



Thaithi v Eldoret Express Company Limited (Employment and Labour Relations Cause 15 of 2022) [2023] KEELRC 385 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
EMPLOYMENT AND LABOUR RELATIONS CAUSE 15 OF 2022**

NJ ABUODHA, J

FEBRUARY 3, 2023

BETWEEN

MICHAEL GITAU THAITHI CLAIMANT

AND

ELDOR ET EXPRESS COMPANY LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim dated August 19, 2016 and filed on the same day, the claimant sought the following orders: -
 - a. A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with respondent, she was not remunerated as required by law.
 - b. Payment of sums of money of Kshs. 4,209,250.
 - c. Costs and interests
 - d. Any other relief that the court may deem fit to grant.
2. It was the Claimant's case that at all material times to this cause, he was employed by the Respondent on July 5, 2001 until May 2016 when his employment was suspended(sic) by the Respondent without justifiable cause.
3. He maintained that his termination was unlawful as his trade union was not informed of the intention to be dismissed nor was he given an opportunity to be heard; no leave pay was given; no three months' salary in lieu of notice was paid and that further, no severance pay was given.



4. The Respondent filed a Replying Memorandum in response on October 30, 2016 where it denied the Claimant's averments and stated that the Claimant was employed in October 2003 until October 2004 and that this claim has been filed out of time as the oral agreement expired way back in the year 2004.
5. The court was then urged to dismiss the Claimant's cause with costs to the Respondent.
6. The Claimant testified on July 26, 2022 as CW1 and adopted his witness statement recorded on August 19, 2016. CW1 stated that he was employed by the Respondent as a mechanic and that he was issued with a staff ID which ID was produced as exhibit in court and that upon employment. He was later terminated from employment without any notice.
7. On cross examination, CW1 conceded that he had no documentation to show that he was an employee of the Respondent as of the year 2016.
8. In re-examination the Claimant told the court that he started working for the Respondent in 2001 up until 2016.
9. The Respondent's witness, one Joseph Nganga Thungu testified on July 26, 2017 as RW1. He introduced himself as the Respondent's operations director. He adopted his witness statement recorded on May 10, 2022 as his evidence in chief.
10. RW1 maintained that the claimant was only employed on a contractual basis for one year between October 2003 and October 2004 and that his contract was never renewed.
11. It was RW1's contention was that the Claimant was paid all his dues when his contract expired in October 2004.
12. With that evidence, the court gave directions for parties to file written submissions. The Claimant filed his on August 31, 2022 whereas the Respondent filed its submissions on September 26, 2022.
13. The Court has considered the pleadings before it, the evidence of the parties as well as the submissions filed by the counsels for the respective parties and finds that the main issue for determination to be whether there was an employer employee relationship between the claimant and the respondent herein.
14. In the instant case, the Claimant adduced evidence and produced two staff IDs issued by the Respondent. The 1st ID was issued in October 2003 and it was to expire in October 2004. The 2nd ID was issued in July 2006 and it did not have an expiry period.
15. The Respondent's witness, RW1, denied the allegation that the Claimant was employed by the Respondent until 2016 and maintained that the Claimant's employment contract was for a period of one year only.
 16. The burden of proving the existence of an employment relationship rests upon a claimant as stipulated by Section 47(5) of the *Employment Act* which provides as follows –
 - (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.



17. In the case of *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* [2013] eKLR the court held that;-

That settled, I will now deal with the status of the Claimant vis a vis Charles Asiaba. The Claimant did not produce a single document to prove an employment relationship between the grievant and the Respondent, not even the letter of resignation which the grievant claimed to have written to the Respondent.

An employment relationship has serious implications on the parties. The Court must therefore be fully satisfied that it actually exists. A Claimant claiming employment rights must prove the existence of an employment relationship.

18. In this case, the only documentation that the Claimant produced to prove the existence of an employee-employer relationship was the staff ID that was issued many almost 14 years ago. Besides the claimant himself conceded during cross-examination that the two identity cards did not resemble. Further the respondent's witness Mr. Joseph Ng'ang'a Thung'u who said he was the one responsible for signing and issuing staff identity cards denied issuing the same.
19. Can the Court then rely on the same and say that the said document is conclusive proof that there existed an employer employee relationship between the parties herein? I do not think so. In my view, a staff ID card alone, cannot stand as conclusive evidence of the existence of an employer employee relationship especially when the authenticity of the same has been disputed. Their ought to be other evidence to support the claim.
20. In the absence of any other documentation to justify the Claimant's engagement with the respondent, this court cannot ascertain if indeed such a relationship existed after the expiry of the 1-year contract period between 2003 October and 2004 October.
21. Having found that employer employee relationship was not established, it therefore follows that no legal claim in respect of the termination of the Claimant's employment can stand against the respondent and as such this Claim is dismissed with costs.
22. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF FEBRUARY, 2023

ABUODHA NELSON JORUM

JUDGE ELRC

