



Tarus v Iten County & Referral Hospital (Employment and Labour Relations Appeal E007 of 2021) [2024] KEELRC 13397 (KLR) (11 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13397 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2021
MA ONYANGO, J
DECEMBER 11, 2024**

BETWEEN

STEPHEN BIWOTT TARUS APPELLANT

AND

ITEN COUNTY & REFFERAL HOSPITAL RESPONDENT

(Being an appeal from the Judgment and decree arising from Senior Principal Magistrate's Court at Iten in ELRC Cause No. 13 of 2019 delivered by the Honourable C. A. KUTWA SPM on 16th July, 2021)

JUDGMENT

1. The Appellant herein was the Claimant in the trial court in which he sued the Respondent in the said suit who is also the Respondent in the instant appeal. Vide a Statement of Claim dated 12th November 2019, the Appellant herein had alleged that his employment was unfairly, un-procedurally and unlawfully orally terminated by the Respondent.
2. In the Statement of Claim, the Appellant averred that he was employed by the Respondent as a plumber in the Respondent's sewerage section and assigned work at the Respondent's sanitation department from 16th August, 2015. The Appellant stated that he worked for the Respondent continuously until May, 2019 when his employment was terminated unfairly, un-procedurally and unlawfully by the Respondent without a valid reason and without paying his terminal dues.
3. The Appellant averred that he was issued with a letter of appointment dated 10th August, 2015 which was for a duration of 3 months commencing 16th August, 2015. He averred that he continued working for the Respondent as a plumber after the duration of the appointment expired.
4. It was the Appellant's case that at the time of termination he was earning a basic monthly salary of Kshs. 10,000 excluding house allowance. That the salary remained constant throughout the duration



- of his employment, even though other employees working in the same position earned Kshs. 45,000 with house allowance and other benefits. That he was therefore discriminated by the Respondent.
5. The Appellant averred that he was treated as a casual for more than 4 years. That between the date of his appointment in 2015 and termination in 2019 the Respondent employed new casual employees who were confirmed into permanent and pensionable terms while the Appellant continued to work as a casual.
 6. The Appellant averred that when he and other casuals demanded to be issued with letters converting their employment to permanent and pensionable terms they were issued with fresh fixed term contracts for 6 months which stated that the contract superseded any pre-existing agreements and upon expiry renewal was not automatic.
 7. That when he and other casuals refused to sign the new contract the Respondent stopped remitting his salary.
 8. In his Statement of Claim the Appellant prayed for the following orders:
 - a. A Declaration that the Claimant is a permanent employee of the Respondent and the contract of employment be reduced into writing or into permanent employment.
 - b. A declaration that the Respondent engaged in unfair labour practices in respect of the Claimant.
 - c. A Declaration that the Claimant was unfairly and unlawfully constructively and orally terminated from employment;
 - d. The sum as set out herein above.
 - e. Certificate of service;
 - f. A declaration that the Claimant was discriminated upon.
 - g. Damages for discrimination.
 - h. Claimant's salary difference be reckoned to August, 2015 until when the claimant was terminated and evaluated upwards in tandem with employees working on similar department and Job group and/or description on the same length of service.
 - i. Cost of this suit and Interests on at court rates from time of filing suit until payment in full and
 - j. Any other further and better relief the Honourable Court may deem just and fit to grant.
 9. The Respondent filed a Response to Statement of Claim dated 13th January 2020 in which it denied the averments in the Claim and specifically denied that the Appellant was ever its employee.
 10. The Appellant filed a reply to the Respondents Response to Claim dated 18th January, 2020 joining issues with the Respondent.
 11. At the hearing the Claimant testified on his own behalf as PW1 while the Respondent called Dr. Kipkemboi Birir, Chief Officer for the County and Dr. Benjamin Muisyo Kimaile, the Medical Superintendent, County Referral Hospital, who testified as DW1 and DW2.
 12. After hearing the parties, the trial court delivered its judgment on 16th July, 2021, dismissing the claim on grounds that the Appellant and his colleagues were not employees of the Respondent.



13. The Appellant being dissatisfied with the trial court's judgment instituted the instant appeal vide the Memorandum of Appeal dated 14th August, 2021 on the following grounds of appeal:
1. That the Hon leaned trial magistrate erred both in law and in fact by failing to direct his mind properly on the provisions of the [Employment Act, 2007](#).
 2. That the Hon leaned trial magistrate erred both in law and in fact in his finding that the respondent was not a legal entity capable of being sued.
 3. That the Hon leaned trial magistrate erred both in law and in fact by holding that the appellants were not employees of the respondent.
 4. That the Hon leaned trial magistrate erred both in law and in fact in his judgment that the appellants were not entitled to remedies sought in their respective statements of claim.
 5. That the Hon leaned trial magistrate erred both in law and in fact in failing to consider the evidence on record.
 6. That the Hon leaned trial magistrate erred both in law and in fact by holding that the respondent did not engage in unfair labour Practices against the appellants.
 7. That the Hon leaned trial magistrate erred both in law and in fact in failing to hold that the appellants were discriminated upon.
 8. That the leaned trial magistrate erred both in law and in fact in dismissing the appellant's statement of claim in their entirety citing grounds in his judgment.
 9. That the judgment of the Hon Leaned trial magistrate is in the circumstance misconceived, unfair and unjust.
14. The Appellant prayed for the following orders:
- a. That the appeal be allowed in its entirety.
 - b. That the judgment of the Hon. Charles Kutwa SPM be set aside and substituted by orders granting the prayers sought in the appellants respective statements of claim to wit:- Iten PMELRC No. 11, 12, 13, 14, 15, 16, 17, 18 ,19, 20 and 21 all of 2019.
 - c. That costs of the appeal be awarded to the appellants;
 - d. Any other relief that this honorable court deems fit and just to grant.
15. The appeal was disposed of by way of written submissions. The Appellant filed his submissions dated 11th March, 2024 while the Respondent's submissions are dated 16th April, 2024.

Appellant's Submissions

16. In his submissions the Appellant set out the following issues for determination:
- a. Whether the Appellants were employees of the Respondent.
 - b. Whether the sued Respondent was the right Respondent to institute these proceedings against.
 - c. Whether the Respondent engaged in unfair labour practices against the Appellants.
 - d. Whether the Hon. Learned Magistrate failed to consider the evidence on record.
 - e. Whether the Appellants are entitled to remedies sought in their respective statements of claim.



- f. Costs of this appeal.
17. On the 1st issue the Appellant submitted that the appellant produced in court a letter dated 10th August, 2015 at page 22 of Record of Appeal confirming he received the letter from Dr. Castro Mugalla who was the Respondent's Medical Superintendent. That the letter confirms the Appellant was employed by the Respondent.
 18. It is submitted that the Respondent did not adduce any evidence to prove that the Respondent's employees are employed by the County Public Service Board and then sent to the Respondent, referring to page 241 to 253 of the Record of Appeal.
 19. It was further submitted that the Respondent did not deny that it issued the letter dated 10th August, 2015. Further, that the Appellant adduced evidence that he was paid salary by the Respondent. It was also submitted that the Respondent did not produce any Muster Rolls or attendance chits to confirm that it did not employ the Appellant.
 20. Relying on the definition of "employee" in section 2 and 10(7) of the *Employment Act*, and the decision in *Kabogo Munene v Equity Bank Limited: Cause No. 1123 of 2012*, the Appellant submitted that the Respondent did not adduce evidence to rebut the Appellant's evidence that he was employed by the Respondent.
 21. On the second issue, it was submitted for the Appellant that section 10 of the *Government Proceedings Act* provides that suits against the Government are instituted according to the rules of the court, in this case, the Magistrates' Court Act and the *Civil Procedure Act*. The Appellant submitted that Order 1 rule 3 of the Civil Procedure Rules provides that a plaintiff can institute a suit against any defendant to whom any right or relief is alleged to exist. That Order 1 rule 5 of the Civil Procedure Rules provides that defendants in a suit need not have an interest in all reliefs. That Order 1 Rule 6 provides for parties to a suit to include those that have an interest in the contract.
 22. It is submitted that section 3 of the *Employment Act* provides that the Act binds the Government. It is submitted that the Respondent herein meets the criteria defining a Respondent in a suit and is therefore the rightful respondent in the instant suit.
 23. The Appellant also relied on the decision in *Eliud Thuku Buku v Paul Karuiki Mwangi & 2 Others [2009]* where the court held that no suit should be defeated by reason of misjoinder or non-joinder of parties. That the court has jurisdiction to substitute a party wrongly sued and to bring on board a party who ought to be sued. It is submitted that the Respondent is rightly sued.
 24. On the 3rd issue whether the Respondent engaged in unfair labour practices it is submitted that the Appellant left work after working for 5 months without pay. That the termination of his employment was constructive. The Appellant relied on the decisions in *Peter Kaburu Karanja v Kirinyaga Construction (K) Limited [2020] eKLR*, and *Maureen Wanjiru Mwangi v Blue Sea Energy Limited [2020] eKLR* where the courts held that failure to pay salary amounted to constructive dismissal.
 25. It was further submitted for the Appellant that he was discriminated by being underpaid compared to his colleagues in similar jobs, and further discriminated when other plumbers were converted to permanent employment terms while he remained a casual. It was further the submission of the Appellant that failure of the Respondent to pay him allowances paid to his colleagues constituted further discrimination.
 26. It was submitted that under section 7 of the *Employment Act* it was the burden of the Respondent as employer to prove that discrimination did not occur as alleged by the employee.



27. It is submitted that the Respondent violated section 37 of the *Employment Act* by not issuing a letter of appointment to the Appellant, relying on the decision in *Janine Buss v Gems Cambridge International School Limited* [2016] eKLR.
28. On issue No. 4 whether the Learned Magistrate failed to consider the evidence on record it was submitted that the Appellant adduced evidence that he was employed by the Respondent by letter dated 10th August, 2015 signed by the Medical Superintendent Dr. Castro Mugalla. That this evidence was not rebutted by the Respondent. That under section 10(7) of the *Employment Act* the Respondent was under duty to disprove the averments by the Appellant which it failed to do.
29. On issue No. 5 whether the Appellant is entitled to the remedies sought the Appellant submitted that having been constructively dismissed the Appellant is entitled to pay in lieu of notice, compensation, salary for days worked and not paid from February to May 2019, service pay, house allowance and leave dues
30. It was submitted that having proved his case the Appellant is entitled to costs.

Respondents Submissions

31. In its submissions the Respondent states that the Iten County Referral Hospital is a health facility/ department established by the County Government of Elgeyo Marakwet. That *the Constitution* of Kenya, the *Health Act* and the County Government Act place the control and management of the said health facility under the County Government of Elgeyo Marakwet.
32. It is submitted that the evidence of DW1 and DW2 was that there were only two health facilities in Kenya that had legal capacity, being Kenyatta National Hospital and Moi Teaching and Referral Hospital. That there was no evidence adduced to prove that Iten County Referral Hospital was a legal entity.
33. It is submitted that the Respondent's witnesses testified that all the employees working in Iten County Hospital are supposed to be employed by the County Public Service Board of Elgeyo Marakwet County.
34. It was submitted that the Learned Trial Magistrate correctly found that the Respondent is not a legal entity capable of being sued.

Analysis and Determination

35. Having considered the record of appeal and submissions of the parties, the issues for determination by this court are the following:
 - a. Whether the Respondent is an employer under the *Employment Act*;
 - b. Whether the Respondent has no capacity to be sued as an employer;
 - c. Whether the Leaned trial Magistrate erred in holding that the Appellant had not proved that he was an employee of the Respondent;
 - d. Whether the Appellant is entitled to the prayers sought in the Statement of Claim
 - e. Who bears the costs



36. Section 2 of the [Employment Act](#) defines an employee and an employer as: -

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“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;

37. The Appellant produced a letter of appointment which I reproduce below:

Elgeyo Markawet County

Department Of Health

To

Stephen Biwott Tanui

BOX xxx

Iten

Re: Acceptance For Vacancy

Name: Stephen Biwott Tanui

ID/NO:2172xxxx

The Hospital Management has decided to employ you as Hospital casual attached to Hospital Sanitation department to handle issues on plumbing and Hospital Sewerage from 16th August 2015 on (3) three months renewable contract.

You will be paid a monthly wage of Ksh. 10,000/= inclusive of NHIF and NSSF. you are further required to write offer of acceptance letter.

We wish you success as you start your assignment.

Yours faithfully,

Signed

Dr. Castro Mugalla

Medical Superintendent

Iten County referral Hospital

cc.

Chief Officer, Health Services

Hospital Accountant

PHO – Hospital Sanitation

38. The Appellant further produced attendance records showing that he was reporting to work, bank statements and NSSF records showing that he was an employee of the Respondent.

39. This evidence was not rebutted. All that the Respondent stated was that the Respondent is not a legal person and that the person who wrote the letter of appointment for the Appellant was not authorized to employ by the County Government of Elgeyo Marakwet which operates the Respondent Hospital



facility. The Respondent however did not deny that Castro Mugalla who issued the Appellant's appointment letter was the Medical Superintendent of the Respondent at the time he wrote the letter. It did not deny that the Appellant reported for work and was paid for work done over the period he was in employment.

40. An employment relationship can either be express or implied according to the definition of contract of employment in section 2 of the Act which is reproduced below:

“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;

41. The *Employment Act* recognizes that an employer includes “the agent, foreman, manager or factor of an employer being a person, public body, firm, corporation or company”.
42. There is no doubt that there was a contract of service between the Appellant and the Respondent. Whether or not the person who issued the letter was authorized to do so is an internal matter for the Respondent that cannot be used against the Appellant who has proved that he was issued with an appointment letter and that he performed work for which he was paid by the Respondent over a period of 5 years.
43. I find that the Learned Trial Magistrate erred in holding that there was no employment relationship between the Appellant and the Respondent.
44. The issue whether the Respondent is a legal entity capable of suing or being sued in the context of section 2 of the *Employment Act* was not addressed by the Trial court. Had the court properly addressed the issue with reference to the definition of employer and employment relationship in section 2 of the *Employment Act*, it should in my view have reached the conclusion that the Appellant had proved that there was an employment relationship between the Appellant and the Respondent, irrespective that the Respondent may not have legal capacity to sue and be sued. This is because the definition in the Act covers any person or body that enters into an employment contract with an individual even in a representative capacity.
45. The Act is very clear about this. In my view this was intended to remove the legal hurdle of legal personality in the law of contract and to make it easy for employees to deal with the person who is the visible employer, taking into account the fact that many employees only know the person they deal with and not the principal on behalf of which that “employer” may represent.
46. Under section 3 of the *Judicature Act*, the *Employment Act* takes precedence over common law and the law of contract as it is specific to employment which is a special contract. Sections 7 to 13 of the Act specify the requirements of employment contracts which employers are under obligation to include in a contract of employment and other responsibilities of employers, including indicating the name of the employer in the employment contract.
47. Section 10(6) as read with 10(7) place the burden of disproving particulars of employment as stated by the employee that are not set out in the employment contract on the employer.
48. Section 16 of the Act provides for enforcement of the Act in very wide terms as follows:

16. Enforcement



- (1) Where an employer does not give an employee a statement as required by section 10, 12 or 13 or an itemised pay statement as required by section 20, the employee may file a complaint with the labour officer and the complaint shall be deemed to be a complaint filed under section 87.
- (2) Where as a result of a complaint arising out of section 10, 12, 13 or 20 the Industrial Court determines particulars which ought to have been included or referred to in a statement given under these sections, the employer shall be deemed to have given to the employee a statement in which those particulars were included or referred to as specified in the decision of the Industrial Court.
- (3) Where under subsection (1) the Industrial Court has to determine whether the statement given complies with a statement under section 10, 13 or 20 the Industrial Court may—
 - (a) confirm the particulars as included or referred to in the statement given by the employer;
 - (b) amend those particulars; or
 - (c) substitute other particulars for them as the Industrial Court may determine to be appropriate, and the statement shall be deemed to have been given by the employer to the employee in accordance with the court’s decision.
- (4) A person who fails to give to an employee a statement as required by section 10, 12, 13 or 20 commits an offence and shall, on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.
- (5) Where a person contravenes the sections specified in subsection (1), a court, on application of the employee or the labour officer on behalf of the employee may, in addition to the penalty specified in subsection (4) order any remedy specified in subsection (3).

49. This court is further under section 20(1) under obligation to dispense justice without undue regard to technicalities. This may explain why the [Employment Act](#) gives a broad definition of employer to include agents of an employer. Section 20(1) provides

“(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities...”

50. Having found that there was an employment relationship between the Appellant and the Respondent as evidenced by the letter of appointment, the proof of performance of the contract by the employee and payment for the work by the Respondent, the next issue is whether the Appellant proved that his employment was unlawfully and/or unfairly terminated.

51. It was the Appellant’s case that the Respondent terminated his employment when he demanded to be confirmed as a permanent and pensionable employee and declined to sign a fixed term contract for 6 months without taking into account the years already served by the Appellant.

52. The Respondent did not deny that this averment of the Appellant. It did not explain why it kept the Appellant on casual/temporary terms of employment for 4 years against the provisions of section 37



of the Act that provides for conversion of casual contracts into regular employment, what is normally referred to as “permanent” contracts.

53. The Respondent further did not deny that the Appellant worked from February to May 2019 without pay or that the Appellant’s employment was constructively terminated by failure to pay salary from February to May, 2019.
54. I find that the Respondent unfairly terminated the Appellant’s employment when the Respondent failed to pay his salary from February to May 2019, thus constituting constructive dismissal.
55. I accordingly find that by constructively dismissing the Appellant, the termination was unfair.
56. On remedies the Appellant prayed for pay in lieu of notice which I award him in the sum of Kshs. 10,000. The Appellant did not prove that plumbers engaged by the Respondent are paid Kshs. 45,000 as alleged in his claim.
57. The Appellant further prayed for compensation. In view of the length of service, the circumstances under which his employment was terminated and the reasons for the termination, I award him 10 months salary as compensation at Kshs. 10,000 x10 being Kshs. 100,000.
58. The Appellant further prayed for salary for February to May, 2019 which I award him at Kshs. 40,000.
59. The Appellant further prayed for service pay which I award him at 15 days’ pay per year for 4 years being Kshs. 20,000
60. The prayer for house allowance is rejected as the appointment letter stated that the salary was consolidated.
61. Having worked for 4 years the Appellant was entitled to annual leave for every year at 21 working days. The Respondent did not rebut the averment that the Appellant did not take leave or produce evidence that the Appellant was either given leave or paid in lieu. I award him Kshs. 28,000 as prayed.
62. The prayer for extraneous allowance was not proved and is rejected.
63. The Respondent shall issue a certificate of service to the Appellant in terms of section 51 of the *Employment Act*.
64. The Respondent shall pay the Appellant’s costs both in this appeal and in the trial court.
65. Interest shall accrue from the date of judgment.
66. In view of the fact that this was a test suit for several files that are not before this court, the trial court shall apply the findings in this judgment to all the associated files.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 11TH DAY OF DECEMBER 2024.

M. ONYANGO

JUDGE

