



**Gangla v Linksoft Intergrated Services (EA) Ltd & another (Cause 36 of 2017) [2023] KEELRC 397 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 397 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 36 OF 2017  
HS WASILWA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**TOM OLOO GANGLA ..... CLAIMANT**

**AND**

**LINKSOFT INTERGRATED SERVICES (EA) LTD ..... 1<sup>ST</sup> RESPONDENT**

**CAREER DIRECTION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This suit was instituted by the Claimant against the Respondents alleging to have been unfairly terminated and seeking for compensation for the unfair termination. 14 other similar suits against the Respondents being ELRC Cause Nos 3, 39, 40, 41, 54, 55, 56, 86, 87, 88, 132, 161, 410 and 411 all of 2017 that arose from the same circumstances and facts were ordered on October 16, 2018 by consent of parties, to be considered alongside this Cause, with this cause was marked as the test suit.
2. The summary of this case is that, the Claimant was employed by the Respondents commencing February 3, 2015 up to June 15, 2016 when he was dismissed. He stated that the 2<sup>nd</sup> Respondent was the agent and or the sub-contractor of the 1<sup>st</sup> Respondent, who was contracted to provide labour for the 1<sup>st</sup> Respondent.
3. He stated that he used to report to work at 6am and clock out at 6pm on all days of the week without any off day or leave for the 1 year worked. Further that he was underpaid and not paid House allowance as provided for under the law.
4. It was his case that sometimes on January 12, 2016, the Respondents changed his employment contract and offered him a three months' temporary contract that was to end sometimes in April, 2016. He served the said contract and upon completed, he was allowed to continue working but that he did not sign any other contract. He served the Respondents till June 15, 2016 when his services were cut short. At the time of dismissal, he was earning Kshs 36,500/=.



5. The Claimant herein prays for the following reliefs;
  - 1) A declaration that the Claimant's termination is unfair, illegal and unlawful in the circumstances.
  - 2) A declaration that the temporary contract of employment introduced on January 12, 2016 is illegal, null and void.
  - 3) The Respondent to pay the following; -
    - i. One-month salary in lieu of notice of Kshs 36,500.
    - ii. Leave days.
    - iii. Public holidays.
    - iv. House allowance.
    - v. Compensation for unfair termination equivalent to 12 months' salary.
    - vi. 6 months NSSF dues not remitted.
    - vii. 6 months NHIF dues not remitted.
    - viii. General damages.
    - ix. Certificate of service.
  - 4) Interest on (3) herein above at Court rates.
  - 5) Any other relief this Court may deem fit to grant.
6. During hearing, the Claimant testified as CW-1 and adopted his witness statement of February 14, 2014 together with the list of documents of even date marked as Exhibit 1-6.
7. Upon cross examination by the 1<sup>st</sup> Respondent's advocate, he testified that he was employed by the 2<sup>nd</sup> Respondent as indicated in the employment contract dated 3.2.2015 and the addendum. He stated that the issue that forced him to file this suit was non-payment of his terminal dues including NHIF and NSSF statutory dues. He stated that he was to be paid all these dues by the 2<sup>nd</sup> Respondent however that he sued the 1<sup>st</sup> Respondent because on termination the payslips reflected the name of the 1<sup>st</sup> Respondent.
8. It was his testimony that he signed the addendum contract, that changed his contract to three-months contract, to acknowledge receipt of the contract but not in acceptance of the terms of engagement indicated in the said addendum. He testified that upon termination, they were given three days to vacate the premises.
9. On cross examination by the 2<sup>nd</sup> Respondent's advocates, the witness testified that he entered into two employment contract with the last one running for three months from January 15, 2016. He testified that they received a Memo of termination from the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent and at that point they were denied entry to Menengai. He testified that his contract stated that he was to work for 12 hours from midnight to midday every day of the week including Sundays however that he worked for 14 days and went for off duty for 14 days in a month. It was his case that he was deducted NSSF and NHIF but the same were not remitted to the statutory bodies beginning March, 2016 till termination in June, 2016.



## **Respondents' case.**

10. The Suit is opposed by the Respondents who entered appearance on the March 22, 2017 and filed a joint defence on the April 11, 2017 denying the contents of the claim and stating that the termination was fair and lawful.
11. The Respondents denied allegation that the Claimant worked during public holidays. It was their case that the Claimant was granted two paid days in two weeks as per the contract and on the allegation of underpayment it was averred that the Claimant was paid a competitive salary which was above the statutory wage Order. Moreover, that the Claimant was provided food and accommodation as such the claim of House allowance is not tenable.
12. The Respondents stated that the reason for termination was because they had lost the parent contract with Geothermal Development Company (GDC). Also that they gave the Claimant sufficient notice before the said termination.
13. On the reliefs sought, the Respondents aver that the Claimant should be awarded notice pay but for 26 days because the notice given was served for 4 days. NSSF claim was also admitted.
14. On January 31, 2018, the 1<sup>st</sup> Respondent changed its advocate and filed an amended defence to claim on the March 20, 2019 denying the entire claim and in particular stated that the Claimant was employed by the 2<sup>nd</sup> Respondent but later seconded to the 1<sup>st</sup> Respondent.
15. It is stated that the Claimant was granted two off days as per the contract of employment entered between him and the 2<sup>nd</sup> Respondent as such the claim of leave pay is not warranted.
16. It was the 1<sup>st</sup> Respondent's case that the salary agreed between the Claimant and the 2<sup>nd</sup> Respondent included house allowance and in any case that the Claimant was housed at the expense of the 1<sup>st</sup> Respondent. He reiterated that the employment contract at all material times was between the Claimant and the 2<sup>nd</sup> Respondent and that the Claimant only worked for it on secondment terms.
17. The 1<sup>st</sup> Respondent avers that it got a contract from Geothermal Development Company (GDC) that caused it to seek for manpower services from the 2<sup>nd</sup> Respondent who seconded the Claimant as Rigfloorman. However, that the contract with GDC came to an abrupt end, forcing it to issue notice for the termination of all its work force that obtain employment pursuant to the said Contract, which included the Claimant.
18. The 1<sup>st</sup> Respondent avers that the contractual terms entered between the Claimant and the 2<sup>nd</sup> Respondent are the same terms the Claimant served while in secondment with the 1<sup>st</sup> Respondent, therefore that the agreed salary was Kshs 35,000 which was paid to the Claimant when due, therefore, the Claimant was not underpaid.
19. The 1<sup>st</sup> Respondent stated that the Claimant ought to have sought for the certificate of service from the 2<sup>nd</sup> Respondent and added that it has been willing to issue a certificate of service to the Claimant for the few months he worked for it.
20. On the reliefs sought, the 1<sup>st</sup> Respondent denied owing the Claimant notice pay because, he was issued with sufficient notice before the said termination. He denied owing the Claimant any house allowance arrears because the Claimant was housed by the 1<sup>st</sup> Respondent. They then denied all the other reliefs and put the Claimant to strict proof thereof.
21. During hearing, the 1<sup>st</sup> Respondent Summoned its Human Resource officer, Ms Faith Mugambi, as its first witness (RW-1) who adopted her statement of February 28, 2022 and produced documents dated



- January 28, 2018 as the 1<sup>st</sup> Respondent Exhibits. She testified that she notified all employees of the looming termination as communicated by the 2<sup>nd</sup> Respondent. It was her testimony that that the 2<sup>nd</sup> Respondent was responsible for statutory remittance. She maintained that the termination arose out of a government directive terminating the contract that created the employment with the Claimant.
22. Upon cross examination by the Claimant's Advocate, she testified that the 2<sup>nd</sup> Respondent was the employer of the Claimant and that they never entered into any employment relationship with the Claimant though he admitted that it's the 1<sup>st</sup> Respondent that issued the termination notice.
  23. Upon cross examination by the 2<sup>nd</sup> Respondent's Advocate, the witness testified that the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents came about due to outsourcing agreement. The witness did not provide the government directive document and sought to rely on the Memo from the 1<sup>st</sup> Respondent dated June 15, 2016. It was her case that the contract between the Respondents was terminated and the subsequent issues that arose thereafter were settled in Court by consent of the Respondents. She testified that the 1<sup>st</sup> Respondent had agreed to settle all the terminal dues for the Claimant and all the employees affected as per the letter of June 10, 2016 addressed to Career direction.
  24. On re-examination the witness testified that the 1<sup>st</sup> Respondent paid the Claimant and all employees all their salaries up until the date of termination. She stated that part of the consent recorded in Court in settling the issues between the Respondents included some amount which was paid to the 2<sup>nd</sup> Respondent on September 29, 2016. She concluded that the 2<sup>nd</sup> Respondent was the one to remit statutory dues.
  25. The 2<sup>nd</sup> Respondent summoned, Rodgers Wafula, its legal officer as RW-2. RW-2 adopted his witness statement of 2.11.2021 and in addition testified that the Respondents' dispute arose when the 1<sup>st</sup> Respondent failed to pay management fees and salaries. The issue was raised in a suit filed in Nairobi, Milimani Court. He stated that the parties entered into a consent in that case to separate amicable and a figure was agreed upon which the 1<sup>st</sup> Respondent was to remit to the 2<sup>nd</sup> Respondent, which amount was not for payment of employees' salaries. It was his case that the 2<sup>nd</sup> Respondent was in charge from 3.2.2015 until February, 2016 where the 1<sup>st</sup> Respondent took over. He maintained that there were no complaints from the employees for the period, they were in charge.
  26. On cross examination by the Claimant's advocate the witness testified that the employment contract exhibited in Court is between the Claimant and the 2<sup>nd</sup> Respondent. He stated that the Claimant was not consulted before the addendum was signed. Also that 2<sup>nd</sup> Respondent did not issue any termination letter to the Claimant.
  27. Upon cross examination by the 1<sup>st</sup> Respondent's advocate, the witness testified that when the 1<sup>st</sup> Respondent took over the Employees, it took over the responsibility of remitting salaries and released the 2<sup>nd</sup> Respondent from its obligation save for statutory deductions. He stated that the amount in arrears that had taken them to Court was in excess of Kshs 6 Million, which he admitted include; salaries, disbursements and statutory claim. He however reiterated that their responsibility over the Claimant ceased in February, 2016 when the 1<sup>st</sup> Respondent took over and began to make direct payment to the employees. He thus urged this Court to place any wrongdoing on the shoulders of the 1<sup>st</sup> Respondent.

### **Claimant's Submissions.**

28. The Claimant submitted from the onset that his termination from employment was unfair for want of notice as provided for under section 35 of the *Employment Act*. It was argued that there was no reason



given before the said termination was effected contrary to the dictates of section 43 of the Employment Act, thus the termination was unfair.

29. The Claimant submitted that the move by the 2<sup>nd</sup> Respondent to unilaterally change the terms of contract from a continuous employment to a contract of 3 months was in violation of provisions of section 10(5) of the Employment Act, that contemplates consultations with the employee before any term of the contract is changed. To support this argument, the Claimant relied on the case of James Angawa Atanda & 10 others v Judicial Service Commission [2017] eKLR where the Court held that;
- “Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essentialia of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.”
30. On the reliefs sought, the Claimant submitted that he was not issued with any notice before termination, therefore pay in lieu of notice should issue. He urged this Court to declare the addendum to contract of January 15, 2016 illegal. He then prayed to be compensated for the unfair termination and be paid leave, house allowance not paid, public holidays worked and to be reimbursed the NSSF and NHIF deducted but not remitted.
31. The Claimant also urged this Court to award him general damages for breach of contract which the 2<sup>nd</sup> Respondent unilaterally changed to a short term contract without any consultation. The Claimant also prayed to be given certificate of service and awarded costs of this Suit.

#### **1<sup>st</sup> Respondent's Submissions.**

32. The Respondent herein submitted that the relationship between it and the Claimant came about as a result of secondment by the 2<sup>nd</sup> Respondent pursuant to a contract it received from Geothermal Development Company which required an additional manpower informing the decision to source for man power from the 2<sup>nd</sup> Respondent. It was argued that the terms of engagement remained the same and the guiding contract of employment was the one between the Claimant and the 2<sup>nd</sup> Respondent.
33. It was submitted that the employment contract that had been issued to the 1<sup>st</sup> Respondent was terminated by a Government directive and the 1<sup>st</sup> Respondent on receipt of the said communication informed the 2<sup>nd</sup> Respondent and directed the 2<sup>nd</sup> Respondent to initiate separation process between it and all the seconded employees. It was argued that the termination of employment was not by design but because of the Government directive. Further that the 1<sup>st</sup> Respondent had undertaken to pay the employees terminal benefits upon receiving pending payment from Geothermal Development Company which has not been paid to date. Additionally that the Claimant and all seconded employees were given 30 days' notice before the employment came to an end. On that basis the Respondent herein argued that the Claimant is not entitled to compensation because the employment was frustrated by revocation of contract by GDC through Government directive.
34. To support this argument the 1<sup>st</sup> Respondent relied on the case of Naim Bilal Yaseen v Judicial Service Commission [2019] eKLR that cited the case of David Barasa v British peace Support Team and another [2016] eKLR where Court held that;

“A Secondment in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing



authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so placed.”

35. The Respondent also relied on the case of *Rev John Mugania v Kenya Methodist University and Prof Mutuma Mugambi*, cause 133 of 2013 where the Court with regard to secondment stated that;

“... secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment.”

36. From the foregoing, the 1<sup>st</sup> Respondent submitted that the termination came about as a result of the termination of the parent contract with GDC; therefore the termination was not intentional or unfair.
37. On the consent entered into between the Respondents, the 1<sup>st</sup> Respondent submitted that the same did not indicate the time frame covered. It was argued that the letter by the 1<sup>st</sup> Respondent seeking to pay the employees directly was to avert any other strikes that was organized by employees due to late payment of salaries by the 2<sup>nd</sup> Respondent which did not in any way shift the roles of the parties or create direct employment relationship between the Claimant and the 1<sup>st</sup> Respondent. On that basis, the 1<sup>st</sup> Respondent submitted that the prayers sought by the Claimant as against it are not warranted and the same should be dismissed with costs.

#### **2<sup>nd</sup> Respondent's Submissions.**

38. The Respondent submitted on two issues; whether it is liable for termination of the Claimant's contract and whether the Claimant is entitled to the reliefs sought;
39. On the first issue, it was submitted that the 2<sup>nd</sup> Respondent did not instigate the termination of the Claimant and therefore it ought to be exonerated from any claim in this case. It was argued that the first contract was issued on February 3, 2015 which was open, however on January 15, 2016 the Claimant was issued with a fixed term contract that lapsed on 12<sup>th</sup> April, 2016. He argued that the termination of the contract, subject of these proceedings, was made on June 15, 2016 long after the lapse of employment contract between the Claimant and the Respondent. Therefore, that the 2<sup>nd</sup> Respondent was not to be blamed for termination. To support the argument, they relied on the case of Registered trustees of the *Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho Kariuki* [2017] eKLR where the Court held that;

“we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the Respondent's contract ought not to have been maintained.”

40. The 2<sup>nd</sup> Respondent submitted that the relationship between it and the 1<sup>st</sup> Respondent was governed by the Bid agreement and the Sub-contractor agreement which spelt out clear roles of each party. He



argued that disagreement arose between the Respondents because the 1<sup>st</sup> Respondent failed to settle the invoices raised by the 2<sup>nd</sup> Respondent and to alleviate the issues, the 1<sup>st</sup> Respondent resolved to pay the employees directly with effect from January 1, 2016. In response the 2<sup>nd</sup> Respondent sued the 1<sup>st</sup> Respondent in Milimani Commercial Court to recover arrears and generally challenge the unprocedural nature the 1<sup>st</sup> Respondent took in terminating the agreement between them. In the said case, a consent was entered on the September 26, 2016 agreeing inter alia for the 1<sup>st</sup> Respondent to handle and settle all employment issues with the staff seconded to GDC from January 12, 2016 till the date of termination. Therefore, that any inaction between January, 2016 till termination is to be borne by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent bears responsibility for any action prior to 2016.

41. The Respondent submitted with regard to the legality of the Addendum contract of January 15, 2016 and argued that none of the Claimants ever contested the contents of the said contract. Rather that they all signed the said contract voluntarily without raising any question, therefore that the allegation that the contract was illegal is an afterthought which ought to collapse on its weight.
42. On the reliefs sought, the 2<sup>nd</sup> Respondent submitted with regard to House allowance that, the claim is unwarranted because the salary given was a cumulative sum which included house allowance even though the same was not indicated in the Claimant's pay slip. On leave and public holidays pay, it was submitted that the Claimant worked for 12 hours in a day for only 14 days in a month with the other 14 days reserved for off duty, Furthermore, that the Claimant was given 2 off days within a month, thus the claim on this head is not warranted.
43. On the NSSF and NHIF dues, the 2<sup>nd</sup> Respondent submitted that it paid all these statutory deductions for the period between February, 2015 to March, 2016 when it was in control of paying the Employees. The duration which was not paid was when the 1<sup>st</sup> Respondent was in charge and he should be penalized for the same.
44. In conclusion, the 2<sup>nd</sup> Respondent urged this Court to find the 1<sup>st</sup> Respondent at fault and award it costs for defending this suit.
45. I have examined all the evidence and submissions of the parties herein.
46. From the documents provided herein, the Claimant was issued an employment contract by Career Directions Ltd, on February 3, 2015.
47. The letter indicated that he was to be seconded to Geothermal Development Company (GDC) at Menengai.
48. In paragraph (1) of the contract, the employer is defined as Career Direction Ltd, a private limited liability company incorporated in Kenya under the Companies Act of Kenya.
49. The client is Geothermal Development Company (GDC).
50. The contract was effective February 3, 2015  
"shall continue until terminated by either party on notification as per the stipulated notice period".
51. In view of these provisions in the contract, it is explicitly clear that the employer of the Claimant was the 2<sup>nd</sup> Respondent herein.
52. It is also indicated that by a consent of the parties in the Chief Magistrates Milimani Court, Civil Suit No. 4943 of 2016, the Respondents herein agreed that the 1<sup>st</sup> Respondent was to handle all the issues



with the staff seconded to GDC from 12<sup>th</sup> February, to June 19, 2016 and to keep the 2<sup>nd</sup> Respondent herein indemnified from all claims arising during that period.

53. It is averred by the 2<sup>nd</sup> Respondent that the Claimants and others who are Claimants in other suits were terminated in or about the month of June 2016.
54. The Claimants herein was terminated on June 15, 2016 vide a letter written by the 1<sup>st</sup> Respondent.
55. There is no letter terminating their employment from the 2<sup>nd</sup> Respondent though.
56. That notwithstanding the consent between the parties recorded as an order of the Court was to indemnify the 2<sup>nd</sup> Respondent of all liabilities arising out of any claims arising during the period in contention.
57. The 1<sup>st</sup> Respondent never appealed the decision and he has not indicated that the consent was obtained fraudulently or by coercion.
58. That being the position it is my finding that the 1<sup>st</sup> Respondent is liable to pay dues arising out of the claim between the Claimant and the Respondents herein.
59. The Claimant has sought various dues. The 1<sup>st</sup> one is to fault the Respondents for his unfair termination. Indeed, the termination was affected by the 1<sup>st</sup> Respondent vide a letter dated 15/6/2016 which was after the consent recorded in Court CM's Civil 4943 of 2016.
60. The 1<sup>st</sup> Respondent is the issuer of the termination letter and this was done without due process. No notice was given, then the 1<sup>st</sup> Respondent is responsible for payment of compensation for the unlawful termination which I set as 1 month's salary given that the contract had already expired in April 2016 and so the Claimant was serving on a new contract that has not been exhibited before Court.
61. As concerns payment of house allowance, the contract that the Claimant was issued with had indicated that his salary, was kshs.36,500/= all inclusive. The issue of non-payment of house allowance under this contract does not arise.
62. However as pertains to the "contract" after April 12, 2016, I find the Claimant entitled to house allowance being 15% of the salary = 15% of 36,500 = 5,475 x 2 months = 10,950/= for the Claimant herein.
63. As no proper notice was given to the Claimant before termination, I find the Claimant is entitled to payment of 1 month's salary in lieu of notice. The Claimant is also entitled to payment of terminal dues being any pending leave, NHIF & NSSF dues not paid and issuance of a Certificate of Service.
64. This being a test suit, my finding however will apply to the other claims in the series whereby the Claimant will be entitled to their dues as follows;-
  1. 1 month's salary as compensation for the unfair termination.
  2. 1 month's salary in lieu of notice.
  3. 2 month's salary for month of 14<sup>th</sup> April to June 15, 2016 at 15% of the salary paid to each Claimant.
  4. Payment of NHIF & NSSF dues deducted and not remitted.
  5. All outstanding leave not taken.
  6. Issuance of a Certificate of Service.



7. Costs of the suit be borne by the 1<sup>st</sup> respondent.

For proper order in managing this case I direct that these dues be calculated by the parties and be recorded as part of the judgment herein. In default, the court will be at liberty to proceed and give further directions.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

**Mutai for Claimants – present**

**Mr. Rweya for 1<sup>st</sup> Respondent – present**

**Nderitu holding brief Wambua for 2<sup>nd</sup> respondent – present**

**Court Assistant – Fred**

