



**Bereket v Estate of James Alan Davies & another (Cause E494 of 2021)
[2024] KEELRC 13262 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13262 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E494 OF 2021
L NDOLO, J
NOVEMBER 28, 2024**

BETWEEN

TEKLEAB GEBREHIWOT BEREKET CLAIMANT

AND

ESTATE OF JAMES ALAN DAVIES 1ST RESPONDENT

RICHARD JAMES CHARLES DAVIES 2ND RESPONDENT

JUDGMENT

1. The issue in dispute as stated by the Claimant in his Memorandum of Claim dated 18th June 2021, is ‘payment of terminal dues upon termination of employment on account of redundancy’. The Respondents filed a joint Memorandum of Response dated 25th January 2022, to which the Claimant responded on 16th May 2022.
2. At the trial, the Claimant testified on his own behalf and the 2nd Respondent, Richard James Charles Davies testified for the Respondents. Thereafter, the parties filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed in the year 1990, by the late James Alan Davies at J.D Tennis Academy as a Tennis Instructor. He claims to have discharged his duties throughout his employment period, including after the death of James Alan Davies in the year 2012.
4. The Claimant avers that he worked at the Academy for a period of thirty (30) years until December 2019, when his services were terminated by the 2nd Respondent, on account of redundancy, following closure of the Academy. He states that he was not paid his terminal dues.



5. The Claimant adds that from 2012, until the termination of his services, the 2nd Respondent declined to pay or reimburse his work permit fees, which were hitherto paid or payable to the Immigration Department by the late James Alan Davies.
6. The Claimant submits that the termination of his employment was unlawful and unfair. He therefore claims the following:
 - a. 1 month's salary in lieu of notice.....Kshs. 137,500
 - b. Severance pay.....2,062,500
 - c. Work permit fees since 2012:
 - i. Issuance fee.....Kshs. 2,000,000
 - ii. Processing fee.....100,000
 - iii. Application fee.....3,000
 - d. Costs of the case

The Respondents' Case

7. In their Memorandum of Response dated 25th January 2022, the Respondents state that they are non-suited for the reason that they were never employers of the Claimant.
8. The Respondents deny the Claimant's averment that he was employed by the late James Alan Davies as a Tennis Instructor at J.D Academy. They state that the Claimant was engaged intermittently, as an independent contractor, to teach and coach tennis; citing the following as corroborative facts:
 - a. The Claimant did not draw a wage/salary from the Academy, but was paid commissions only in instances where his services were contracted. The Claimant's commissions would fluctuate drastically from month to month, and the nature of his services were that he would make a loss or profit in a given month;
 - b. Neither the late James Alan Davies nor the 2nd Respondent nor even the Academy ever dictated or controlled the manner in which the Claimant performed his tasks, as he had no defined job description, and had no specific time within which he was to report to or leave work;
 - c. There were no rules or procedures that applied to the Claimant or which he was expected to adhere to as would be the case if he was an employee, that had been set either by the late James Alan Davies, his Estate, the 2nd Respondent or the Academy;
 - d. The Claimant was not restricted to work with the Academy, and the Academy had no obligation to remit any of the Claimant's statutory deductions on his behalf, hence the reason his monthly commissions were paid to him in full, with the obligation to pay taxes resting solely on him.
9. The Respondents admit that James Alan Davies died in 2012 but state that his Estate did not continue the Claimant's alleged employment. They maintain that the Claimant was only offered teaching and coaching services at the Academy, intermittently as an independent contractor.
10. The Respondents state that as a result of the harsh economic conditions witnessed globally starting early 2020, the Academy's management deemed it fit to close it. The Claimant's coaching services were,



therefore, no longer required. The Respondents assert that the Claimant was not declared redundant because he was not an employee of the Academy.

11. Regarding the claim for work permit fees, it is pleaded that it was neither the Academy's nor the Respondents' obligation to pay for the Claimant's work permit.
12. Finally, the Respondents state that the Claimant was paid all his commissions as they fell due, with the final commission for the month of May 2020 being Kshs. 22,500.

Findings and Determination

13. The first issue for determination in this dispute is whether there was an employment relationship between the parties, capable of enforcement by this Court. The Claimant claims to have been employed at J.D Academy as a Tennis Instructor, for a record 30 years, spanning from 1990 to December 2019.
14. On their part, the Respondents state that the Claimant was an independent contractor, who was retained intermittently and paid variable commissions for work done. Section 2 of the [Employment Act](#) defines an employee as:

“a person employed for wages or a salary and includes an apprentice and indentured learner.”
15. The same provision defines an employer as:

“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”
16. In the final submissions filed on behalf of the Claimant, reference was made to several decisions on the applicable tests in determining the existence of an employment relationship. In this regard, the Claimant cited the decision in *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Ltd) [2014] eKLR* where it was held that the distinction between an employee and an independent contractor is drawn from statute and tests set out in case law.
17. The Claimant then went ahead to refer to the integration and control tests; but steered clear of the fundamental question whether he was paid wages or a salary as defined in the [Employment Act](#), which is the primary statute governing employment relationships in Kenya.
18. In his testimony before the Court, the Claimant conceded that he did not earn a salary. He told the Court that he earned commissions calculated at the rate 45% of monthly income. This testimony was at variance with the Claimant's assertion that he was paid a fixed monthly amount of Kshs. 137,500. In fact, apart from a statement of his earnings for the month of July 2015, from which this figure is drawn, the Claimant did not produce any other document to show his monthly earnings. He claims to have been issued with payslips but did not avail a single one for scrutiny by the Court.
19. Moreover, the National Social Security Fund provisional statement availed by the Claimant shows his employment date as 1st August 2010, which is contrary to the 1990 date pleaded by the Claimant in his Memorandum of Claim and confirmed in his testimony before the Court. Further, the National Hospital Insurance Fund statement also produced by the Claimant records contributions having been made for only three years; 2017, 2018 and 2019.
20. Even more intriguing was a letter dated 12th September 2012 under reference 'Renewal of Work Permit For Mr. Bereket Tekleab: R678649' allegedly signed by the late James Alan Davies, who according to Grant of Probate of Written Will (P&A 45) issued on 12th February 2013, had died on 26th June 2012.



21. What emerges from the foregoing is a web of contradictory evidence and as held by the Court of Appeal in *Abudi Ali Mahadhi v Ramadhan Saidi & another* [1999] eKLR evidence that is inconsistent and contradictory has no probative value and must be rejected.
22. Finally, I find and hold that the Claimant has failed to establish an employment relationship between himself and the Respondents. His entire claim, which is predicated on the existence of such a relationship, therefore fails and is dismissed with an order that each party will bear their own costs.
23. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF NOVEMBER 2024.

LINNET NDOLO

JUDGE

Appearance:

Mr. Barak for the Claimant

Mr. Mitto for the Respondent

