



**Matsitsi (Suing as Personal Representative of the Estate of Benson Shilibea  
(Deceased)) v Construction Company Limited (Cause 2178 of 2017)  
[2024] KEELRC 2390 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2390 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2178 OF 2017  
JK GAKERI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**ADELAIDE MUCHANJI MATSITSI ..... CLAIMANT  
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BENSON  
SHILIBEA (DECEASED)**

**AND**

**CONSTRUCTION COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the instant suit by a Claim on 2<sup>nd</sup> November, 2017 and was subsequently amended following the death of the Claimant on 7<sup>th</sup> February, 2022. The Claimant alleges that the Respondent breached the contract of employment by failing to pay agreed sums of money.
2. Regrettably, the amended claim filed on 1<sup>st</sup> February, 2023 is incomplete as only the first page was filed.
3. The alleged particulars of breach of contract and reliefs are unknown.
4. However, from the submissions filed by both counsels, it is decipherable that the Claimant prays for;
  - i. Payment of Kshs 492,134.4 comprising; Kshs 240,134.40 for work done, Kshs 240,000/= as risk allowance at Kshs 10,000/= per month, Kshs 72,000/= as deductions made by the Respondent at Kshs 6,000/= per month.
  - ii. Interest in (i) above at Court rate.
  - iii. Damages for breach of contract.
  - iv. Cost of this suit.



- v. Any other relief this Honourable Court may deem fit and just to grant.

### **Respondent's case**

5. The Respondent admits that the deceased was its employee and acknowledges that the instant suit was filed on 2<sup>nd</sup> November, 2017 but avers that before the Claimant's death, he and the Respondent had settled the case out of Court provided the Respondent paid the Claimant the sum of Kshs 15,054.45 as underpayment for the months of September and October 2017 and the same was paid.
6. That the Claimant had agreed to withdraw the demand letter and the instant suit did not proceed and culminated in its dismissal in early 2022 but a subsequent application for reinstatement was granted.
7. The Respondent previously sought to have the suit marked as withdrawn and/or fully settled but failed for want of proof.

### **Claimant's evidence**

8. CWI, Adelaide Matsitsi, the deceased's representative admitted on cross-examination that the Claimant was an employee of the Respondent, paid a salary per month and payslips on record showed that the salary was dependent on certain variables and therefore not fixed for instance while it was Kshs 28,067.35 in December 2016 and Kshs 25,923.70 in March 2017, it was Kshs 46,321.80 in July 2017.
9. The witness confirmed that the Claimant had an hourly rate of payment and was receiving a risk allowance.
10. The witness confirmed that there was no record of the work done for the sum of Kshs 240,134.4 as no particulars were provided.
11. That the employment was terminated before the contract ended.
12. The witness admitted that the copies of payslips on record revealed that overtime was paid.
13. On re-examination, the witness testified that the Claimant was an employee of the Respondent and his employment was terminated by the Respondent.

### **Respondent's evidence**

14. RWI, Esther Sarange confirmed on cross-examination that she had served the Respondent for 4 years and was not an employee when the Claimant was.
15. RWI confirmed that the Claimant had a job card not a company identity card and was unaware of the Respondent's application dated 15<sup>th</sup> October, 2023 or the orders sought or dismissal of the suit.
16. The witness testified that the Claimant was paid all his dues but had no evidence of payment.
17. That the claim was settled in 2018 and the company was unaware that the Claimant had an advocate or that the matter was in Court and no consent had been filed.

### **Claimant's submission**

18. Counsel submits that the deceased was an employee of the Respondent as evidenced by the exhibits on record.
19. Counsel further submits that the deceased's employment was terminated and urges the Court to rely on the decisions in [\*Rahul Ramesh Kothary v Rai Cement Company\*](#) Cause No E022 of 2022 and [\*Walter\*](#)



*Ogal Anuro v Teachers Service Commission* (2013) eKLR among others to urge that the termination of employment was unfair.

20. On compensation, counsel submits that the deceased deserves compensation for the unfair termination of employment and relies on the sentiments of the Court in *The Registered Trustees of the National Council of Churches of Kenya* Cause No 203 of 2012 and *D K Njagi Marete v Teachers Service Commission* (2013) eKLR.

### **Respondent's submissions**

21. Counsel for the Respondent urges that the Claimant neither proved nor substantiated the claims as they are in the nature of special damages which require strict prove of each claim.
22. That the payslips on record showed that the deceased was adequately compensated for work done.
23. Counsel submits that the claim for damages for breach of contract does not lie in contracts of service.
24. That the evidence on record revealed that the deceased resigned and his employment was not terminated and the legal representative decided to revive the suit.

### **Analysis and determination**

25. One of the uncontested issues the Claimant's counsel addressed is whether the deceased was an employee of the Respondent, and answered the question in the affirmative.
26. The Respondent admitted that the deceased was its employee and even if it had contested the issue, there was overwhelming documentary evidence to prove that the deceased was indeed an employee of the Respondent within the meaning of Section 2 of the *Employment Act*.
27. The issues for determination are;
- i. Whether the deceased's employment was terminated by the Respondent or he resigned.
  - ii. Whether the deceased is entitled to the reliefs sought.
28. On the 1<sup>st</sup> issue, parties have adopted opposing positions with the Claimant's counsel maintaining that the deceased's employment was terminated. The Respondent's counsel on the other hand contends that the Claimant resigned.
29. Was the Claimant's employment terminated?
30. Paragraph 8 of the original claim dated 31<sup>st</sup> October, 2017 states that on or about 14<sup>th</sup> October, 2017, the Respondent wrongfully sacked and/or terminated the deceased's employment and refused to pay his dues of Kshs 492,134.4 and the same statement is repeated in the witness statement dated 31<sup>st</sup> October, 2017.
31. According to the demand letter dated 17<sup>th</sup> October, 2017, the Claimant was dismissed from employment when he went to inquire about a deduction of Kshs 6,000/= from the salary for September 2017, details the deceased statement does not have.
32. The deceased payslip for September 2017, which he availed as an exhibit shows that his gross salary was Kshs 28,690.40, gross deductions of Kshs 4,527.60 and the net salary was Kshs 24,162.80.
33. The alleged deduction of Kshs 6,000/= is not reflected in any of the 10 copies of payslips on record.
34. Although the deceased's statement mentions dues owing, it lacks essential details to render the evidence credible.



35. Notably, the Claimant's assertion that the deceased was terminated from employment on 14<sup>th</sup> October, 2017 contradicts the documents on record authored by the deceased.
36. In sum, none of the documents on record lay bare the circumstances that led to and how the alleged termination of the deceased's employment took place.
37. Section 47(5) of the *Employment Act*, 2007 provides that;  
For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
38. Judicial authority has it that for the burden of proof to shift to the employer to demonstrate that it had a valid and fair reason to terminate the employee's employment or dismissal, the employee is required to establish a prima facie case of an unlawful termination of employment or wrongful dismissal.
39. Based on the evidence on record, it is unclear as to what transpired between the deceased and the Respondent between 1<sup>st</sup> October and 17<sup>th</sup> October, 2017 when the demand letter was written.
40. Regrettably, the witness statement and the claim lay more emphasis on the prayers as opposed to how the separation took place which is also critical.
41. As to whether the deceased resigned, the Respondent has not availed any evidence to show how the separation occurred.
42. Based on the material before Court, there is some basis on which a finding of resignation may be justified.
43. The Employer Exit Checklist completed by the deceased on 12<sup>th</sup> October, 2017 shows that there may have been a resignation letter. The term resignation is inserted by hand and the form was completed by the deceased.
44. Relatedly, the deceased's letter of 23<sup>rd</sup> June, 2018 confirms that he resigned.
45. The more pertinent contention of the Respondent is that the deceased and the Respondent settled the claim out of Court in 2018 and nothing is owing, the subject matter of the Respondent's Notice of Motion dated 15<sup>th</sup> October, 2023, which the Court dismissed for want of proof in anticipation that the Claimant's evidence would affirm or controvert the documents relied upon by the Respondent.
46. The documents leave no doubt that the deceased was employed as a mason paid per hour and had a job card.
47. The Claimant did not contest the letter dated 23<sup>rd</sup> June, 2018 allegedly written by him, undated disclaimer and the Employer Exit Checklist.
48. The deceased's letter dated 23<sup>rd</sup> June, 2018 identifies his ID Card Number, designation and Employment Number under the reference "Withdrawal of intention to sue for wrongful termination and unpaid dues" reveal that the deceased had indeed agreed to withdraw the instant suit and admits in writing that he indeed resigned on 13<sup>th</sup> November, 2017.
49. The letter reveals that the deceased had sought service pay for the unserved duration of one (1) year and would additionally be paid the difference between the hourly rate of Kshs 63.35 and Kshs 83.85 and that leave pay was paid on resignation.



50. That the Respondent would pay deductions made to the September salary and would have no further claims against the Respondent after payment.
51. That no person including counsel had authority to follow up the suit in the deceased's absence.
52. That the amount underpaid in September was Kshs 6,162.80.
53. The deceased signed and thumb printed the letter on 23<sup>rd</sup> June, 2018 and inserted his ID Card Number 318XXXXXX in the presence of one Louis Kiok ID Number 250XXXXXX who also signed on even date.
54. Similarly, by an undated disclaimer also by the deceased, the deceased states that on payment of Kshs 15,054/= by the Respondent, in  

“full and final settlement of all, any and every claim, costs, expense or right of any kind (if any) which I may have against the employer and I knowingly and voluntarily waive and release the same from all any and every such claim, cost expense or right (if any) including but not limited to . . .”
55. In the Court's view, although the deceased did not sign the disclaimer, his letter dated 23<sup>rd</sup> June, 2018 is emphatic that after the Respondent paid the two amounts,  

“I will have nothing more against the company as these are the only rightful dues that the company owes me.”
56. By this letter, it is clear that the Claimant had decided to withdraw the instant suit against the Respondent through Ng'eno Ondieki & Co. Advocates.
57. The foregoing contents were not contradicted by CWI who relied on the documentary evidence availed by the deceased.
58. Flowing from the foregoing, it is decipherable that on 23<sup>rd</sup> June, 2018, the Claimant voluntarily resolved to withdraw the instant suit following negotiations with the Respondent and waived his right to pursue further claims against the Respondent.
59. Pertinently, since the witness did not allege or show that the deceased did not exercise his free will in completing the two documents on record and authoring the detailed letter, the same is deemed to have been the wishes of the deceased.
60. The Respondent's account of events as reflected by the documentary evidence appears more credible and probable.
61. In the end, it is the finding of the Court that the deceased's employment terminated by way of resignation on 12<sup>th</sup> October, 2017 and the deceased withdrew the instant suit vide letter dated 23<sup>rd</sup> June, 2018.
62. The foregoing is fortified by the fact that although the suit was certified ready for hearing on 18<sup>th</sup> February, 2019, no action was taken until the court issued a notice to show cause suo motu dated 13<sup>th</sup> October, 2021 and the suit was dismissed on 24<sup>th</sup> January, 2022 while the Claimant was still alive and it was not until July 2022 that attempts to revive the suit were made.
63. Having so found, the representative for the deceased has no sustainable case against the Respondent.
64. However, it is essential to dispose of the issue of reliefs.



**i. Sums of Kshs 492,134.4**

65. The witness provided no evidence as to when and how the deceased agreed with the Respondent on payment on risk allowance of Kshs 10,000/= per month as it is not reflected on any of the payslips on record.
66. The sum of Kshs 240,134.4 for the work done is hardly explained and CWI had no particulars of the services rendered or the duration and admitted as much.
67. The allegation that it was for the entire duration of employment could not explain the figure.
68. As regards the deductions of Kshs 6,000/=, the witness adduced no evidence to prove that the deductions were actually made for every claim made by the deceased and why he only raised the issue for the September 2017 salary only, in his letter.
69. This claim lacks particulars and is declined for want of proof.
70. The Court is in agreement with the Respondent's counsel's argument that the claim is exclusively special damages which must be specifically pleaded and strictly proved. See *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (1992) KLR 177, *Joseph Kipkorir Rono v Kenya Breweries Ltd & another* HCCA No 45 of 2023, *Hahn v Singh* Civil Appeal No 42 of 1983 (185) KLR 716, *Woodruff v Dupont* (1964) EA 404, *Nazir Virani T/A Kisumu Beach Resort v Phoenix EA Assurance Co. Ltd* (2004) 2 KLR 269, *Coast Bus Service Ltd v Sisco E. Murunga Ndanyi & 2 others* Civ Appeal No 192 of 1992 among others.

**ii. Damages for breach of contract**

71. As correctly submitted by the Respondent's counsel, an action in damages does not lie for termination of a contract of service.
72. The Claimant did not evidentiary demonstrate entitlement to damages for breach of contract.

**The claim is unproven and is disallowed.**

73. In conclusion, it is evident that the Claimant's suit against the Respondent is unsustainable, is for dismissal and it is accordingly dismissed.
74. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

