



**Obonyo v Sure Link International Ltd (Cause 507 of 2017)
[2023] KEELRC 582 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 582 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 507 OF 2017
SC RUTTO, J
MARCH 10, 2023**

BETWEEN

CALVINCE OTIENO OBONYO CLAIMANT

AND

SURE LINK INTERNATIONAL LTD RESPONDENT

JUDGMENT

1. The claimant avers that being knowledgeable in masonry work, he was engaged by the respondent sometimes in the month of July, 2014. His claim against the respondent is for the sum of Kshs 37,340.00 being the balance of the money which was agreed to by the parties, as a result of the supervision work he did for the respondent between July 26, 2014 and August 28, 2014. He further prays for interest on the said amount as well as the costs of the suit.
2. The respondent opposed the claim and denied the existence of an employment relationship with the claimant. It contended that the claimant was an independent contractor and as such, asked the Court to dismiss the claim with costs.
3. The matter proceeded for hearing on October 13, 2022, with the claimant testifying in support of his case. On its part, the respondent elected not to call oral evidence.

Claimant's case

4. At the start of the hearing, the claimant adopted his witness statement to constitute his evidence in chief. He further produced the bundle of documents filed together with his claim as exhibits before Court.
5. It was the claimant's evidence that he was employed by the respondent as a supervisor with effect from July 28, 2014 and was earning a sum of Kshs 2,000.00 per day. That he worked as a foreman for 2 months and 2 weeks.



6. He further told court that he worked for the respondent at a construction site at Namanga Police Station Block (4) where he was to undertake construction from excavation, foundation and slabs at a cost of Kshs 100,000.00. He admitted that the respondent paid him the full amount for the said work as agreed. That he was subsequently engaged to build a guard's house and later the NIS office where he was to undertake excavation, strip rooting and bending reinforcement bars and binding at a cost of Kshs 66,640/= with his labour being Kshs 30,700/= That as such, the total costs was Kshs 97,340/=.
7. That the respondent only paid him Kshs 60,000/= thus leaving a balance of Kshs 37,340. That being the foreman he was supervising 16 employees all of who were paid their dues while he was left out. That his efforts to get paid by the respondent have not been fruitful hence the instant suit. He further denied being an independent contractor.
8. Closing his testimony, the claimant asked the Court to allow his claim as prayed.

Respondents' case

9. As stated herein, the respondent did not call oral evidence hence its case is as per its Statement of Response to the Claim.

Submissions

10. It was submitted on behalf of the claimant that there was an employment relationship between him and the respondent and that he was not a subcontractor. That the existence of the employment relationship is properly brought in light of an agreement of payment of the balance of Kshs 37,340/= by the respondent's manager Moses Cheptumo.
11. On the other hand, the respondent submitted that the remedies sought by the claimant have no relation with those envisaged under Section 49 of the *Employment Act, 2007* for remedies under wrongful dismissal or unfair termination. That it is evident that the parties' relationship was a commercial one since there is completely no mention of any of the remedies under the said Section 49.
12. Citing the case of *Zarika Adoyo Obondo v Tai Shunjun & another* (2020) eKLR, it was submitted that the claimant never produced a single document authored by the respondents to support his assertions. That this Court's jurisdiction is on employment disputes only by dint of Section 12 of the *Employment and Labour Relations Court Act*. That this court's hands are therefore tied once the claimant failed to prove the existence of an employment relationship.

Analysis and determination

13. Having considered the pleadings by both parties, the evidentiary material before me as well as the opposing submissions, the following questions stand out for resolution by the Court: -
 - a. Was there an employment relationship between the parties?
 - b. If the answer to (a) is in the affirmative, was the claimant's termination unfair and unlawful?
 - c. Is the claimant entitled to the reliefs sought?

Existence of an employment relationship?

14. The claimant avers that he was employed by the respondent. This assertion has been disputed by the respondent who avers that the claimant was not its employee and thus, there is no employment relationship. With this denial by the respondent, the burden was on the claimant to prove the existence of an employment relationship.



15. On this issue, I gather support from the determination in the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* (2016) eKLR, where the Court held as follows: -

“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word.”

16. In support of his case, the claimant exhibited documents in which he stated that the respondent admitted owing him the sum of money he claims under this suit. One of the claimant’s exhibits, marked as COO 2 reads in part: -

“Calvince Otieno Confirmation Report

We checked and confirmed that the original information on the subcontractors report dated 1August 4, 2014 for Calvince Otieno of Kshs 66,640 was correct. We also agree (illegible) confirmed the same amount was only for his labourers. The point of contention (discrepancy) came from his amount for supervision, which amounts KES 30,700. This amount when added to the labourer’s amount comes to KES 97,340 and this is what was due amount from him”

17. In other exhibits marked as COO3 and COO4, the claimant is also named as a “subcontractor” and reference is made to his “labourers”.
18. What stands out from the foregoing is that the claimant was indeed engaged as a subcontractor as opposed to an employee. Indeed, it is evident that he had his own labourers further confirming the respondent’s assertion that he was a subcontractor.
19. If he was indeed an employee of the respondent, then the issue of labourers would not have arisen in the first place. I must say that the claimant’s own evidence dismantled his case and discounted his assertion that he was indeed an employee of the respondent.
20. It is also worth pointing out that the claim before Court is not for unfair termination or such other claim contemplated under the *Employment Act, 2007* and Section 12 of the *Employment and Labour Relations Court Act*.
21. If anything, it is crystal clear that the claimant’s claim is for work performed and not paid for. Essentially his engagement was for a contract for service as opposed to a contract of service. This therefore takes the dispute outside the realm of this Court thus depriving it of jurisdiction to hear and determine the matter. Evidently, the claimant brought his suit to the wrong forum.
22. In as much as the Court sympathizes with the claimant, its hands are tied as without jurisdiction, it cannot move a step further and has to down its tools.
23. It is therefore not logical to determine the next issue as the same was solely dependent on the existence of an employment relationship.

Orders

24. In the final analysis, the claim is dismissed in its entirety with an order that each party bears its own costs.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Awuor

For the Respondent Mr. Kihara

Court assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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 had 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 *Civil 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.

