



**Odhambo v Columbia Developers [K] Limited (Cause E417 of 2022)
[2024] KEELRC 13549 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13549 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E417 OF 2022
CN BAARI, J
DECEMBER 19, 2024**

BETWEEN

BENSON BWIRE ODHIAMBO CLAIMANT

AND

COLUMBIA DEVELOPERS [K] LIMITED RESPONDENT

JUDGMENT

1. Before court is the Claimant's Memorandum of Claim dated 15th June, 2022, wherein, the Claimant sued the Respondent alleging unfair labour practices. He seeks the following reliefs:-
 - a. A mandatory injunction directing the Respondent to pay the Claimant his remuneration on time without fail
 - b. A mandatory injunction directing the Respondent to remit NSSF and NHIF contributions on time and without fail
 - c. Withheld salaries Kshs. 7,300,000/= plus Kshs. 100,000 per month till the date of determination of the suit
 - d. House allowance Kshs. 1,590,000/= plus Kshs. 15,000 per month till the date of determination of the suit
 - e. Travel, meetings and accommodation expenses Kshs. 878,500/=
 - f. Unremitted NSSF Kshs. 14,600/= plus Kshs. 200 per month till the date of determination of the suit
 - g. Unremitted NHIF Kshs. 124,100/= plus Kshs. 1,700 per month till the date of determination of the suit
 - h. Unpaid leave days Kshs. 700,000/=



- i. Compensation for violation of right to fair labour practice
 - j. Costs of this suit
 - k. Interest on (c) to (j) above
 - l. Any other relief the Court may deem fit and just to award.
2. Accompanying the Claim, the Claimant filed a Verifying Affidavit, list of witnesses, a witness Statement and a list and bundle of documents all dated 15th June, 2022.
 3. The Respondent conversely, filed a Response to the Memorandum of Claim dated 29th September, 2022.
 4. Subsequently, the Claimant filed a further list and bundle of documents dated 30th September, 2022.
 5. The Claimant's case was heard on 5th April, 2024 when the Claimant (CW1), testified in support of his case. He adopted his witness statement dated 15th June, 2022 and produced his list and bundle of documents of even date as CW1 Exhibits No. 1-3, and his further list and bundle of documents as CW1 Exhibits No. 4-7.
 6. The Respondent's case was heard on 3rd October, 2024. The Respondent's witness one Mr. John Gatobu (RW 1), testified on behalf of the Respondent, adopted his witness statement dated 4th April, 2024 as his evidence in chief and produced documents of even date filed in support of the Respondent's case as RW1 Exhibits No. 1-3.
 7. Submissions were received from both parties.

The Claimant's case

8. It is the Claimant's case that he was employed by the Respondent on the 1st July, 2013 as a Projects Manager earning a basic salary of Kshs. 100,000/=.
9. The Claimant states that he performed his duties diligently and faithfully as assigned. He avers that he was entitled to house allowance at the rate of 31% of his basic salary and in accordance with Section 31 of the [Employment Act](#), which he claims was never paid by the Respondent for the entire duration of his employment.
10. The Claimant avers that his duties involved travelling to construction sites and attending meetings. It is his further case that the Respondent owes him a total sum of Kshs. 878, 500/= being reimbursement of accommodation expenses and travelling and meeting allowances for the duration of his employment which he is entitled to. The Claimant further claims that the Respondent refused to repay the said expenses despite his requests and submission of requisitions, invoices and receipts for the same.
11. It is the Claimant's case that the Respondent irregularly and without lawful cause, violated the terms of his contract by failing to pay him salary, statutory deductions and contractual allowances.
12. The Claimant avers that he was last paid salary was in April, 2016 and despite his numerous requests for payment, the Respondent has failed to make good of his claim. The Claimant further claims he never took leave from the year 2015 to date and has not been paid for the leave not taken.
13. It is further claimed that the Respondent stopped remitting the Claimant's NSSF and NHIF contribution resulting in penalties which were later waived through the Claimant's intervention, and since then, the Claimant has been paying from his own pocket.



14. The Claimant states that the Respondent's actions exposed him to tough economic challenges and is now forced to undertake odd jobs in order to sustain his economic needs besides his employment duties assigned to him by the Respondent. It is the Claimant's case that the Respondent is in breach of fundamental terms of his contract and has violated the Claimant's right to fair labour practices under Article 41 of *the Constitution*.
15. The Claimant claims a total cumulative sum of Kshs. 10,607,200/= comprising of withheld salaries, house allowance, travel and accommodation expenses, unremitted NSSF and NHIF contributions and unpaid leave days as enumerated in the Statement of Claim.
16. The Claimant testified that he was an employee of the Respondent and not a consultant. It is his evidence that he never absconded or deserted his work nor has he been accused of so doing by the Respondent.
17. On cross-examination, the Claimant maintained that he was still an employee of the Respondent, and that he holds the position of technician and shares an office with the Director of the Respondent one Mr. Brian Mwenda.
18. The Claimant stated that he had been making claims for salary as shown in his emails filed by the Respondent, and has been working without leave and has been making his own NHIF levies and surviving on facilitation and doing other odd jobs.
19. The Claimant stated that clause 6 of his contract stipulated that he should not engage in any other work as a full-time employee of the Respondent. Further, the Claimant stated that the jobs that he was doing on the side conflicted with his duties at the Respondent's Company.
20. On re-examination, the Claimant clarified that there were no allegations of conflict of his side jobs with his current work.
21. That the both parties had agreed on refund of expenses of moving from one site to another and where he used his own car, they agreed on mileage allowance.
22. In summation, the Claimant urges the Court to allow his claim.

The Respondent's case

23. In response, it is the Respondent's case that if at all the Claimant was in their employment, it was limited to the period from June, 2013 to April, 2016, after which the Claimant absconded duty.
24. The Respondent asserts that during the aforesaid period, the Claimant was paid a gross salary of Kshs. 100,000/= which was inclusive of housing, and was not entitled to any other benefits or allowances.
25. The Respondent states that the Claimant was not entitled to any travel, accommodation or any expenses or benefits as a result of his employment as alleged.
26. Additionally, it is averred that the Claimant never requested, applied or sought authorization from the Respondent to incur the travelling or accommodation expense of Kshs. 878,500/= which he now claims. The Respondent further states that if at all cost or expense was to be incurred by the Claimant as a result of his employment, such costs or expenses would have been directly borne by the Respondent.
27. It is the Respondent's case that the Claimant ceased to report to his work station at the Respondent's place of business from April, 2016 thereby absconding duty, and has since not reported back to work.



28. The Respondent states that the Claimant frustrated his employment by absenting himself from employment and that no contract of employment or employer-employee relationship exist between him and the Respondent.
29. The Respondent further claims that it has never received any demand for the Claimant for his salaries during the period between May 2016 to date, and the Respondent cannot therefore be expected to pay an employee salary that they have not earned. The Respondent avers that it would be unreasonable to expect it pay salary after six years when the Claimant has never reported to work.
30. On the unpaid leave days, the Respondent claims that upon termination of the Claimant's employment, the Claimant took all of his leave days and to date there are no unpaid leave days.
31. It is the Respondent's position that it dutifully deducted the Claimant's PAYE, NHIF and NSSF dues for the period between June, 2013 and April, 2016 when the Claimant was in employment.
32. It is the Respondent's case that there are no employment dues owing to the Claimant for the employment period between June 2013-April 2016.
33. It is RW1' testimony that the Claimant worked for the Respondent on a contract basis as and when required. He stated further that the Respondent did not have a site at KAA as it was closed six years ago and RW1 invited the Claimant to JKUAT Arbitration since he prepares for the Respondent documents and would be paid a commission.
34. RW1 further stated that he closed the office which the Claimant claims to work in back in the year 2017, and has since moved to Meru.
35. On cross-examination, the Respondent stated that the Claimant absconded his duty and subsequently, a mutual separation agreement was entered between the Respondent and the Claimant. He claimed that he did not have a copy of the separation agreement or a letter of termination of his services.
36. The court was told that the Respondent continued to engage the Claimant on a personal basis and not through the Respondent Company wherein, the Claimant used to play his role and used his Company's email.
37. The witness admitted that the house allowance was not included in the payslip.
38. On re-examination, the RW1 asserted that the mutual separation agreement was not in writing, but was oral and that the Claimant continued working for RW1 as a technical person on a personal basis and not on behalf of the Respondent Company.
39. In summation, the Respondent urges the Court to dismiss the Claimant suit with costs.

The Claimant's Submissions

40. It is the Claimant's submission that there was no evidence of separation, no termination letter was issued, no mutual separation agreement, no contract on change of terms to independent contractor.
41. On whether the claim is statute barred, the Claimant submits that though the prayers sought are continuing injuries, time did not start running in April, 2016, but has actually not started running at all as the Claimant is still in employment and is suffering the injuries each new month he is not paid.
42. It is his further submission that time starts to run for continuing injuries when the employer expressly communicates the decision not to pay any salaries or when the contract is terminated, and for reason that there was no indication on whether payment of salaries had been formally stopped, the question of cessation as contemplated in the statute does not arise.



43. The Claimant submits that the burden of proof is on the employer/Respondent to explain how the Claimant's contract ended (if it did which is not the case). That the Respondent did not discharge this burden as it did not exhibit any documents to counter the evidence given by the Claimant.
44. It is submitted that the Claimant has proved on a balance of probabilities that he is still in the employment of the Respondent.

The Respondent's Submissions

45. It is the Respondent's submission that the employment in respect of which the claim is premised ceased in April, 2016 when both the Respondent and the Claimant agreed on a mutual separation, and the Claimant received his last formal payment under the employment contract as explained at paragraph 17 of the Respondent's witness statement. It submits that the Claimant stopped reporting to his former place of work immediately.
46. It is the Respondent's further submission that by virtue of the Claimant's contract ending in April, 2016, this Court lacks jurisdiction to entertain, hear and determine the Claim.

Analysis and Determination

47. I have considered the pleadings in the matter, the witnesses' evidence and the submissions by both parties. The issues for determination are:
 - i. Whether the Claimant is an employee of the Respondent
 - ii. Whether the Claimant is entitled to the remedies sought

Whether the Claimant is an employee of the Respondent

48. The Claimant's case is that he is an employee of the Respondent employed as a Project Manager since 14th June, 2013. The Respondent on its part admitted having employed the Claimant in June, 2013, but that they in April, 2016, separated by mutual agreement.
49. The evidence before court and which is not disputed, is that the Claimant was paid the agreed salary of KShs.100,000/- since he was employed in 2013 to April, 2016. The Claimant now lays claim for salaries and other benefits not paid from April, 2016 to date.
50. There is no doubt that the Claimant was an employee of the Respondent between June, 2013 and April, 2016. The question for the court is whether the Claimant continued in the service of the Respondent after April, 2016.
51. The Respondent's position is that upon its separation with the Claimant in April, 2016, it continued contracting the services of the Claimant, not as an employee, but a consultant who would then be paid a commission.
52. Indeed, as correctly submitted by the Claimant, the mutual separation agreement was not produced in evidence. As submitted further by the Claimant, there are myriad emails between the Claimant and the Respondent and others by the Claimant to the project manager on the works that was being undertaken by the Respondent's company.
53. The emails by the Claimant to the Respondent carried attachments of progress of works at various sites and notification of a potential dispute resulting from non-payment for the work done.



54. In my view, the emails support the Respondent's assertion that though it separated with the Claimant, the Claimant continued to provide consultancy services on most of its projects. This position is informed by the fact that none of the emails sought payment of salary from the Respondent, but were mostly seeking payment owed to the Respondent by its contractors and giving works progress for various sites.
55. It is also unfathomable that an employee whose salary has not been paid since April, 2016 to date, continues to provide services to the same supposed employer and even shares an office with one of the directors of the Respondent, within premises owned by the Respondent that he is now in court with.
56. I am convinced by the Respondent's argument that it separated with the Claimant, but who still provides occasional consultancy services, as nothing supports a regular employer-employee relationship.
57. In the end, I find and hold that the Claimant has not proved that he is still an employee of the Respondent.
58. Further, consultancy contracts are commercial contracts that do not fall within the jurisdiction of this court, and I would thus not venture into whether or not the Claimant is owed under the consultancy arrangement that seem to exist between him and the Respondent.
59. Finally, having found that the Claimant is not an employee of the Respondent, it follows that he is not entitled to the reliefs he seeks under this claim.
60. In whole, I find the claim devoid of merit and is dismissed with costs to the Respondent.
61. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 19TH DAY OF DECEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Odhiambo Present for the Claimant

Ms. Sheunda present for the Respondent

Ms. Esther-CA

