



Ndoli v Eggen Joinex Limited (Employment and Labour Relations Cause 109 of 2018) [2023] KEELRC 1306 (KLR) (23 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1306 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 109 OF 2018
NZIOKI WA MAKAU, J
MAY 23, 2023**

BETWEEN

WELLINGTON NDOLI CLAIMANT

AND

EGGEN JOINEX LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent averring that he was dismissed on account of redundancy. The Claimant avers that he was employed by the sometime in November 2012 or thereabout. The Claimant avers that he was employed as a casual labourer and was being paid daily wages. He avers that he would collect his dues at the end of any given week instead of daily. The Claimant avers that his services were terminated by the Respondent sometime in January 2018 on account of redundancy. The Claimant thus seeks one month salary in lieu of notice, service pay, leave for 7 years worked, house allowance, severance pay, 12 month's salary for unlawful termination as well as costs of the suit.
2. The Respondent on its part asserts that it was not the employer of the Claimant but that he offered his services as a casual from time to time. The Respondent avers that the Claimant's services were never terminated in any way, shape, form, fashion and/or construction of the word and seeks for the claim to be dismissed in totality.

The Claimant's case

3. The Claimant adopted his witness statements and list of documents. The Claimant stated that he worked for the Respondent from November 2012 as a carpenter. The Claimant testified that he worked in various sites where the Respondent was either tasked to and/or seconded to perform various duties and/or works. The Claimant stated that the Respondent terminated his services on account of redundancy. The Claimant stated that he had worked over the Christmas period of 2017 and when he went to ask for his payments, he was informed that his services had been terminated.



4. The Claimant submitted that the Respondent engaged him as a carpenter at Kshs 5,400/- per month on casual basis in November 2012. He stated that during his employment he worked in different sites which the Respondent was involved in up to January 2018. The Claimant submits that when his services were terminated on redundancy grounds at which point he was earning Kshs 1,100/- per day and he was working for 6 days a week.
5. The Claimant submitted that the Respondent's case was presented by one Michael Rotich who stated that he had been employed by the Respondent in January 2022 and all evidence presented by him was not based on his own knowledge but on information that he gathered from the file. The Claimant submits that the Respondent also failed to avail in evidence their list of casuals who worked for them within the period that the Claimant stated to have worked for them to demonstrate that the Claimant was not one of their employees as at November 2012. The Claimant submitted that the Respondent's witness could not state with certainty that the Claimant was not an employee of the company from 2012 as information relating to that was not within the knowledge of the witness being that the witness was a new employee having been employed in 2022.
6. The Claimant cited the provisions of section 10(7) of the *Employment Act* which is to the effect that in any legal proceedings, if the employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. He submits that the Respondent by its own admission had indicated that it does not issue contracts to its casuals and thus none had been issued to the Claimant. He cited the case of *Silas Mutwiri v Haggai Multi-Cargo Handling Services Limited [2013] eKLR* where Mbaru J.

'With the respondent omissions as required under section 20 and 74 of the *Employment Act*, the benefit of it must go to the employee, the claimant. Where there is no record that leave, overtime, dues as under section 35(6) are made, then the employee account must be taken in good faith. At the time of termination, that which was legally due to the claimant, whatever the reason or reasons for his termination, that should have been paid as of rights. If there were leave days due, overtime and other dues, this should have been paid.'

7. The Claimant submitted that the Respondent opted to avail extracts of the voucher book of diverse dates in 2017 which only created an assumption that certain information was being concealed from the court which information would have revealed the exact length of time the Claimant had worked for the Respondent. The Claimant submitted that the Respondent having failed to demonstrate the Claimant was not an employee from 2012 but having not opposed the sites mentioned by the Claimant were engagements the Respondent had taken, it in turn violates the provisions of section 10(7) of the *Employment Act* and the court has no option but to believe the Claimant's evidence. The Claimant submitted that he earned Kshs 1,100/- a day which translates to Kshs 33,000/- a month. He submitted that at the time of termination the Respondent disregarded the fact that the Claimant had faithfully worked for a period of 6 years. The Claimant thus submitted that the termination was malicious and intended to frustrate the Claimant. He thus sought the prayers in his claim as well as costs of the suit.

The Respondent's case

8. The Respondent's witness was one Mr Michael Rotich who testified that the Claimant's services were never terminated. He stated that the Claimant was a casual labourer and that due to harsh economic conditions that existed then, it was forced to stop working on a site located at the Two Rivers Mall. He stated that as a result of ceasing work at the site the Respondent was forced to stop its employees and/



or casual laborers from attending to the site. He stated that the employees were seconded to other sites while casual laborers were advised to await further instructions.

9. The Respondent submitted that the fact of the Claimant offering his services to the Respondent is not in dispute and that what is in dispute is whether the Claimant was indeed an employee or a casual labourer such that the rights and duties encapsulated in the *Employment Act*, 2007 (herein referred to as the Act); took effect and offered protection to the Claimant herein. The second issue in dispute is when the Claimant become a permanent employee, if at all. The Respondent submits that the other issue in dispute was whether the rights and duties espoused in the Act are available to the Claimant in respect to his claim that his for termination of services was on account of redundancy or not. It submits that it is trite law that he who alleges must prove and that the onus of proving the allegations made herein lies with the Claimant throughout. The Respondent posed the question: when was the Claimant employed by the Respondent? It submitted that the question has been answered resoundingly by both parties, the same being sometime in November 2012. The Respondent submitted that the capacity in which the Claimant was employed by the Respondent was also a factor. It submitted that the Claimant stated that he started working for the Respondent as a carpenter and that at the start of their employment relationship, the he started out as a casual labourer and that sometime during the pendency of his employment he was made a permanent employee therein. The Respondent submitted that the period when the Claimant purportedly become a permanent employee is unknown and unclear even to the Claimant himself. The Respondent submits that the Claimant did not produce evidence of the same and merely asserted that working at various sites for the Respondent made him a permanent employee. The Respondent submitted that working at various sites did not, does not and cannot be equated to permanent employment in any way, form, fashion and/or construction of the word.
10. The Respondent submits that the Claimant's services were those of a casual employee and at no point in time were his services enhanced and/or elevated to those of a permanent employee. The Respondent further submits that the Claimant cannot and could not identify the point in time when his employment status was enhanced and/or elevated from that of a casual labourer to that of a permanent employee as this never happened. The Respondent submits that the Claimant all along knew that he was a casual employee as was evidenced by his responses during cross-examination. The Respondent submits that the Claimant's assertion that he was a permanent employee without proving the day, month and/or year when he became a one calls for speculation as to non-existent facts. The Respondent submits that the Claimant's assertion that he was a permanent employee all the while he knew he was a casual employee is a veiled attempt at having rights accruing to him as an employee all the while no such rights accrued to him. It submits that by his own admission during cross-examination, the Claimant affirmed that he was not a permanent employee but was rather a casual employee.
11. The Respondent submits that the Claimant should not be at liberty to change the facts, terms and conditions of his employment after the fact after diligently working within the said terms and conditions only to have a change of heart afterwards. The Respondent submits that it offered work to the Claimant when work was available and the Claimant performed his duties when called upon to do so and that when work was not available to the Respondent then the Claimant was under no obligation to offer his services. It submits that in the present case the Claimant admitted that there was no work to be performed at the Respondent's Two Rivers Mall site where he was working and thus he was under no obligation to offer his services therein. The Respondent submits that the Claimant could therefore not demand for work from the Respondent where none was available. The Respondent submits that the point of divergence is whether the Claimant was entitled to earn wages for work not done after he was informed by the Respondent that there was no work at its Two River's Mall site.



12. The Respondent submits that the Claimant stated that he was under the impression that he would continue receiving wages despite the fact that he had not worked at the Respondent's site after work was halted. The Respondent submits the notion that the Claimant was entitled to wages without providing any services on the basis that he had worked for the Respondent since 2012 is demonstrably fallacious and the arguments of a disputatious sophist. The Respondent submits that the Claimant asserts that he never took annual leave for seven (7) years whilst working for the Respondent. The Respondent contends that the entitlement to annual leave is the preserve of an employee and not a casual labourer. The Respondent submits that the Claimant can therefore not claim a right that never accrued to him in the first place. The Respondent submits that during cross-examination, the Claimant admitted to the fact that he was not entitled to annual leave as he was not an employee. The Respondent submits that the Claimant failed to prove this arm by adducing documentary proof that he never took his leave days save for his viva voce testimony that he had not taken leave for the past seven (7) years. The Respondent submits that the Claimant avers that he was entitled to house allowance since he was an employee and the Respondent contends that the Claimant was not entitled to house allowance as he was not an employee but rather he was a casual labourer. The Respondent submits that sections 19 and 20 of the Employment Act mandates an employee to make statutory deductions from the employee's monthly salary. The same duty and obligation is not available to casual laborers and thus the Respondent was not mandated to make any deductions therein. It submits that section 1 (A) of the National Health Insurance Fund Act No 9 of 1998 provides that every employer shall be liable as a contributor to the Fund in respect of its employees. The Respondent submits that the Claimant did not show that the Respondent was remitting payments in relation to his NHIF contributions thus he cannot claim that he was employee if the deductions were never made nor remitted in his favour. The Respondent submits that the Claimant adduced an NSSF Statement of Account with zero evidentiary and/or probative value as the said Statement of Account referred to a different company, to wit, Tools & Paints Hardware and not the Respondent. The Respondent submits that the Statement of Account also referred to a totally different time period, to wit, the period between 2006 and 2008 long before the Claimant was ever employed by the Respondent.
13. The Respondent submits that the Claimant avers that he was earning a salary of Kshs 33,000/- per month and that based on the foregoing, the salary earned by the Claimant was well over and above the threshold of Kshs 25,000/- mandated for the payment PAYE as per Section 5 of the Income Tax Act Cap 470 Laws of Kenya. The Respondent submits that the Claimant did not provide a Statement of Account to show that deductions of PAYE were made from his salary. The Respondent submits that PAYE was never deducted since the Claimant was not an employee rather he was a casual labourer. The Respondent submits it produced payment vouchers which clearly indicate the amounts paid to the Claimant which was conclusive proof that the Claimant was a casual labourer. The Respondent submits that the Claimant testified that he was paid a daily at a rate of Kshs. 1,100/- and that the salary of Kshs 33,000/- was only raised in his submissions.
14. The Respondent submits that the Claimant on different occasions during trial has given conflicting and contacting statements as to how much he was earning. During his viva voce testimony, the Claimant stated that he used to earn Kshs 1,100/- per day and in the same breath he stated that he used to earn Kshs 900/- per day. Further in his pleadings the Claimant gives two (2) different figures of wages earned per week, to wit, Kshs 5,400/- per week as per paragraph 4 of the Memorandum of Claim and Kshs 4,500/- per week as per his witness statement. The Respondent submits that the Claimant's evidence of how much he was earning in terms of wages leaves so much to be desired, is fractured, inconsistent and/or incoherent and the Honourable Court should take the Claimant's testimony with a grain of salt. The Respondent submits that based on evidence it adduced, the Claimant earned wages of Kshs 900/- per day payable at the end of the week. The Respondent submits that redundancy as



a reason for terminating one's services is an affirmative reason that must be pleaded and specifically proven. The Respondent submits the Claimant did not plead nor did he specifically prove redundancy as the reason behind his termination. The Respondent submits that the contract with their client at Two Rivers Mall was what was terminated and not the employee contracts. The Respondent avers that the Claimant either misunderstood and/or intentionally misread the substituted witness statement to suit his narrative of dismissal based on redundancy rather than appreciate the true context and tenor of the statement to mean, termination of the agreement between the Respondent and its client and not termination of the employment contracts between the Respondent and the Claimant. The Respondent submits that since the Claimant was earning daily wages payable at the end of any given week, his services were short term and they were terminated at the end of the day and thus no notice period was required.

15. The Respondent submitted that since the Claimant could not show that the Respondent did not remit NHIF and/or NSSF deductions, service pay should not accrue to him. The Respondent submitted that further, the Claimant is not entitled to severance pay. As to whether the Claimant is entitled to damages equivalent to twelve (12) months' salary, the Respondent submitted that since the Claimant was earning daily wages paid at the end of any given week, the Claimant cannot claim to have been earning a salary and this prayer thus fails. On the matter of costs, the Respondent submits it applied the law as it was meant to and the Claimant misunderstood the law as it exists and filed suit prematurely and as such he should pay costs of the suit and interest.
16. The Claimant's evidence was equivocal. On one hand he stated that he received Kshs 900/- a day and shortly thereafter stated that he earned Kshs 1,100/- per day as at the time he left the Respondent's employ. He stated that he was a casual and that had he been informed to stop working by the Respondent he would have. Prior to that he indicated that he had gone to the workshop and met a Mr Raju, the boss, who told him there was no work and that he (the Claimant) was to go home. It is clear the Claimant was employed as a casual and his employ was intermittent. The Claimant attempted to rely on the provisions of section 10(7) of the *Employment Act* to suggest that the burden of proving his claims in relation to the duration of his service shifted to the Respondent. The Respondent readily admitted that the Claimant worked at various times for it from 2012. It availed as proof of payment of various sums to the Claimant vouchers indicating the Claimant was paid varying sums depending on the days he worked and the hours he worked. There was for instance overtime of Kshs 843.75 paid on August 4, 2017 when he worked at City Lodge. Similarly, on September 9, 2017 he was paid overtime of Kshs 675/-. If the Claimant was minded to extract variations or additional evidence to indicate he earned Kshs 1,100/- per day, he could have caused the Respondent to avail all copies of the petty cash voucher issued in his name. The vouchers show that at the time of the end of his contract, he earned Kshs 900/- per day which differs from his own testimony. Instructive to note, the Claimant did not avail any documentary evidence on payments. He only attached a statement from NSSF which indicated a different employer and which did not relate to the period in question. In any event it only showed contributions for one year.
17. Despite the fact the Respondent's witness had not been employed at the time the Claimant served it, the facts of the case do not change. The Claimant had no proper claim against the Respondent and his assertions were a fishing expedition. He suggests termination on account of redundancy yet it is clear there was an end to the assignment he was on. The Claimant having failed to prove his claim is entitled to the following order: suit dismissed with costs to the Respondent.
18. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2023



NZIOKI WA MAKAU
JUDGE

