed his written statement.



5. The claimant's case was heard virtually on 28th November, 2023 when the claimant, CW1, testified and closed his case. The defence was heard on the same day with the respondent (RW1) testifying and closing his case.
6. Counsel for both parties addressed the court by way of written submissions. Miss Chelagat for the claimant filed her submissions on 19th January, 2024 and Miss Litunda for the respondent filed on 1st February, 2024.

II. The Claimant's Case

7. The claimant's case is expressed in the memorandum of claim, the oral and documentary evidence tendered, and the submissions by his counsel.
8. In his memorandum of claim, the claimant pleads that up to and until December, 2022 he had worked for the respondent for 47 years as a farm supervisor. In November, 2022 the claimant notified the respondent of his intention to retire from service as from 31st December, 2022. A copy of the notice was produced in court as an exhibit.
9. It is pleaded that for the 47 years the claimant allegedly served well with a clean disciplinary record but he was denied leave and the respondent failed, refused, and or neglected to register the claimant with National Social Security Fund (NSSF) and or remit the statutory dues in that regard.
10. In his testimony in court he adopted his filed written statement and relied on the foregoing pleadings as his evidence-in-chief.
11. In cross-examination, the claimant stated that he was employed by the respondent in 1977 and terminated in 2022. However, the claimant admitted that he was engaged by the respondent's dad (the deceased) who died in 2009. He admitted that he had no evidence to prove that the respondent is the administrator of the estate of the deceased. He admitted that his salary was paid by the deceased until his death in 2009 and thereafter the respondent allegedly took over and paid his salary until 2022. He admitted that to the best of his knowledge the estate of the deceased has not been distributed but he alleged that the respondent as the first born is the "informal administrator" of the estate.
12. He claimed that his salary has always been paid in cash but no evidence was availed in support of that allegation.
13. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

14. The respondent's case is contained in the statement of response to the claim, the oral and documentary evidence that he adduced in court, and the written submissions by his counsel.
15. In the response to the statement of claim, the respondent vehemently opposed the prayers in the memorandum of claim. The respondent states that the claimant was an employee of his deceased father and that the claimant was terminated in 2000 and paid all his dues. It is pleaded that between 1977 and 2000 the respondent was a minor incapable of entering into the alleged contract. It is pleaded that the respondent has never paid a salary to the claimant as alleged.
16. In his testimony in court the respondent reiterated the foregoing and adopted his written statement as his evidence-in-chief. He stated that his deceased father died in October, 2008. He stated that he knew



- the claimant as a former employee of his deceased father in a tea farm. He further stated that he did not know when the claimant started working there.
17. He stated that he has never engaged the claimant in any discussions, agreements, or negotiations concerning his employment as the tea farm is managed by a factory that also pays salaries to the employees who work there.
 18. He stated that the claimant was relieved of his duties by the deceased in 2000 and paid all his dues. He stated that the estate of the deceased was subject of a succession cause as the deceased died intestate and that there are four administrators of the estate.
 19. It is on the basis of the foregoing evidence and circumstances that the respondent prays that the claimant's cause be dismissed with costs. The submissions by the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions

20. The claimant's counsel identified two main issues for determination – Whether the claimant was an employee of the respondent; and, Whether the claimant is entitled to the reliefs sought.
21. On the first issue, it is submitted that the evidence on record confirms that the claimant was an employee of the deceased, the father of the respondent. It is further submitted that the respondent as the administrator of the estate of the deceased should settle the claim. It is submitted that the claimant has proved an employment between himself and the deceased and against the respondent as the administrator of the estate of the deceased. It is submitted that the claimant retired on 31st December, 2022 as per his notice dated 30th November, 2022.
22. On reliefs it is submitted that the claimant is entitled to service pay for the 47 years worked as provided for under Section 35(5) of the *Employment Act* (the Act). The court is urged to be persuaded by the holding in *Mary Rhobi V Annah Bhamania* (2014), *John Willice Opot V Starehe Boys Centre* (2013) eKLR, and *Linnet Akasa Shikoli V Lilian Otundo* (2014) eKLR.
23. In regard to statutory deductions to NSSF the court is urged to follow the reasoning in *Joab Ashitiba Kashon V Samaritan Medical Services* (2017) eKLR and award the claimant as prayed. The court is urged to award the claim on medical cover based on Section 34 of the Act.
24. The court is urged to allow the entire claim as prayed with costs.
25. Counsel for the respondent identified two main issues for determination – Whether there existed an employment relationship between the parties; and, Whether the claimant is entitled to the reliefs sought.
26. It is submitted that in 1977 when the claimant was allegedly engaged by the respondent's deceased father the respondent was about eight years old as he was born in 1971. It is submitted that the claimant failed to establish an employment relationship between him and the respondent as defined in Section 2 of the Act. In the very least, it is submitted, the claimant ought to have sued the estate of the deceased for any claims as the respondent was not a party to the alleged employment relationship which was allegedly terminated by the deceased in 2000.
27. The court is urged to apply the appropriate tests as applied in *Everret Aviation Limited V Kenya Revenue Authority* (2023) eKLR and find that the claimant failed to prove that he was at any time an employee of the respondent.



28. On reliefs, it is submitted that since an employment relationship has not been established between the parties herein there is no way that the respondent may be ordered to relieve the claimant as prayed.
29. The court is urged to dismiss the cause with costs.

V. Issues For Determination

30. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for the parties. The following issues commend themselves to the court for determination-
 - a. Whether the claimant established and proved an employment relationship between himself and the respondent.
 - b. Whether the claimant is entitled to the reliefs sought.
 - c. Who should bear the costs of the cause?

VI. Employment

31. Section 2 of the Act defines an employee as – “a person employed for wages or a salary and includes an apprentice and indentured learner.”
32. The evidence on record as adduced from both sides confirms that the claimant was engaged by the respondent’s deceased father in 1977 or thereabout. It is the claimant’s case that after the employer passed on sometimes in 1999 or 2000 he was “inherited” by the respondent and continued to serve the estate of the deceased.
33. However, the respondent’s position is that as at the time of the death of his deceased father, the claimant and the deceased had parted ways and that the claimant was paid all his dues.
34. It was incumbent upon the claimant to establish either one of the following for him to establish a legitimate and justiciable action against the respondent as a fundamental issue – that the respondent is the only administrator of the estate of the deceased or that there was an employment relationship between the respondent and the claimant.
35. It is the finding and holding of the court that the claimant did not establish and prove that there was an employment relationship between him and the respondent, whether oral or written, as defined in the impugned law above. Secondly, the claimant failed to establish and prove that the respondent is the administrator or indeed the only administrator of the estate of the deceased.
36. It is an elementary principle of the law of evidence that he who alleges must prove. The claimant alleges that he is an employee of the respondent and or that the respondent is an administrator of the estate of the deceased. As stated above, neither oral nor written contract of employment was proved between the claimant and the respondent. Likewise, the claimant did not prove that the respondent is one of the administrators or indeed the only administrator of the estate of the deceased. To prove this the claimant ought to have availed letters of administration issued by a competent court confirming that indeed the respondent is such an administrator.
37. It was the burden and duty for the claimant to prove an employment relationship between him and the respondent. The court finds and holds that the claimant failed in doing so. It was not enough for the claimant to allege employment and assume that the burden of disproving the same automatically shifted to the respondent. That is not the law and holding otherwise shall amount to unprecedented legal absurdity.



38. Having failed in establishing employment, the issue of compensation to the claimant does not arise as between the claimant and the respondent.

VII. Order

39. For all the foregoing reasons, the claimant's cause is hereby dismissed with each party ordered to meet own costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 31ST DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

