



**Astro Techwell Limited v Kamami (Appeal E008 of 2023)
[2024] KEELRC 2822 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2822 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E008 OF 2023
B ONGAYA, J
NOVEMBER 15, 2024**

BETWEEN

ASTRO TECHWELL LIMITED APPELLANT

AND

PAUL MUSAU KAMAMI RESPONDENT

*(Being an appeal from the Judgment of Hon. B.Ojoo, Senior Principal Magistrate,
delivered on 25.08.2023 in ELRC No. 66 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 take into account evidence on record that showed the appellant was not the respondent's employer;



- d. failing to consider that the respondent's witness Paul Mukusa Musau had filed a similar matter *ELR Case No. 57 of 2021* claiming to be a machine operator which he lost whereas in the respondent's instant case his witness statement indicated that he was a guard; and,
 - e. arriving at conclusions and inferences not supported by evidence and documentation.
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 is 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, the respondent pleaded that the appellant employed him from 09.08.2012 until 31.12.2019 as a night security guard and as a dog handler at Kshs. 7,500.00 per month. Further, on 25.12.2019, he was summoned by Mr. Kyalo who paid him the salary for December 2019 and conveyed to him that his services would no longer be required by the appellant, effective 01.01.2020. The claimant 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; untaken annual leaves; house allowance throughout the service; payment for off days due but not taken; pay for work on public holidays; overtime for last year served; underpayments per minimum wage orders; 12-months' salary compensation for unfair termination; and, making a total claim of Kshs.1, 257, 018.00.
 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 25.12.2019 the appellant's officer Mr. Kyalo paid the respondent's December 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 dismissed with costs.
 8. In finding that parties were in a contract of service, the trial Court stated as follows, "(9) DW1 denied any relationship with the claimant. DW2 who is an employee of DW1 joined issue with his boss. They maintained that the claimant was an employee of the company's tenant, Mr. Rupinder. With due respect, DW1 came across as less than candid and allowed himself to be unnecessarily blurred in



the presentation of his evidence. In my view, he was hard-pressed to explain his involvement in an alleged case of theft of Mr. Rupinder's goods by the claimant after the latter had left their premises. In their evidence, the two witnesses directed immense effort towards the attempt to demonstrate that the claimant was a disgruntled ex-employee of Mr. Rupinder. It is however not clear to court why Mr. Rupinder was not involved in the alleged case that happened to have taken place just before or after the termination of the claimant. In the end, the version of events as narrated by the Claimant and his witness is more persuasive than told by the respondent's witnesses. In particular, the claimant's evidence that he was a night security guard at the respondent's premises from 09.08.2012 to 31.12.2019 earning a gross pay of Kshs.7, 500.00 per month was not dislodged by the respondent's evidence."

9. The Court has revisited the record before the trial Court and returns that the trial Court did not misdirect itself in any material respect. The evidence was that the respondent started working for the appellant long before the alleged tenant came on the premises. The alleged tenancy remained not proved and no third party proceedings were taken out for the appellant. 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

