



Olemuteke v Jiwa (Cause 35(A) of 2018) [2023] KEELRC 590 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 590 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 35(A) OF 2018**

**JW KELI, J
MARCH 9, 2023**

BETWEEN

RAJAB BARASA OLEMUTEKE CLAIMANT

AND

SHALWAZ S JIWA RESPONDENT

JUDGMENT

1. The Claimant vide Memorandum of Claim dated 15th March 2018 and received in court on the 27th April 2018 brought the claim against the Respondent seeking the following reliefs:-
 - (a) That this Honourable Court be pleased to find that the termination dismissal by the Respondent to be unjustified, unlawful, unfair, wrongful and illegal.
 - (b) That this Honourable court be pleased to find that the Claimant having served the Respondent for 19 years without a single warning either orally or written, the whole process was unfair, unconstitutional, malicious and the Claimant should accordingly be reinstated in the employment.
 - (c) Salary arrears for the month of January 1999 to February 2018 totalling to Kshs.763,000/-.
 - (d) Outstanding House allowance from the month of January 1999 to February 2018 totalling to Kshs.327,00/-.
 - (e) 3 months salary in lieu of Notice of Kshs.10,500/-.
 - (f) Payment of the delayed annual salary increment as per the various Gazzette Notices.
 - (g) General damages.
 - (h) Costs of this suit both party to party and Advocate client together with interest therein from the date of institution hereof until payment in full.



- (i) Any other relief this Honourable court may deem fit and just to grant.
2. The Claimant together with the claim filed verifying affidavit to the claim, list of witnesses, his witness statement, witness statement of Abdillahi Hassan Abdirihaman all dated 15th March 2018 and list of documents together the document.
 3. The claim was opposed. The respondent filed response to the claim dated 22nd May 2018 and received in court on the 23rd May 2018 together with list of witnesses of even date. On the 22nd August 2018 the respondent filed in court statement of Cosma Walimbwa dated 20th August 2018, statement of Rodgers Simiyu Khaemba dated 20th August 2018, respondents list of documents dated 20th August 2018 together with the bundle of documents.
 4. On the 13th May 2020 the court delivered a ruling injuncting Mr. Makokha Advocate personally from representing the respondent on basis of existence of advocate client relationship.
 5. On the 17th November 2021 Claimant filed further list of documents of even date and the bundle of documents.
 6. On the 6th April 2022 the respondent filed notice to produce the Original Master Roll under list of documents dated 15th march 2018.

The Hearing

Claimant's Evidence

7. The Claimant's case was heard by the court on the 6th July and 12th October 2022 with two witnesses of fact being Rajab Barasa Olemuteke (the Claimant CW1) who produced his bundle of documents and Abdullahi Hassan Abdirihaman(CW2). The two witnesses adopted their written witness statements as their evidence in chief. The witnesses were cross-examined by counsel for the respondent Mr. Bw'onchiri.

Respondent's evidence

8. The Respondent testified in his case virtually from the USA Texas Dallas on the 23rd November 2022. The witness adopted his written statement as his evidence in chief, produced his filed documents as his evidence and was cross-examined by counsel for Claimant Mr. Wanjala.

Written Submissions

9. After close of defence the court issued directions on filing of written submissions. The claimant's written submissions drawn by the law firm of Makokha Wattanga & Luyali Associates Advocates were dated 20th January 2023 and filed in court on the 23rd January 2023. The respondent's written submissions drawn by M/S Omundi Bw'Onchiri Advocates were dated 31st January 2023 and filed in court on the 13th February 2023.

Claimant's case in summary

10. The Claimant's case was that he was employed as a caretaker by the respondent of his property situated within Malikisi township of Bungoma County in the year 1999. That he worked diligently until February 2018 when he was dismissed without valid reasons. That vide his written statement adopted as evidence in chief the Claimant initially worked for Jetha Jiwa Bakeries Limited as ovenor from 1987 to 1999. That the respondent approached him to work as a caretaker at salary of Kes 3500 per



month, that he worked for the respondent even after the family left the country until 2018 when the respondent demanded he must leave his premises. The claimant called one witness Abdillahi Hassan Abdirihaman who testified he knew the claimant as being the caretaker of the respondent's property from 2009 to 2018.

The Respondent's case in summary

11. The Respondent testified under oath and vide his response to the claim dated 22nd May 2018 and denied the entire claim. The respondent adopted his witness statement dated 20th August 2018 as his evidence in chief and stated that the claimant had never been his employee at any time and that Jetha Jiwa was a company owned by his parents and that the claim should be dismissed. To buttress his submissions the respondent relied on the decision in *Zarika Adoyo Obondo v Tai Shunjun & Another* [2020]eKLR where the court in addressing the issue of employer employee relationship cited several decisions to wit:-

“The claimant did not submit on the first issue on whether or not there was an employment relationship between the claimant and the respondent. Although the claimant pleaded that she was employed by the respondent as a messenger/cleaner, the respondent avers in the defence to the claim that she was engaged on casual basis as and when the need arose.

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 on quicksand.

In the case of *Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR, the court stated;-

“

- “8. The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further.

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. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”

Further in the case of *Transport Workers Union v Euro Petroleum Products & Another* [2019] eKLR, the court stated that –

The Respondents on their part did not produce any documents to prove that the grievants were neither their employees nor engaged on casual basis. However, the Claimant ought to have at the least established that there was an employment relationship between the grievants and the Respondent(s) before the respondent would be called upon to produce records. The Claimant herein has failed to prove the existence of an employment relationship between the grievants and the Respondents. In the absence of an employer-employee relationship the Court is not in a position to consider the issue of termination of employment under the *Employment Act*.”



In the case of *Joseph Munene Murage v Salome Ndung'u* [2019] eKLR the court held that –

The determination of the other heads of claims advanced by the Claimant will depend on whether the Court finds that there was an employment relationship.

Regrettably, this is one of those cases where it is purely the word of the Claimant as against that of the Respondent. The Respondent opted to include an additional witness RW2 with a view of corroborating and strengthening her case as against the Claimant.

The Claimant testified that he was employed by the Respondent on 17th May 2011 as a caretaker, gardener cum security guard at the Respondent's plot number 15(b) earning a monthly salary of Kshs.8,200.

The Claimant further stated that he met the Respondent through a bureau where he had left his number in the event someone would be interested to hire him. The Claimant however failed to secure the attendance of any witness from the bureau to ascertain the fact that he was referred to the Respondent by the agency, or to submit any other evidence to corroborate his evidence.

The Claimant also stated that prior to his termination he sought leave for three days to attend to his mother's burial and that during this time the night guard took over his duties. Similarly, the Claimant failed to call the said night guard as a witness in this matter.

Section 47(5) of the *Employment Act* 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.

It was thus the burden of the claimant to prove the existence of an employment relationship and the unfair termination thereof. Having failed to prove the existence of an employment relationship the claim has no leg to stand and must thus fail....”

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.”

Determination

Issues for determination

12. The claimant in their submissions identified the following issues for determination:-
 - a. whether the claimant was employed by the respondent
 - b. whether the termination of the claimant was unlawful and or unfair.
13. The Respondent in their written submissions identified the following issues for determination :-



- a. Whether the Claimant was an employee of the Respondent
 - b. Whether the law firm of M/S Makokha Wattanga & Luyali are on record
 - c. Whether the claimant has proved his case.
14. The court finds that on the 5th October 2021 the issue of the Claimant's legal representation was raised. The court ruled in the Ruling of Justice Nduma Nderi of 15th May 2020 that Mr. Makokha Advocate was barred from representing the Claimant. The injunction was against Mr. Makokha Advocate only. On the 2nd December 2021 Mr. Wanjala appeared for the claimant and the court noted that the claimant's representation was sorted in the presence of the counsel for the respondent. The court then proceeded to issue a hearing date. The court then finds that the claimant's representation is no longer an issue for determination.
15. The court then was of the opinion that the issues for determination placed before it by the parties in the determination of the dispute were as follows:-
- a. Whether the claimant was an employee of the respondent
 - b. If the claimant was an employee, whether his employment was unfairly terminated.
 - c. Whether the claimant is entitled to reliefs sought.

a. Whether the Claimant was an employee of the respondent

16. The claimant adopted his witness statement where he had stated he was employed as a caretaker of the property that belongs to the respondent. That initially he was employed by Jetha Jiwa Bakeries as Ovenor from 1987 to 1999 when the bakery was shut down vide court order. That he was approached by the respondent to work for him as a caretaker at a salary of KES 3500. That the family left the country. That he took care of the property until February 2018 when the respondent told him to leave the premises so that he can rent for him alternative premises. That as at March 2018 he was owed salary arrears of Kshs.1,500,000/= and other benefits.
17. During cross-examination by counsel for the respondent the claimant told the court that he was an employee of the respondent, he had no letter of employment, that in the claim before court he was employed in 1987 and in 1999 by the respondent. That in 1987 he was employed by the respondent's father's company, that he stopped being an employee in 2020. When asked about having been sacked in 2018 as per his statement the claimant told the court he left work in 2020 and not 2018. When asked why he came to court in 2018 if sacked in 2020, the claimant told the court that in 2020 was when the respondent sold the farm. On the master roll being for 1998, the claimant told the court he was working at Jetha Jiwa bakeries but he had not sued the company. The claimant told the court he sued the respondent as he had inherited the farm from his father vide title of 2016. That the land had no title before. The Claimant denied having testified in court in Case No. 216 of 2014 where he had described the Respondent as his former employer. The sale agreements did not state whose witness he was for but he told the court he was for the respondent. The Claimant's exhibit 4 and 5 was money sent by Shanif Jiwa but he had sued the respondent. He told the court Shanif was the respondent's brother. The Claimant stated he was paid salary by cash and signed the master roll and that was his evidence of employment. He stated he worked for the respondent from 1987 to 2020.
18. On re-exam CW1 told the court he signed the sale agreements as witness of the respondent, that he was the caretaker and Abdullahi agent. That he used to stay outside but when the respondent family moved out he moved in 1999 until 2020 when he was evicted on sale of the property.



19. CW2 agreed with his statement signed on 13th November 2015 in cause 216 of 2014 where he had stated he was caretaker. CW2 agreed had other suits against the respondent pending in court. CW2 told the court he was employed as caretaker in 2012. CW2 told the court he was caretaker for documentation and that the claimant was on the ground.
20. On re-examination CW2 told the court he joined Barasa(claimant) in 2009 who was the caretaker, that he was tenant and later in 2012 made caretaker and later agent upto now. That he worked with Indians *sic upto 2018 when they told them they no longer need them.
21. To buttress his submissions the claimant submits that when called to determine the employer employee relationship existence between the parties or not, the court in *Alice M'Mboga Ogolla v Nyayo Tea Zones Development Authority (2017)e KLR* stated ‘... under section 10 and 74 of the *Employment Act* it is the responsibility of the employer to keep records of employment for all employees and to produce such records when required. RW1 confirmed that he has custody of all records. It would not have been difficult for him to submit such records to court as proof that the Claimant was not its employee. The Claimant cannot be expected to provide records that are ordinarily in the Respondent's custody when the respondent is a party to the suit.’”

Response

22. The respondent adopted his statement dated 20th August 2018 and produced his filed documents. The respondent denied the claimant was his employee and hence could not dismiss him. That the property in 1999 was in his name and every one was in Kenya with his parents living in the property, that he never hired the claimant or paid him. He only knew of Cosma who was in the property. That they did not ask the claimant to witness any of the sale agreements.
23. During cross-examination the respondent told the court that Jiwa Bakeries was owned by his parents. That he was not in the company and had no knowledge of how long it operated, he said he knew one or two of the employees and the company had several employees. On the sale agreement of 21st December 2013 the respondent stated that the claimant was a witness of the Muslim side. That the claimant signed as a witness in sale agreement dated 20th January 2014 sale of land to Priscilla Kibet. The respondent denied he had a caretaker in property. That Cosma worked for his father in the house. That Rodger Simiyu Khaemba worked for his father's company as supervisor. The respondent stated he had nothing to do with the master roll.
24. On re-examination the Respondent stated he did not know about the master roll and that it had no name of any person he had engaged, that he was not connected to Jiwa Bekaries , that he had not been shown any documents of having employed the claimant or instructed him to act as his witness in any sale agreement. That he was in the USA in 2018 when the claimant alleged to have been sacked him. That he had not received any demand notice before filing of the claim.

Decision

25. The Claimant told the court he relied on the master roll as his evidence of employment and submits that it contains his name and that other employees of the respondent including Rodgers Simiyu who the respondent acknowledged as only employee he knew(PEXB-1). That the sale agreements CEXB 2,3 AND 4 were attested by the claimant as employee of the respondent. The respondent denied knowledge of the master roll and stated that Simiyu was an employee of his father's company not his. He denied the claimant as his employee.



26. The master roll was produced by the claimant vide list of documents dated 15th March 2018. The roll had dates month of January 1998 to October 1999. The said document had the name of the claimant and also Rodgers Simiyu. During cross-examination the claimant told the court that in 1998 he was working for the respondent's father Jetha Jiwa as per the master roll. The claimant in his written statement which he adopted as his evidence in chief stated that he was employed from 1987 to 1999 by Jetha Jiwa Bakeries. The court finds that the master roll was evidence of employment by the Jetha Jiwa Bakeries and not the respondent. An employer is defined under the Employment Act to be "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;" Under the said master roll it was evident that the respondent was not an employer of the claimant.
27. The Claimant further relied on sale agreements CEXB 2,3 and 4 (claimant's list of documents dated 17th November 2021) which he testified he attested on behalf of the respondent as his employee. The said sale agreements just indicated the claimant as a witness together with others without being specific as to whether they were witnesses for the vendor or the purchaser. The court finds no nexus between the claimant and the respondent under the said sale agreements as prove of employee employer relationship.
28. The Claimant further produced western union payments to him by one Shanif Jiwa who he told the court was the brother of the respondent. The court found the claimant's testimony was not consistent for example in the witness statement of 15th march 2018 he stated he was asked to leave the premises yet in oral testimony he told the court his services were terminated in 2020. The court found CW2 not credible witness. In his testament CW2 wrote that he knew the claimant as caretaker from 2009 upto 2018. In oral testimony he told the court he was engaged as caretaker of same property in 2012. Later he tried to change to state he was documentation caretaker and the claimant was on the ground. The claimant told the court he was the caretaker and CW2 agent. The court found CW2 to have been motivated by ulterior motives in his testimony considering he admitted to having several suits against the respondent
29. The court agreed with decision in Zarika Adoyo Obondo v Tai Shunjun & another [2020] eKLR that it was the burden of the claimant to prove the existence of an employment relationship and the unfair termination thereof under section Section 47(5) of the Employment Act 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.”
30. The court found prove that the claimant was a former employee of Jetha Jiwa Bakery owned by the Respondent's father and that the claimant's employment ended sometimes in 1999 on closure of the said company. That the master roll relied on as evidence of employment of the claimant belonged to Jetha Jiwa Bakery and not to the respondent. That there was no prove that the claimant signed the said sale agreements as witness of the respondent or in capacity of being an employee. That his evidence on employment as a caretaker by the Respondent was tainted by inconsistencies and lack of prove of engagement and that CW2 was not a credible witness. That being the finding of the court then the other issues of unfair termination and reliefs sought have no leg to stand on. The court finds on a balance of probabilities that there was no prove of employer employee relationship between the claimant and the respondent.



31. In conclusion the claim dated 15th March 2018 is dismissed for lack of merit with costs to the respondent.
32. Right of appeal in 30 days
33. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 9TH DAY OF MARCH, 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

For Claimant: Wanjala Advocate

For Respondent:- Wafula holding brief for Bw'Onchiri Advocate

