



**Mutunga v Wataalamu Company Limited (Cause 745 of 2017)
[2023] KEELRC 436 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 436 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 745 OF 2017
AN MWAURE, J
FEBRUARY 16, 2023**

BETWEEN

MACKENZIE MUTUNGA CLAIMANT

AND

WATAALAMU COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claim was instituted by way of the memorandum of claim dated April 12, 2017 and filed in court on April 19, 2017. The claimant says he was employed by the respondent as a caretaker of a building that was being constructed at Karen Estate, Nairobi. There was no contract of employment issued. His duties entailed giving information to potential tenants and ensuring safety of construction materials on site and his starting salary was agreed at ksh 10,000 per month payable at the end of every month.

Claimant's case

2. The claimant says that on December 25, 2014 while at work with a director of the respondent on the building that was under construction, he fell from the 1st floor and sustained injuries on his neck among other parts of his body. He states that he was attended to at various medical facilities but was eventually referred to Kenyatta National Hospital where he was admitted and discharged on December 31, 2014.
3. That after recovery he went back to work whereupon he requested the respondent to compensate him for pain and suffering as a result of the accident but the respondent was non-committal. From this time onwards, the relation between the claimant and the respondent became tense.
4. It is averred that on June 01, 2016 the respondent's director, one Mr Kenneth Mukora directed the claimant to leave for his up-country home and promised to recall him to work. The claimant says that when he inquired the reason for the directive and was informed by the director that there was no more work for him.



5. The claimant states that at the time of this directive the house the claimant was taking care of was still under construction and therefore there was still work for the claimant to perform. The claimant was not issued with any notice of termination. The claimant left as directed but was deprived of the source of his livelihood without any justifiable reason.
6. It is averred that the respondent did not comply with the provisions of the law regulating termination of employment and no money was paid to the claimant at the time of termination despite the fact that he had worked for the entire month of May 2016 and that he neither occasioned nor contributed to his termination. He says there were no payslips given and the salary was below the minimum wage set by law. It is also said the respondent was not remitting NSSF dues on behalf of the claimant or at all.
7. The claimant prays for judgment against the respondent for:
 - a. A declaration that the termination of the claimant is unlawful, wrongful and unfair
 - b. An order compelling the Respondent to pay the following;
 - i. Days worked ksh 22,718.00
 - ii. In lieu of notice 22,718.00
 - iii. In lieu of leave 51, 990. 04
 - iv. In lieu of rest days 129,317. 85
 - v. In lieu of public holidays 15,727.85
 - vi. Severance pay 27,523.76
 - vii. Underpayment of wages 369,140.00
 - viii. Service Pays 35,054.90
 - ix. Twelve month's compensation 272,616.00
 - c. Certificate of Service
 - d. Costs of this cause
 - e. Interests on 2 (i)-(ix) and 4 hereinabove
 - f. Any other relief the honourable court may deem fit and just to grant.

Respondent's case

8. The respondent denied that there ever existed an employee employer relationship between them and claimant. The respondent avers that they are strangers to the alleged accident that the accident occurred on the said date on the respondent's property and also denies that the claimant sustained serious injuries. The claimant then filed a reply to the defence which reiterates what is stated in the claim.

Claimant's evidence

9. Claimant witness Makenzie Mutunga gave sworn testimony and adopted the witness statement dated April 20, 2017 as his evidence in chief. He also produced documents as contained in the list of documents dated April 20, 2017 together with those in the list of documents dated February 24, 2022 and filed on March 2, 2022 as exhibits in the case.



10. The claimant testified that he was employed in May 2013 by one Mr Mukora who was the director of the respondent but never dealt with one Zachary Njoroge. He worked at Karen as a caretaker of the house. He did not deal with the branches of the respondent as he used to be in Karen. He stated that he used to deal with Mr Mukora and used to be paid cash or through mpesa. He added that he used to be paid ksh 10,000 with no payslips being given. He asked the court to award him his dues as prayed in the claim.
11. In cross examination he said that he was not given anything when he was employed and was paid by Mr Mukora and Wataalamu Company. The company used to sell cards of Safaricom and telephones and mpesa and he never used to sell cards or phones as he was a caretaker. The house belonged to Mr Mukora. He said Mr Mukora had contractors and it was not Wataalamu who were building the house. He said he does not know the manager of Wataalamu. On re-examination he said that he was employed by Mr Mukora as he used to pay him and the company used to pay him as well and he did not know who owned the house in Karen where he used to be the caretaker.

Respondent's evidence

12. Respondent witness Zachary Njuguna Ngure gave sworn testimony and said that he was working with Wataalamu as the HR manager and became the general manager in 2021. He adopted the witness statement dated October 8, 2021 as his evidence in chief. The witness testified that the claimant was not paid any salary as he was not an employee of the respondent.
13. In cross examination, he said he has no appointment letter with the respondent and the claimant was not an employee of the respondent. He further says that he was in charge of stations in Moi avenue, Harambee and Malindi and was not involved in construction of a house in Karen. The directors would oversee their operations but Managers ran the company. The employees in the list of NSSF would have written contracts with them. He reiterates that the claimant was not their employee hence there was no need to issue termination notice.
14. On re-examination he said that the company has proper records of their employees and no employees were employed by Mr Mukora on behalf of the Company. He also said that the company never paid by way of mpesa. He added that Mr Mukora was not the only director of the Company.

Claimants submissions

15. The claimant submitted that the documents produced by the respondent cannot be evidence that the claimant was not an employee of the respondent. In any event, the claimant produced evidence that the claimant was not contributing to the fund on his behalf. The list of persons produced by the respondent is not signed and cannot be tied to anything else so as to prove employment. The NSSF receipt issued was issued to Wataalamu Radio Service and not Wataalamu company ltd which is a distinct entity.
16. The claimant relied on, *inter alia*, the case of *Josephine M Akinyi O V Farhiyo Mohammed* 2016 eKLR where the court held that section 10(7) of the *Employment Act* 2007 provides that where an employer fails to produce written contract in legal proceedings then the employer must prove or disprove an alleged term of employment relationship. In the instant case the respondent did not cause a written contract to be drawn up and therefore where there are contradictory statements as to the terms of the contract, the employee's statement must be given more weight.
17. The claimant argued that the respondent terminated the claimant on June 01, 2016 on account of what the respondent informed him was reduced workload which translates to redundancy under section 2 of



the *Employment Act*, 2007. The claimant further argued that the procedure provided for termination on redundancy was not followed. The respondent should have issued the mandatory months' notice in addition to undertaking consultations with a view to averting the redundancy as required by section 43 of the *Employment Act* 2007.

18. The claimant relied on, *inter alia*, the case of *Hesborn Ngaruiya Waigi versus Equatorial Commercial Bank Limited* 2013 eKLR where it was held that 'Where redundancy is declared by an employer the procedure to follow is as set out under the provisions of section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.
19. The Respondent never filed any submissions in the CTS and court file.

Issues for Determination

- a. Whether the claimant was an employee of the respondent
 - b. Whether the respondent terminated the claimant unfairly
 - c. Whether the claimant is entitled to the remedies sought.
20. The court is of the view that the evidence tendered does not with certainty demonstrate that the claimant was employed by the respondent to confer jurisdiction upon the court to adjudicate the matter herein. The mpesa statements for instance show different figures of money received from one Kenneth Mukora which variations has not been explained and the claimant did not lead sufficient evidence as to why he was suing the company just by the virtue of the fact that the said person who had allocated him caretaker duties happened to be one of the directors of the company. Indeed, the claimant in the cross-examination confirmed that it was not the respondent Company which was building the house where he was the caretaker.
 21. The claimant also in cross examination confessed he was employed by Mr Mukora and that he used to pay him. It is not clear what kind of relationship existed between him and Mr Mukora. What seems clear is that the claimant does not seem to establish an employment relationship with the respondent. It is unfortunate there is no tangible document that can establish the claimant had an employee relationship with the respondent.
 22. In the case of *Zarika Adoyo Obondo v Shunjun & Another* Cause no 40 of 2014 the court held:

“It has been stated time and again by this court that where the respondent does not participate in the hearing and has not admitted the employment relationship the claimant must prove the same as a preliminary point as without proof the whole claim is anchored in quicksand.”
 23. In the case of *Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR the court stated:

“the jurisdiction of this employment and labour relations court as far as employment matters are concerned is limited to existence of an employment relationship as defined in law and the court must always satisfy itself on this account before proceeding further.”
 24. The court further pronounced itself that even if the employer has a duty to keep records of employees, the employee however must prove his case.



25. Another case *Transport Workers union v Euro Petroleum products & Another* [2019] eKLR the court states:

”The claimant ought to have at least established that there was an employment relationship between the grievant and the respondents before the respondent could be called upon to produce records.”

26. In this case as well the claimant has failed to prove that there was an employer and employee relationship with the respondent. In the absence of an employer and employee relationship the court is not in a place to consider the issue of termination of employment under the *Employment Act*. This is purely the word of the claimant as against the respondent.

27. Having no evidence of employer and employee relationship save for some unexplained mpesa statements the claim must fail. The said statements show some intermittent Mpesa transactions by one Mukora and the amounts are varying from time to time. The court is expected to assume those are salary payments by the respondent. There is also no evidence of who is Mr Mukora to the respondent.

28. Regrettably the claim has not been proved on the balance of probability and so it fails.

29. Each party will meet their costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

