



**Obonyo v Britam Life Assurance Co (K) Ltd (Cause E035 of 2022)
[2023] KEELRC 1133 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1133 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E035 OF 2022**

**S RADIDO, J
MAY 11, 2023**

BETWEEN

BENARD NAMUTU OBONYO CLAIMANT

AND

BRITAM LIFE ASSURANCE CO (K) LTD RESPONDENT

JUDGMENT

1. Benard Namutu Obonyo (the claimant) sued Britam Life Assurance Co (K) Ltd (the respondent) alleging unfair termination of employment and breach of contract.
2. On 16 September 2022, the respondent filed a Notice of Preliminary Objection contesting the court's jurisdiction and in a Ruling delivered on 9 November 2022, the court indicated that facts had to be ascertained before a determination of the objection.
3. The claimant filed an Amended Memorandum of Claim on 11 October 2022, and the respondent filed a Response on 15 December 2022.
4. The Cause was heard on 14 February 2023 and 28 February 2023. The claimant and a Legal Manager with the respondent testified.
5. The claimant filed his submissions on 17 March 2023, and the respondent on 14 April 2023.
6. The claimant identified the Issues for determination as:
 - i. Whether the claimant was an employee of the respondent?
 - ii. Whether the claimant's termination was unlawful?
 - iii. Whether the claimant is entitled to damages for unlawful termination amounting to Kshs 5,823,125.49 and issuance of a certificate of service.



- iv. Whether the claimant is entitled to contracted and unpaid commission amounting to Kshs 2,567,863.20?
 - v. Whether the respondent should be enjoined from unlawfully increasing the claimant's loan interest rate from 6% per annum to 14.5%?
 - vi. Who is to bear the costs of this suit?
7. The respondent did not specifically identify the Issues in contention but its submissions were on jurisdiction, i.e. whether the parties were in an employment relationship.

Background

8. The claimant was initially engaged by Britam through a contract dated 20 January 2001 as an Agency Sales Team Leader in charge of Kisumu. The letter of engagement indicated that the claimant was an independent contractor.
9. Around 9 August 2007, Britam offered the claimant a contract as a Life Assurance Agent and on 28 August 2007, the claimant entered into a Career Agent Agreement with Britam. The agreement indicated that the claimant was an independent contractor.
10. Britam terminated the agency through a letter dated 12 June 2008.
11. On 31 October 2017, Britam issued a letter of engagement to the claimant for the role of Branch Manager, Narok branch. The letter indicated that compensation would be by way of commissions and overrides. The letter had a termination clause.
12. On 30 July 2018, Britam issued another letter of engagement to the claimant and the terms were similar to the previous one save that the claimant was to be based in Kisumu branch.
13. The claimant signed a formal agent contract on 9 November 2018, and it clearly stated that he was an independent contractor, and that Britam entered into the agreement on behalf of the respondent, Britam General Insurance Company (K) Ltd, Britam Asset Managers (k) Ltd and Britam Properties (K) Ltd.
14. Sometime in March 2022, the respondent caused investigations to be conducted into allegations that the claimant had been soliciting bribes from unit managers.
15. As a result, the respondent issued a show-cause notice to the claimant on 15 March 2022, and he responded on a date which is not clear.
16. In the response, the claimant requested for better particulars of the allegations to enable him respond substantively.
17. The response was followed with a disciplinary hearing on 21 March 2022. On 22 March 2022, the respondent gave the claimant notice of termination of his contract, precipitating the instant proceedings.
18. Before the court, the respondent contended that the relationship between it and the claimant was that of an independent contractor and client and not employer/employee and thus the court did not have the jurisdiction over the dispute.
19. To support the assertions, the respondent posited that the claimant was earning commissions and not a salary, was not paying statutory contributions to the National Social Security Fund and the National



Hospital Insurance Fund. It was also urged that the claimants earnings were subjected to withholding tax and not Pay As You Earn.

20. The respondent cited several decisions including *Vitalis Oliweo K'omudbo v AAR Health Services Ltd* (2016) eKLR and *Frederick Byakika v Mutiso Menezes International Ltd* (2016) eKLR.
21. The claimant resisted the attempt by the respondent to discount the existence of an employer/employee relationship by drawing the attention of the court to copies of letters of engagement, payslip embossed with an employee number, the fact that he was issued with a show cause and was taken through a disciplinary hearing and the termination letter.
22. The claimant called to his aid the case of *Omusamia v Upperhill Springs Restaurant* (2021) KEELRC 3 (KLR).
23. The court has considered the pleadings, evidence and submissions.

Jurisdiction: Whether Claimant was an employee

24. The respondent challenged the court's jurisdiction over the dispute on the ground that the claimant was an independent contractor and not in an employer/employee relationship with it and, therefore, in light of article 162 of the *Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*, the court did not have the requisite jurisdiction.

The test to establish employment relationship

25. The general law of employment in Kenya, the *Employment Act*, 2007 defines employee as:

means any person employed for wages or a salary and includes an apprentice and indentured learner.
26. However, the statute does not define wages or salary but defines remuneration as:

means the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee.
27. The definitions are restrictive and does not illumine or unravel clearly who is an employee.
28. The court must therefore turn its attention elsewhere in the Act to unravel the question.
29. The preamble of the *Employment Act*, 2007 sets its contours in the following terms:

An Act of Parliament to repeal the *Employment Act*, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.
30. The court must, therefore, isolate from the body of the Act or other applicable statutes, the fundamental rights and basic conditions of employment accruing to employees in the Act and jurisprudence from domestic and comparative jurisdictions.
31. Some of the fundamental rights and basic conditions of employment which the court can glean from the Act are:

written contract of service under section 9 of the Act; an itemised pay statement under section 20 of the Act; identified hours of work under section 27 of the Act; an entitlement to annual leave under section 28 of the Act; entitlement to maternity and paternity leave



under section 29 of the Act; entitlement to sick leave under section 30 of the Act and an entitlement to housing or house allowance under section 31 of the Act.

32. Under the *Income Tax Act*, an employee is under an obligation to pay Pay As You Earn, while under the National Social Security Fund, there is a duty to make monthly contributions to the Fund. Similar provisions are found in the *National Hospital Insurance Fund Act*.
33. From comparative jurisdictions, the Court of Final Appeal of Hong Kong dealt with the question in *Poon Chau Nam v Yim Siu Cheung* (2007) 10 HKCFAR 156.
34. The court indicated that to establish whether a person was an employee, it was necessary to consider the extent of the respondent's control over how the claimant performed his work; whether the claimant had a fixed salary or whether it fluctuated; whether the claimant was an integral part of the organisation or business; whether the respondent had the obligation to provide the claimant with work or he had to look for own business and clients; whether the respondent had an obligation to provide the claimant with an office or equipment; payment of tax and the traditional structure of the trade.
35. The court has looked at the agreements signed between the claimant and respondent herein and can make the following determinations.
36. One, the last Sales Agent Agreement executed by the parties clearly indicated that the claimant was an independent contractor.
37. Two, the agreement(s) did not provide for the payment of wages or salary, but rather commissions and that tax liabilities would be charged on the commissions.
38. Three, the agreement(s) did not provide for some of the basic rights of employees such as housing, leave and payment of statutory deductions such as Pay As You Earn and contributions towards the National Social Security Fund and National Hospital Insurance Fund.
39. Four, the claimant was not paying Pay As You Earn, but was deducted withholding tax on the commissions earned.
40. Five, the claimant was licensed annually by the Insurance Regulatory Authority as an Insurance Agent. Section 69(1) of the *Insurance Act* forbids an insurance company from engaging an agent as an employee
41. Six, under the *Insurance Act*, an agent is defined as:

means a person, not being a salaried employee of an insurer who in consideration of a commission, solicits or procures insurance business for an insurer or broker;
42. Seven, the respondent did not provide the claimant with an office or equipment for purposes of procuring business on its behalf
43. Eight, the claimant did not have a fixed salary was earning according to the business procured.
44. From the foregoing, the court finds that the claimant was not an employee of the respondent, but was an independent contractor.
45. By virtue of section 12 of the *Employment and Labour Relations Court Act*, the court has no jurisdiction.



Conclusion and Orders

46. In consideration of the above and the conclusion that the claimant was not an employee of the respondent, the court will not delve into the merits of the Cause, but down its pen.
47. The Cause is struck out with costs for lack of jurisdiction.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 11TH DAY OF MAY 2023.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Bruce Odeny & Co. Advocates

For Respondent AKO Advocates LLP

Court Assistant Chrispo Aura

