



**Astro Techwell Limited v Masasabi (Appeal 9 of 2023)
[2024] KEELRC 2836 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2836 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 9 OF 2023
B ONGAYA, J
NOVEMBER 15, 2024**

BETWEEN

ASTRO TECHWELL LIMITED APPELLANT

AND

EPHAR NAMAROME MASASABI RESPONDENT

(Being an appeal from the Judgment of Hon. B.Ojoo, Senior Principal Magistrate, delivered on 25.08.2023 in ELRC No. 69 of 2020 in the Magistrates' Court at Mavoko)

JUDGMENT

1. The Appellant filed the memorandum of appeal dated 18.09.2013 against the trial Court's judgment delivered on 25.08.2023 by the Honourable B. Ojoo, Senior Principal Magistrate. The memorandum of appeal was filed through Ngugi Kamau Advocates. The appellant's case is that the learned trial Magistrate erred in law and fact by finding that the appellant was the employer of the respondent. In urging that the appellant was not in employment relationship with the respondent, the appellant stated that the trial Court erred in law and fact by:
 - a. failing to appreciate that the respondent was the landlord of the respondent's employer, Dalip Engineering Ltd and the respondent did not provide evidence to show that the appellant was his employer;
 - b. disregarding the evidence that the appellant at material time exercised the right of distress of rent against his tenant's goods which had been taken as lien for the unpaid rent and the appellant had every right to file a complaint to the police when the said goods were reportedly stolen by the respondent;
 - c. failing to appreciate the significance of the documentary evidence tendered in support of the appellant's case showing that appellant's tenant Dalip Engineering paid the respondent's salary through its director's (Mr. Bupinder) mobile Mpesa number;



- d. failing to consider the evidence that Mr. Bupinder of Dulip Engineering terminated respondent's contract of employment and not the appellant and matters arising from the said employment were equally controverted;
 - e. failing to consider that the appellant's director was not a director of Dalip Engineering rather the relationship was that of a landlord and tenant; and,
 - f. by basing the judgment on testimony of Moustafa Mwanyoloi (PW2) who claimed was an employee of the appellant without proof of said employment and arriving at conclusions and inferences not supported by evidence or documents.
2. The appellant made prayers as follows:
 - a. The appeal be allowed.
 - b. The judgment of the trial Magistrate be set aside and substituted with an order dismissing the respondent's suit in the subordinate Court.
 - c. The appellant be awarded costs of the appeal.
 3. The appellant filed submissions on the appeal. The respondent also filed submissions dated 05.09.2024 and through Namada Simoni Advocate.
 4. The Court has considered all the material on record and the only issue for determination is whether the parties were in a contract of employment.
 5. The *Employment Act* Cap 226 section 2 states, "contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies. The section also states, "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner; and, "employer" means 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.
 6. In the memorandum of claim dated 21.09.2020, the respondent pleaded that the appellant employed him from 14.06.2018 until 09.09.2019 as a day security guard and as a grounds person at last monthly payment of Kshs. 10,800.00 per month. It was pleaded that the salary was not negotiated at all and was fixed unilaterally by the appellant as it was below the minimum statutory wages. The respondent pleaded that on 09.09.2019, the appellant's Managing Director summoned the respondent who paid her Kshs. 10,000.00 being part payment of salary for August 2019 and thereafter dismissed her stating that her services were no longer needed. The respondent alleged unfair summary dismissal without due notice or a hearing. The claimant made particularised claims upon the headings of one-month payment in lieu of notice; outstanding salary for August 2019; salary for 9 days worked in September 2019; untaken annual leaves for 1.25 years served; house allowance throughout the service; overtime for last year served; underpayments per minimum wage orders; 12-months' salary compensation for unfair termination; and, making a total claim of Kshs.411, 538.40.
 7. The appellant filed a statement of defence dated 19.08.2021. The appellant pleaded that there existed no contract of service between the parties. The appellant stated that the claimant had provided no information on bank statements or Mpesa statements to show employment relationship. The appellant denied the claimant's allegation that on 09.09.2019 the appellant's Managing Director summoned her and paid her August 2019 salary. The appellant stated that the suit disclosed no



reasonable cause of action against the appellant and denied all claims made against the appellant. The appellant prayed for a finding that there existed no contract of employment and the suit be dismissed with costs.

8. The trial Court found that the respondent's case and that of her witness was more probable than that of the appellant on account that the appellant failed to explain how he was involved in alleged theft of goods long after the alleged tenant and employer of the respondent had left. The trial Court also found that the appellant had failed to explain how the alleged tenant could have left his workers behind after the tenancy lapsed. The Court finds that the trial Court did not misdirect itself. In any event, the appellant did not take out third party proceedings to bring the alleged tenant in the proceedings. It was submitted for the appellant that the respondent had reported the dispute to the labour officer and that avenue had not been exhausted. The submission suggests that the appellant received the summon by the labour officer and took no steps. The Court considers that such inaction and the failure of the dispute to be resolved by the labour officer did not operate as a bar to the claimant's suit. As urged for the respondent, on a balance of probabilities, the trial Court correctly found that the employment relationship existed between the parties.
9. The appellant was the sole employer of the respondent and the findings of the trial Court are upheld that on a balance of probability, the parties were in a contract of service.

In conclusion, the appeal is hereby dismissed with costs in favour of the respondent and the Deputy Registrar to return court file to Machakos registry.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

