



REPUBLIC OF KENYA



KENYA LAW
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**Ketter v Choge (Employment and Labour Relations Cause 215 of 2018)
[2024] KEELRC 2726 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2726 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 215 OF 2018
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

WILSON KIBITOK KETTER CLAIMANT

AND

ELIEZER KIBIWOT CHOGE RESPONDENT

JUDGMENT

1. The Claimant vide a statement of claim dated 23rd October 2017 seeks the following orders:-
 - a. A declaration that the Claimant's employment services with the Respondent were terminated wrongfully, maliciously and unfairly;
 - b. All unpaid salaries to a tune of Kshs. 11,300 per month and allowances from his time of employment to the day of termination; to wit, 1st January, 1985 to 16th March, 2017
 - c. Award of damages being compensation for loss of employment
 - d. The Respondent to issue the Claimant's certificate of service
 - e. Any other or further relief that the Honourable Court may deem fit and just to grant
2. In that statement of Claim, the Claimant avers that in the year 1985 the Respondent engaged the services of the Claimant to tend and care for his farm namely Plot No. Nandi/Bonjoge/378 in consideration of a two-acre piece of land in lieu of salary.
3. That in breach of the terms of the contract of employment, the *Employment Act* and the law governing all manner of employment dues – salaries, allowances, perks and emoluments generally, the Respondent wrongfully and without right or justifiable cause, reneged on the agreement and withheld the Claimant's dues being basic salary at Kshs. 11,300 for 32 years.



4. It was the Claimant's averment that the termination of his employment was unlawful, unjustified and wrongful on grounds that –
 - i. It ignored the fact that the Claimant had worked for the Respondent for many years and throughout that time he was not being paid his salary since there was a promise to gift him two acres in lieu of the basic salary,
 - ii. Failure to consider that the Claimant had never absented himself from duty throughout the period he was employed, and that his farm had been tended throughout without any complaint,
 - iii. Failure to consider or sufficiently consider the Claimant's unpaid dues for the period worked since 1985,
 - iv. Failure to issue any or any reasonable notice before terminating his employment as per section 44(2) of the Employment Act of 2012. (sic)
5. The Claimant averred that his fundamental rights had been violated and he had a right to dispute the lawfulness and fairness of his termination.
6. The claim having been undefended the Claimant testified on 2nd October, 2023 when he adopted his witness statement and reiterated the averments in his claim. He further testified that he worked for the Respondent guarding his farm which was fallow, on agreement that the Respondent would pay him in kind with 2 acres excised out of the said farm. That the Respondent later came back and chased him out of the farm with the assistance of the police who cautioned him never to go back to the shamba, claiming that the Claimant was a trespasser.
7. In the submissions filed on behalf of the Claimant, the issues for determination are stated as follows:
 - i. Whether the termination of the Claimant' employment by the Respondent was unfair, wrongful and unlawful.
 - ii. Whether the Claimant is entitled to any remedy.
8. It is submitted that the Claimant entered into an oral contract of employment with the Respondent in 1985 and his duties were to be a gardener and caregiver of the Respondent's farm at NANDI/BONJOGE/378. That his remuneration was to be in lumpsum, a 2 acre piece of land in lieu of salary. That otherwise he was to be paid Kshs. 11,300 every month.
9. It is submitted that instead of honouring his obligation the Respondent harassed the Claimant with police officers and forcefully chased him out of the land.
10. It is submitted that notice was not given to the Claimant according to the law. That he was not given reasons for termination. It is submitted that the Respondent did not comply with sections 44(2) of the Employment Act and the termination was unfair in terms of section 45 of the Act.
11. It is further submitted that the Claimant was not given annual leave and is entitled to Kshs. 284,760 as compensation for annual leave.
12. It is further submitted that the Claimant is entitled to pay in lieu of notice in the sum of Kshs.22,600 as provided under section 36 of the Act.
13. It is further submitted that the Claimant is entitled to house allowance of Kshs. 732,240 being 15% of his salary of Kshs. 11,300x12x36 years.



14. It is further submitted the Claimant is entitled to compensation for unfair termination equivalent to 12 months' salary for 36 months making a total of Kshs. 4,881,600.

Determination

15. In any suit before this court where the Respondent does not file a response to the claim, the first issue that the Claimant has to prove is the existence of an employment relationship.
16. In the instant case the Claimant has alleged that there was an oral contract between him and the Respondent under which he was to be paid in kind being 2 acres in lieu of salary for his services of taking care of the Respondent's farm. That if he was to be paid, he would have earned Kshs. 11,300 per month.
17. An employee is defined in the *Employment Act* as-
- “employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;
18. An employer is defined as-
- “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; “forced or compulsory labour”
19. Employer-employee relationship is defined in Black's Law Dictionary 10th Edition as “the association between a person employed to perform services in the affairs of another, who in turn has the right to control the person's physical conduct in the course of that service. At common law the relationship was termed master-servant”
20. In the instant case the Claimant states that the contract was oral and payment was to be made in the form of a 2-acre piece of land excised out of the land which he was taking care of. The Claimant did not tell the court what happened between the time he was allegedly engaged until the time he was allegedly chased out of the farm 32 years later.
21. From the evidence of the Claimant there is no proof of employer-employee relationship between the Claimant and the Respondent. A relationship involving work in exchange for land cannot be an employment relationship but a purchase agreement for the land where the purchase price comprises giving of services. Such an agreement would not be within the jurisdiction of this court but would be enforced by the Environment and Land Court.
22. An employment relationship as defined in the *Employment Act* would be for payment of wages periodically either daily, weekly or monthly, in cash as provided in section 18 of the Act which provides as follows:
18. When wages or salaries due
- (1) Where a contract of service entered into under which a task or piece-work is to be performed by an employee, the employee shall be entitled—
- (a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed,



or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

(b) in the case of piece-work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.

(2) Subject to subsection (1), wages or salaries shall be deemed to be due—

(a) in the case of a casual employee, at the end of the day; (b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;

(c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;

(d) in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier, and on the completion of the journey, respectively.

(3)

23. The Claimant's salary to be paid at the end of an undefined period would offend section 7 of the Act which provides that "No person shall be employed under a contract of service except in accordance with the provisions of this Act."

24. The Claimant has further not stated how he arrived at the sum of Kshs. 11,300 as the wages he was to be paid in lieu of the land as the wages payable for an unskilled farm workman in 1985 when the Claimant alleges the agreement between him and the Respondent was entered into according the Regulation of Wages (Agricultural Industry) Order was Kshs. 448 per month. In the Agricultural Amendment Order for 2017, the amount payable was 6,415.55.

25. I find that the Claimant has not proved that there was an employment relationship between him and the Respondent that is capable of enforcement in this court.

26. The result is that the claim herein has no merit and is accordingly dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

