



**Korir v Kenya National Farmers Federation (Cause 1286 of 2017)  
[2023] KEELRC 462 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 462 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1286 OF 2017  
BOM MANANI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**GIDEON KOSGEI KORIR ..... CLAIMANT**

**AND**

**KENYA NATIONAL FARMERS FEDERATION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant has instituted this suit to claim the sum of Ksh 1,755,000/= being alleged salary arrears from the Respondent. It is the Claimant's contention that the Respondent, who was his employer, failed to pay him the aforesaid amount being salary for the period running between December 2015 and July 2017.
2. The Respondent has denied liability for the amount. According to the Respondent, the Claimant ceased being its regular employee at the close of December 2015. After this period, the Claimant would only be engaged by the Respondent occasionally for specific assignments on need basis. As a result, he was not on the Respondent's monthly payroll. The amount claimed by the Claimant in alleged salary is therefore without basis.

**Claimant's Case**

3. The Claimant states that he was employed by the Respondent in 2008. He was initially engaged as a Project Accountant in charge of the North Rift before he rose through the ranks to become the Senior Finance Officer/Assistant Manager 1, a position he allegedly held until July 2017 when he opted out of employment of the Respondent.
4. It is the Claimant's case that beginning close of December 2015, the Respondent stopped paying the Claimant's monthly salary of Ksh 90,000/=. The Claimant contends that this state of affairs persisted until July 2017 when he filed the current claim.



5. As at July 2017, the Claimant avers that he had not received salary for a period of twenty (20) months. According to him, the cumulative arrears for the period stood at Ksh 1,755,000/=. He therefore prays for judgment for this amount together with accrued interest and costs of the case.

### **Respondent's Case**

6. On its part, the Respondent concedes that the parties initially had a long-term employer-employee relation. However, this relation allegedly came to an end on December 31, 2015. The Respondent asserts that in 2015, it experienced a financial downturn that made it impossible for it to retain permanent staff. As a result of the alleged downturn, the Respondent's Board passed a resolution by which it laid off all its employees effective December 31, 2015.
7. The Respondent avers that the Claimant's contract was coming to a close around the end of December 2015. Due to the financial strain the Respondent was experiencing, a decision was allegedly taken not to renew the contract.
8. It is the Respondent's case that after the December 2015 layoffs, it entered into fresh labour arrangements with some of the affected employees by which the individuals were now to offer their services on need basis. It is the Respondent's position that the Claimant was one of the individuals that entered into this subsequent labour supply arrangement.
9. According to the Respondent, all individuals who entered into this latter arrangement were not on regular terms of employment with the Respondent. They were engaged on piece rate and need basis to offer services only when required. As a consequence, they were not on the Respondent's monthly payroll. They would only draw payments for specific jobs that were assigned to them from time to time. It was the Respondent's case that between January 2016 and July 2017, the Claimant operated under this arrangement.
10. The Respondent contends that the Claimant was paid all monies due to him under this new arrangement. That when he quit employment in May 2017, the Claimant's final dues arising from the arrangement aforesaid totaling Ksh 1,189,935/= were paid to him.

### **Issues for Determination**

11. The parties did not file a list of agreed issues for determination. After carefully analyzing the pleadings and evidence on record, the following are the issues that present for resolution:-
  - a. Whether the Claimant remained a regular employee of the Respondent after December 31, 2015.
  - b. If the answer to a) above is in the affirmative, whether the Respondent settled the Claimant's salary for the period between January 1, 2016 and July 2017.
  - c. Whether the parties are entitled to the reliefs pleaded.

### **Analysis and Determination**

12. In order to resolve the dispute between the parties, it is perhaps necessary to first reflect on the law that applies to the relation. The Claimant states in his pleadings that he was first employed by the Respondent in 2008. Although in its amended defense the Respondent denies this fact, its witness, through his written witness statement dated July 29, 2022 admits that the Claimant was indeed an employee of the Respondent until December 31, 2015 when his contract was allegedly not renewed.



13. The *Employment Act*, 2007 came into force on June 2, 2008. As it is unclear when in 2008 the parties entered the employment relation, it is not possible for the court to determine whether the relation commenced before or after the Act had come into force.
14. The Respondent asserts that the Claimant's contract was terminated on December 31, 2015. This was during the currency of the aforesaid statute. Section 93 of the Act provides as follows:-
- ‘A valid contract of service, and foreign contract of service to which Part XI applies, entered into in accordance with the *Employment Act* (now repealed) shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly.’
15. Section 3 of the Act, in part, provides as follows:-
- a. This Act shall apply to all employees employed by any employer under a contract of service.
  - b. This Act shall not apply to:-
    - i. The armed forces or the reserve as respectively defined in the *Armed Forces Act* (Cap 199);
    - ii. The Kenya Police, the Kenya Prisons Service or the Administration Police Force;
    - iii. The National Youth Service; and
    - iv. An employer and the employer's dependants where the dependants are the only employees in a family undertaking.
  - c. This Act shall bind the Government.
16. From the transitional clause under section 93 of the Act, it is clear to me that the *Employment Act* applies to cover the relation between the parties to this dispute. Further, section 3 of the Act does not exclude the parties to the action from its purview.
17. It is without doubt that the parties had a long-term contract of service before it allegedly came to a close on December 31, 2015. According to the Respondent, it terminated all contracts between it and its various employees through its Board resolution passed on December 3, 2015. A copy of the said resolution was produced as defense exhibit. As the Claimant's contract was allegedly coming to a close around the same time, it was allegedly not renewed.
18. On his part, the Claimant denies that his employment came to a close as alleged by the Respondent. The Claimant denies knowledge of the resolution by the Respondent by which his contract of employment was allegedly either terminated or not renewed. It was the Claimant's case that he continued in regular employment of the Respondent after 2015. He denied serving the Respondent on casual or call basis after December 2015.
19. I have looked at the resolution in question. It appears to me that this was a unilateral decision by the employer to terminate all its employees. There is no evidence that any employee was consulted in the process.



20. The reason for the proposed termination was that the Respondent was undergoing financial strain. In effect, the Respondent was pleading redundancy as the ground for terminating the contracts of its various employees. Yet, there is no evidence that the Respondent invoked the redundancy procedure under section 40 of the *Employment Act* to close the various contracts of service with its employees. Evidently, the legitimacy of the alleged termination is doubtful.
21. Contracts of employment between an employer and employees are individual in nature. It is therefore doubtful that such contracts can be brought to a close through a communal notice which is not shown to have been brought to the attention of individual employees.
22. In respect of the Claimant, the Respondent pleads that after closing his long-term employment on December 31, 2015, it immediately entered into a fresh arrangement with him through which the Claimant was to continue offering labour on need basis. However, there is no evidence that the Respondent communicated to the Claimant the fact that it had terminated his employment on December 31, 2015 allegedly on account of inability to continue paying his monthly salary. As admitted by the defense witness, there is no evidence that the Claimant's attention was drawn to the Respondent's Board resolution of December 3, 2015.
23. Alternately, the Respondent suggests that the Claimant's contract terminated in December 2015 upon lapse of time. However, no evidence that the Claimant was engaged on a fixed term contract was presented to court. In terms of sections 9 (2) and 10 (7) of the *Employment Act*, the duty to have a contract of service whose tenure exceeds three months reduced into writing and to prove its terms rests with the employer.
24. There is also no evidence that the Respondent notified the Claimant that moving forward from January 1, 2016, he would be re-engaged on fresh terms where he was to offer services on need basis without a regular salary. How was the Claimant to know of the transition that the Respondent now pleads?
25. Importantly, the document dated May 15, 2017 produced by the Respondent as proof of the Claimant's final dues shows that the dues in question had been accruing at a constant rate and on monthly basis from February 2016 up to April 2017. The figure representing the monthly accruals remained constant at the rate of Ksh 67,329 per month for the entire period. As a matter of fact, the document refers to these fixed and apparently standard monthly accruals as salary. This evidence, in my view, supports the Claimant's assertion that he was engaged by the Respondent as a regular employee entitled to draw a regular salary for the period under review.
26. If not for anything else, the Respondent's document dated May 15, 2017 is material in so far as it confirms that the parties remained in their labour relation continuously for the period between February 2016 and April 2017. It demonstrates that the Respondent allowed the Claimant to remain in continuous service after January 2016. This is despite the Respondent's resolution of December 3, 2015 allegedly terminating the Claimant's services with effect from December 31, 2015.
27. Under section 10 (5) of the *Employment Act*, whenever an employer proposes to change the character of a subsisting contract of service, he has a duty to consult the affected employee and document the alterations. It is this court's position that the events of December 2015 and January 2016 that the Respondent alludes to in effect sought to alter the character of the contract of service between the parties. By these activities, the Respondent purported to alter the Claimant's contract of service from an indefinite term contract to a piece-rate need based contract. Yet, there is no evidence that the Claimant was consulted on the matter or that the process was documented as required by law. The purported exercise, if at all, was therefore a sham and of no legal consequence.



28. The Respondent has tendered in evidence copies of letters to its bankers dated January 11, 2016 and January 21, 2016 instructing the bankers to "process our staff salaries". The letters give a list of members of staff which includes the Claimant. The *Concise Oxford English Dictionary* defines the term staff to inter alia, mean "the employees of a particular organization".
29. On the basis of the above evidence, I am convinced that between January 1, 2016 and May 2017 the parties were working under a regular employer-employee relationship. They were not engaged on need or piece rate terms as suggested by the Respondent. Otherwise, it would be difficult to account for the constant and regular emoluments that continued to accrue to the Claimant from February 2016 to April 2017 as evidenced by the Respondent's own document setting out the Claimant's final dues. It will also be difficult to account for the sum of Ksh 90,000 paid to the Claimant to cover the January 2016 salary as indicated by the defense witness.
30. If the parties were working on piece rate and need basis, one would expect variations in the Claimant's monthly earnings. Payments for piece rate work are usually pegged on successful execution of specific tasks that are assigned to the employee. Such employee may not maintain constant output throughout. Some variations in achieving his targets will be expected.
31. On the other hand, an employee working on need basis only reports to work whenever there is need. Reasonably, it is expected that there will be some variations in the pay made to such employee over an extended period of time since the times that the employee will be required to work in any given month will not always be equal. It is therefore highly doubtful that even as he allegedly served on piece rate and need basis, the Claimant was able to attract a fixed monthly remuneration of Ksh 67,329/= throughout the period between February 2016 and May 2017.
32. The next issue for determination relates to whether the Respondent settled the Claimant's salary for the period between January 1, 2016 and July 2017. On this, the Respondent's position was that the Claimant was not on regular salary after December 2015. He was only paid periodically after accomplishing intermittent tasks that were assigned to him by the Respondent. However, as has been observed in the preceding sections of this decision, there is evidence that the Claimant remained in continuous employment of the Respondent between January 2016 and around May 2017.
33. That this is the position is self evident from the Respondent's own computation of the Claimant's dues. The document sets out what it refers to as the Claimant's salary and which, as has been stated above, remained constant between February 2016 and April 2017. The Respondent also stated that it paid the Claimant salary for January 2016 implying that the Claimant worked during this month.
34. There is evidence that the Claimant's monthly salary before 31<sup>st</sup> December 2015 was Ksh 90,000/=. The Claimant testified on oath on this issue. Further, during cross examination of the Respondent's witness, he stated that the Claimant's last monthly salary as paid in January 2016 was Ksh 90,000/=.
35. In defense exhibit number two (2), the Respondent alludes to the Claimant's exit gross salary as Ksh 90,000/=. It is to be noted that this document is a computation of the Claimant's final dues accruing between February 2016 and April 2017. From this document, it is clear that the Respondent confirms that the Claimant was on a gross monthly salary of Ksh 90,000/= at the point of exit.
36. In its evidence, the Respondent acknowledges that at the close of April 2017, it owed the Claimant Ksh 1,189,935/= allegedly in "final dues". However, a look at defense exhibit 2 demonstrates that what the Respondent describes as "final dues" for the Claimant was in fact the unpaid net monthly salary for the Claimant running between February 2016 and April 2017. The question is why would the Respondent admit it's obligation to pay the Claimant this sum whilst at the same time deny that it owed him unpaid salary for the duration? In my view, this document alone is sufficient admission by



the Respondent that the Claimant had rendered continuous service to the Respondent for the period under consideration for which he had not been remunerated.

37. In an attempt to fight off the claim, the Respondent's witness stated that all amounts due to the Claimant had either been deposited into his bank account or paid to him in cash. In attempted proof of this assertion, the Respondent's witness produced defense exhibits numbers 5, 6 and 7 being letters by the Respondent to its banker instructing it to pay some monies in the form of salary to the Claimant and other members of staff. For the avoidance of doubt, the amounts allegedly paid to the Claimant do not, as the Claimant's counsel points out, exceed Ksh 178,626/=.
38. These documents are not evidence of payment of the amounts mentioned in them. They are evidence of instructions to the Respondent's bankers to pay out the amounts. Whether the instructions were effected is a different matter. Evidence of actual payments would be in the form of bank statements by the Respondent showing that the money left its account into the Claimant's account.
39. The Claimant denied having received the payments from the Respondent. It is the Respondent who asserts that it paid the Claimant Ksh 1,189,935/= in settlement of his dues. The Respondent wants the court to rely on this assertion to make a finding that indeed the Claimant was paid Ksh 1,189,935/=.
40. In terms of section 109 of the *Evidence Act*, the evidential burden of proof lay with the Respondent to prove that it had paid the Claimant the amount it alleges of Ksh 1,189,935/=. This burden cannot shift to the Claimant to prove that he did not receive the money by producing his bank statements as suggested by the Respondent's counsel.
41. In any event, documents evidencing payment of the money would ordinarily be within the special knowledge of the Respondent as the initiator of the payments. In terms of section 112 of the *Evidence Act*, the burden of proof lay with the Respondent to prove these facts since they are within its special knowledge.
42. The Respondent conceded in his evidence that the Claimant left employment in May 2017. However, it produced no evidence to show that it had settled the Claimant's salary to this date as it alleged. In the premises, I hold that there is sufficient evidence to demonstrate on a balance of probabilities that the Respondent owes the Claimant salary for the period between February 2016 and May 2017. There is no evidence from the Respondent that it had paid the salary arrears contrary to its assertions.
43. In *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR, the Court of Appeal expressed itself as follows on a near similar issue:-

“On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of Section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the *Employment Act*.

Beginning with salary arrears, it is common ground that the respondent's employment came to an end on 10<sup>th</sup> November, 2013. As per the respondent, she had not been paid for the months of July, August, September and October, 2013 prior to the determination of her employment. In contrast, the appellant denied the existence of such arrears. On our part, taking into account that the appellant did not produce any evidence of payment of the respondent's salary during this period we are inclined to give the respondent the benefit of doubt. Therefore, we concur with the ELRC that the appellant



owed the respondent salary arrears for the months of July, August, September, October and 10 days in November, 2013.”

44. Accordingly, I find that the Claimant is entitled to salary for the period between February 2016 and May 2017. At Ksh 90,000/= per month, this works out to Ksh 1,350,000/=. I enter judgment for the Claimant for this amount plus interest at court rates. The amount is subject to the applicable statutory deductions.
45. I also enter judgment for the Claimant for costs of the suit.

#### **Summary of the Award**

- a. The court finds that the Claimant remained in continuous employment of the Respondent after January 2016 until May 2017 when he opted out of employment.
- b. The court finds that the Claimant was entitled to draw monthly salary for this period.
- c. The court finds that the Respondent did not pay the Claimant salary for the period between February 2016 and May 2017 amounting to Ksh 1,350,000/=.
- d. Judgment is entered for the Claimant against the Respondent for the sum of Ksh 1,350,000/=.
- e. The Claimant is awarded interest on the amount at court rates.
- f. The amount is subject to the applicable statutory deductions.
- g. The Claimant is awarded costs of the suit.

**DATED, SIGNED AND DELIVERED ON THE 23<sup>RD</sup> DAY OF FEBRUARY, 2023**

**B. O. M. MANANI**

#### **JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

#### **ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**

