



**Trenk v Cricket Kenya (Cause E376 of 2023)  
[2024] KEELRC 2357 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2357 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E376 OF 2023  
JK GAKERI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**WALTER MUKINGINYI TRENK ..... CLAIMANT**

**AND**

**CRICKET KENYA ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted the instant suit vide a Memorandum of Claim filed on 11<sup>th</sup> May, 2023 alleging that he was an employee of the Respondent as Deputy Chief Executive Officer at USD 3,600 and was owed salary arrears.
2. The Claim was subsequently amended on 15<sup>th</sup> January, 2024 after the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants withdrew their cases against the Respondent vide Notice of Withdrawal dated 5<sup>th</sup> December, 2023.
3. In the amended claim, the Claimant, Mr. Walter Mukinginyi Trenk avers that he was a dutiful and loyal employee and performed his duties in accordance with the contract of employment and directions of the Respondent.
4. That during the course of his employment, the Respondent refused, failed or neglected to pay the Claimant's monthly salary as it fell due.
5. The Claimant prays for:
  - i. A declaration that the Respondent's failure to pay his salary was unfair and unlawful.
  - ii. Payment of the USD176,000.
  - iii. Damages for violation of the Claimant's rights by discrimination.
  - iv. Costs of this suit.



- v. Interest on (iii) above.
- vi. Any other reasonable relief the Court deems fit to grant.

### **Respondent's case**

6. In opposition to the claim, the Respondent filed a response to the amended claim denying that the Claimant was its employee and relies on the Memorandum of Understanding (MOU) executed by the parties on 9<sup>th</sup> May, 2022 which created a partnership in respect of an intended co-operation between the Respondent and the Barbados Cricket Association under which the Claimant's fee was Kshs.400,000.00 for the services rendered.
7. It is the Respondent's case that the Claimant did not discharge his duties as per the MOU as the co-operation between the Respondent and the Barbados Cricket Association did not materialise.
8. Moreover, the MOU was not ratified by the Respondent's Board of Directors.
9. The Respondent prays for dismissal of the Claimant's case with costs.

### **Claimant's evidence**

10. In his evidence-in-chief, the Claimant told the Court that he was employed by the Respondent from March 2022 and remained an employee upto May 2023 and was not paid for the entire duration as the Respondent was unable to pay salaries to its staff and board election had been challenged and it could not even pay rent.
11. On cross-examination, the Claimant confirmed that the MOU he signed on 9<sup>th</sup> May, 2022 was to be converted to a contract of employment between him and the Respondent and was the basis of his employment.
12. It was his evidence that the MOU had a specific objective and scope which did not mention an employment relationship.
13. The Claimant confirmed that the parties had agreements in mind but they were not actualized and had no record of any.
14. That the document they prepared entitled Employees List was personal to them and lacked authentication by any of the persons named or anyone else.
15. The Claimant made reference to an email to Manoj Patel dated 4<sup>th</sup> May, 2023 requesting for payment of salary for the duration worked.
16. Strangely, the Claimant testified that although he worked for the entire period, he had no evidence of the services rendered yet he communicated with other stations and organized tournaments and relied on an email dated 27<sup>th</sup> May, 2022 which was not on record.
17. That he did not know whether the MOU was ratified by the Board or not.
18. That the MOU was intended to solidify the relationship between the parties but it did not happen.
19. CWII, Mr. Kennedy Obuya confirmed that he was not an employee of the Respondent but had interacted with it when he was an Umpire in the League and played cricket and was a member of the Respondent's Board of directors as a County Representative and was privy to the minutes of the board of directors.



20. It was his testimony that the Claimant attended board meetings and undertook tasks of the board and took minutes at board meetings as an employee but had no evidence of those facts.
21. The witness could not tell when and how the Claimant was employed by the Respondent.
22. It was his testimony that he believed that minutes were recorded by the Claimant and that minutes of the meeting between the Respondent and the Barbados High Commission were not filed.
23. The witness confirmed that he was unaware of the Claimant's role at the Respondent.
24. The witness further testified that the position of Deputy Chief Executive officer existed at that time.

### **Respondent's evidence**

25. RWI, Mr. Ronald Bukusi confirmed on cross-examination that he became the Respondent's Chief Executive Officer (CEO) in February, 2024 and was thus not present at the board meeting held on 13<sup>th</sup> September, 2023 and could not have been involved in the Claimant's employment.
26. That he was not sure of the Claimant's employment though it had been discussed by the board as a law suit as minutes show.
27. The witness was unaware of the circumstances in which the MOU was signed and acknowledged that the Respondent's office was closed for non-payment of rent.
28. On re-examination, the witness testified that he was the Respondent's CEO and the Memorandum of Understanding on record was not implemented as per the email dated 13<sup>th</sup> September, 2022 and there were no other agreements, and the minutes of 26<sup>th</sup> November, 2022 do not show that the Claimant was an employee.
29. That the position of Deputy CEO did not exist.

### **Claimant's submissions**

30. As regards employment, the Claimant submits that he performed substantial work which was corroborated by Mr. Obuya's testimony and the position of Deputy CEO existed before it was abolished.
31. Puzzlingly, the Claimant then proceeds to question RWI's testimony.
32. He contends that the Respondent's Constitution did not preclude creation of new positions.
33. On jurisdiction of the Court, the Claimant argues that an arbitral clause does not oust the Court's jurisdiction and cites the Court of Appeal decision in *Tononoka Steel Mills Ltd V The Eastern and Southern African Trade Development Bank Ltd Civil Appeal No. 255 of 1998.*
34. On the MOU, the Claimant submits that the Claimant had no power to sign the MOU between the Respondent and the Barbados Cricket Association but represented it during the negotiation and drafting of the MOU.
35. That the MOU could not be a partnership with an individual and was a drafting error.
36. That abolition of the position of the Deputy CEO was an unfair labour practice under *the Constitution* of Kenya as was the failure to pay for the Claimant's services.



37. According to the Claimant, the Respondent did not prove that there was no employment between the parties and the evidence availed showed that the Claimant was an employee of the Respondent by *inter alia* abolishing the position without due process and failure to pay salaries.

### **Respondent's submissions**

38. Counsel submits that the Claimant failed to prove that he was an employee of the Respondent. That he never worked for the Respondent and no salary was due to him as he was engaged under an MOU which he signed and did not deny his existence.
39. That the Claimant acknowledges that the intended co-operation between the Respondent and the Barbados Cricket Association did not materialize.
40. Reliance was made on the sentiments of the Court in *Peter Ngunjiri Kariuki V Board of Management Magomano Secondary School (2022) eKLR* to urge that the Claimant failed to adduce evidence to demonstrate that he was an employee of the Respondent.
41. Counsel submits that the terms of the MOU were clear on the intention of the parties and no employment relationship was envisioned and cited the decision in *Samuel Wambugu Ndirangu V 2NK Sacco Society Ltd (2019) eKLR* on the essentials of employment.
42. Counsel submits that the Respondent's Board of Directors declined to ratify the MOU and the Claimant could not be considered for a position that did not exist.
43. That Mr. Manoj offered to consider employing the Claimant at the secretariat if opportunity arose hence the MOU which the Respondent's board declined to ratify.
44. That although the employer is bound to keep records, it behooves the employee to prove that he was an employee and the Claimant had not discharged his burden.
45. Reliance was made on the decision in *Joseph Munene Murage V Salome Ndungu (2019) eKLR*.
46. On jurisdiction to hear and determine the suit, counsel submits that the Claimant was not an employee of the Respondent and the Court has no jurisdiction as held in *David Randu V Malindi Water & Sewerage Co. Ltd (2013) eKLR* as well as *George Onyango Ochieng V Chemilil Sugar Co. Ltd (2014) eKLR* among others.
47. On payment of salary for services rendered, counsel submits that the Claimant did not render services as per the MOU as the intended co-operation with the Barbados Cricket Association did not materialize and the fee was Kshs.400,000/= not 400,000 per month.
48. That the MOU had no salary in Kenya Shillings or US Dollars and none was payable for want of an employment relationship.
49. Reliance was made on the sentiments of the Court of Appeal in *Anne Wambui Nderitu V Joseph Kiprono Ropkoi & another (2005) 1 EA 334* on the burden of proof to urge that the emails and documents relied upon by the Claimant did not prove his case for remuneration as an employee of the Respondent and was not entitled to any of the reliefs sought.

### **Analysis and termination**

50. The Claimant's case is that he was an employee of the Respondent from a date he neither identified in the amended Memorandum of Claim nor the original one.



51. However, his witness statement dated 8<sup>th</sup> May, 2023 states that he was employed by the Respondent's Chairman, one Mr. Manoj Patel for the position of Deputy CEO by signing an agreement which was then backdated to 1<sup>st</sup> March, 2022 as the effective date but did not avail a copy of the agreement and the Respondent's witness confirmed that it did not exist.
52. In his Supplementary Witness Statement dated 14<sup>th</sup> June, 2023, the Claimant states that he entered into an MOU on 1<sup>st</sup> March, 2022 and the allowance due was not paid and agreed to be employed as Deputy CEO as the CEO was being recruited and thus participated in the Barbados Co-operation and organized 10 tournaments involving six clubs from 6 unnamed counties sponsored by Pacific Star Sports but tournaments organized for February 2023 failed to take off.
53. The Claimant, however, produced a copy of a MOU he entered into with the Respondent on 9<sup>th</sup> May, 2022 and asserted emails as the foundation of his case against the Respondent.
54. The MOU was executed by the Claimant and one Mr. Manoj Patel as Chairman Cricket Association of Kenya on 9<sup>th</sup> May, 2022 and was thus between the Claimant and the Cricket Association of Kenya, a fact the Claimant acknowledged on cross-examination.
55. The objective and scope of the MOU is tailored as follows;
56. The partnership on which the parties are intending to collaborate has the following mission in mind.
57. To conduct a study of the cricket counties in Kenya and identify their mandate needs for the development of the same at the grass roots.
58. To develop and strengthen the National body to be responsive to the needs of the 1<sup>st</sup> Century.
59. The Claimant and the Respondent bound themselves with respect to the partnership and each party had distinct roles under which the Respondent was obligated to make a down payment of Kshs.200,000/= as 50% of the agreed fee of Kshs.400,000/= as a facilitation for the study and the balance at a later date.
60. Significantly, the MOU itemised the specific duties of the Association and the Claimant and was effective for 4 years.
61. According to the Claimant, the MOU was the basis of his employment but admitted that it made no reference to employment and the agreement they had in mind was never signed.
62. Other than the MOU, the Claimant availed copies of emails whose production as evidence the Respondent's counsel did not contest.
63. The 1<sup>st</sup> email dated 17<sup>th</sup> September, 2022 at 2.32 pm from the Claimant to one Alvin Mboijana, quru Siagid Mahmoud Manoj and Parvez is forwarding an invitation letter for the 5<sup>th</sup> Tournament to be played in Nairobi in December 2022, requesting for responses.
64. The second email dated 22<sup>nd</sup> August, 2022 is from Lex Ochieng Okoth to Azhan asking the Claimant to sign and stamp the attached application form. It is unclear what the application form was about but appear to have originated from Safaricom Ltd.
65. The third email dated 4<sup>th</sup> August, 2022 is from the Claimant to Mahmood and Paevez, copied to Manoj and Kalpesh and several other persons including Kennedy Abuya under the subject Receipt of Part Payment by which the Claimant is acknowledging as having received part payment under the MOU Agreement between the Respondent and Pacific Star Sports for the year 2022.
66. It is unclear how much the payment was or its purpose, as a copy of the MOU was not availed.



67. The fourth email is from the Claimant dated 10<sup>th</sup> August, 2022 to Mahmood Parvez and Manoj forwarding a letter for immigration for some two named individuals.
68. A further email dated 27<sup>th</sup> June, 2022 from Alexander MacDonald, the High Commission of Barbados to the Respondent's board of directors on date of a virtual meeting with specific meeting times suggested.
69. The penultimate email is from the Claimant to the High Commissioner and others dated 28<sup>th</sup> confirming availability of the Kenyan team for a meeting on Thursday 30<sup>th</sup> June, 2022 at 5.00 pm.
70. The last of the emails is from one Thompson Gooding to Alexander Manoj and others on the meeting.
71. It is notable that the emails relate to the period from June to September 2022 and there is none for 2023.
72. Evidently, the Claimant was involved in the organization of the virtual meeting and the evidence that he met the High Commissioner of Barbados corroborates his evidence.
73. To buttress its case against the Claimant, the Respondent availed a copy of the MOU and two sets of the Respondent's board of directors meetings held on 13<sup>th</sup> September, 2022 and 26<sup>th</sup> November, 2022.
74. Notably, the Claimant is not identified as an attendee or member of the board or as minute recorder contrary to the allegations of CWII on cross-examination.
75. One of the Agendas of the meeting held on 13<sup>th</sup> September, 2022 was recruitment of staff and one Mr. Jason Indakwa, the minutes taker gave a status update on the responses from the advertisement and a roadmap for the recruitment process by a HR Consultant was adopted.
76. The CEO's position has attracted 22 Applicants.
77. As regards the Claimant, the meeting noted that there was an agreement between the Claimant and the Respondent which had not been ratified but he would be considered for any position available after recruitment of key officials.
78. The fact that the Respondent admitted that there was an MOU in place is significant its ratification notwithstanding.
79. Intriguingly, the minutes make no reference to there being a Deputy CEO in office.
80. During its meeting held on 26<sup>th</sup> November, 2022, Mr. Jaxon Indakwa, Deputy Commissioner Sports was the minute taker.
81. The meeting revisited the history of the MOU between the Claimant and the Respondent and underlined its decision on 13<sup>th</sup> September, 2022 not to ratify the MOU as the position in question did not exist in the Respondent's Constitution and would communicate to the Claimant as much and continue with efforts to settle the issue mutually.
82. This far, it is clear that the MOU dated 9<sup>th</sup> May, 2022 was entered into to placate the Claimant and as a stepping stone to employment by the Respondent when an opportunity arises and the Claimant accepted the arrangement and admitted that although the MOU was intended to solidify the relationship it did not yet, but admits that he was unaware of the fact that the MOU was not ratified by the board.
83. This responses is curious because the Claimant's evidence is hinged on the allegation that he was the Deputy CEO of the Respondent and as there was no CEO, he could only report the board of directors



and as he was attending meetings and took minutes as alleged by CWII, he ought to have known that the MOU was not ratified by the Respondent's board of directors.

84. The issues that commend themselves for determination are;
- i. Whether there was an employment relationship between the Claimant and the Respondent.
  - ii. Whether the Respondent violated the Claimant's rights.
  - iii. Whether the Claimant is entitled to the reliefs sought.
85. The 1<sup>st</sup> issue stands out as the main issue for determination as it is the bedrock of the other issues and raises a jurisdictional issue.
86. Parties have adopted opposing positions with the Claimant maintaining that he was the Respondent's Deputy CEO by virtue of a contract of service between the parties based on the MOU dated 1<sup>st</sup> March, 2022.
87. Was the MOU, the contract of employment? According to the Claimant no.
88. The Respondent on the other hand testified and submitted that no employment relationship existed between the parties relying on the MOU and minutes of board meetings.
89. Section 2 of the *Employment Act* provides that:  
Employee means a person employed for wages or a salary and includes an apprentice and indentured learner.
90. The definition of an employer under Section 2 of the *Employment Act* is all encompassing and includes agent, foreman, manager or factor of the public body, person, firm, corporation or company. The definition encompasses the Respondent.
91. Relatedly, Section 2 of the *Employment Act* defines a contract of service as; an agreement whether oral or in writing to employ or to serve as an employee.
92. The parties must have intended to create or enter into an employment relationship.
93. From the definition of an employee, employer and contract of service, it is decipherable that wage or salary is a central element.
94. Judicial authority is consistent that any person claiming to be or have been an employee of another or organization bears the burden of proof as ordained by the provisions of Section 107 of the *Evidence Act*.
95. In *Kenya Union of Commercial Food and Allied Workers V Mwana Black Smith Ltd* (2013) eKLR, the Court expressed itself as follows:  
  
“An employment relationship has serious implications on the parties. The Court must therefore be fully satisfied that it actually exists. A Claimant claiming employment rights must prove the existence of an employment relationship”.
96. See also *Mary Mmbone Mbayi V Chandubhai Patel & another* Industrial Cause No. 761 of 2011, *Transport Workers Union V Euro Petroleum Products & another* (2019) eKLR, *Casmur Nyankuru Nyaberi V Mwakikar Agencies Ltd* (2016) eKLR and *Obondo V Shunjun* (2020) eKLR among others.
97. Contrary to the Claimant's assertions that the Respondent did not avail the contractual documents under Section 10(7) of the *Employment Act*, it was the Claimant's duty, in the first instance, to show



that he was an employee of the Respondent by adducing evidence to prove the existence of a contract of service between them.

98. The Respondent availed a copy of the MOU dated 1<sup>st</sup> March, 2022 and minutes of Board meetings to disprove the Claimant's allegations.
99. In determining whether an employer/employee relationship exists, courts have over the years employed various tests though none appear to be determinative as held by the Supreme Court of Canada in Ontario V Sagaz Industries Canada Inc.

“It is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of services serves useful purpose.”
100. These tests include control and integration.
101. In Ready Mixed Concrete (South East) Ltd V Minister of Persons & National Insurance, the Court highlighted the element of agreement by employee to render services in consideration of wages or salary, subject to the master's control on what is to be done, when and where and lastly compliance with statutory requirements on wages, leave and payment of tax.
102. Even assuming that the Claimant was an employee, what was the salary agreed upon and in what currency and why in US Dollars? To whom was he reporting? Office reporting time, work schedule, leave days, off-days etc.
103. The Claimant tendered no verifiable evidence of any agreement on salary.
104. The sum of USD 3,600 per month claimed lacks any solid basis.
105. More significantly, the Claimant is not claiming leave days and makes no allegation of having proceeded on annual leave at any time in the course of his employment.
106. Relatedly, the Claimant has not alleged that the Respondent was remitting or was supposed to remit NSSF, NHIF or PAYE.
107. The absence of reporting and exit times would appear to suggest that the Claimant managed his time and was not required to report to the work place as communication on email does not require office presence.
108. Equally, the Claimant tendered no evidence of his place of work or how he related with the Respondent's board and other employees including how many they were and in what departments.
109. Evidently, the dearth of essential evidence to demonstrate that the parties had an employment relationship is palpable.
110. The unsigned and unacknowledged copy of the demand letter is dated 24<sup>th</sup> April, 2023 (wrongly typed as 2923) and the Claimant's email on salary payment and exit from the Claimant to Manoj and others is dated 11<sup>th</sup> December, 2022.
111. The email which appears to be a resignation from the Respondent is explicit that he had rendered services for ten (10) months as opposed to the 15 prayed for and prays for pay in lieu of notice yet he is the one leaving without notice assuming it was a requirement.
112. From the evidence on record, it is decipherable that the Claimant and the Respondent had no other agreement other than the MOU. In fact, the Claimant adduced no evidence as to when and where the



alleged employment contract was entered into. If there was, the same would have deduced from email communication between the parties but none existed.

113. The Court is at loss how the Claimant rendered services as an employee from 1<sup>st</sup> March, 2022, was not paid at the end of the month and other months until 11<sup>th</sup> December, 2022 when he decided to leave and has not alleged that he was constructively dismissed.
114. Is that reasonably practicable for a person who has no other source of income and who relies on the job exclusively and request or demand had been made for the 10 months?
115. The Court finds the allegation neither entirely truthful nor convincing.
116. Having failed to adduce evidence of the existence of a contract of service with the Respondent other than the MOU, it is the finding of the Court that Claimant has failed to prove that he was an employee of the Respondent at any time between 1<sup>st</sup> March, 2022 and 11<sup>th</sup> December, 2022 and the two related under the MOU on record and the only fee payable was the Kshs.400,000.00 payable as per the MOU.
117. The Court is in agreement with the decisions cited by the Respondent such as Peter Ngunjiri Kariuki V Board of Management Magomano Secondary School (Supra), Samuel Wambugu Ndirangu V 2NK Sacco Society Ltd (2019) eKLR and Joseph Munene Murage V Salome Ndungu (Supra).
118. The Court cannot over emphasis the sagacious aphorism that he who alleges must prove the allegations.
119. The Claimant failed to do so and his claim against the Respondent is unsustainable as the Court has no jurisdiction to hear and determine it. It is trite law that jurisdiction is everything as held by Nyarangi JA in Owner of Motor Vessel “Lilian S” V Caltex Oil Kenya Ltd (1989).
120. As to whether the Claimant’s rights were violated or that she was discriminated by the Respondent, the Claimant tendered no evidence as to what right(s) was violated, when or how he was discriminated.
121. The Claimant has not alleged that he was treated unfairly or different from other persons in similar circumstances unlawfully.
122. In the absence of any verifiable evidence of any unfair treatment or discrimination, the allegations remain unsubstantiated.
123. Finally, as to whether the Claimant is entitled to the reliefs sought, the Court proceeds as follows;

#### **i. Declaration**

124. Having found that the Claimant has failed to prove that there existed an employer/employee relationship between him and the Respondent, the declaration sought is unmerited and is declined.

#### **ii. Payment of USD 176,000**

125. Having found as above, the claim for the sum of USD 176,000 is unsustainable and is declined.

#### **iii. Damages for violation of rights by discrimination**

126. This prayer has not been proved and it is accordingly declined.
127. In the upshot, the Claimant’s suit against the Respondent is unsustainable and it is accordingly dismissed with no orders as to 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**

DRAFT

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