



Odhiambo v Mhasibu Housing Company Ltd & another (Employment and Labour Relations Petition E002 of 2021) [2023] KEELRC 1137 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1137 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E002 OF 2021**

ON MAKAU, J

MAY 5, 2023

BETWEEN

DEBBIE ATIENO ODHIAMBO PETITIONER

AND

MHASIBU HOUSING COMPANY LTD 1ST RESPONDENT

MORRIS NJAGI 2ND RESPONDENT

JUDGMENT

1. The petitioner filed this suit on 15th February, 2021 but she amended the petition on 30th June, 2022. She alleges that she was employed by the respondent as a Sales Representative from September, 2018 to 24th July, 2019 when she was unceremoniously chased out of the 1st respondent's office by the 2nd Respondent and effectively dismissed her without the requisite 2 weeks' notice. The said action violated her rights to fair administrative action.
2. The petitioner further averred that the 2nd Respondent, who is also the CEO of the 1st respondent had severally subjected her to sexual harassment and bullying whenever she went for weekly sessions for sales agents and the CEO. The said meetings were for purposes of assessing payment of money for facilitating their operations. The CEO had the sole discretion of determining the amount payable and therefore he took advantage of the said discretion to demand sexual favours for the Sales Representatives as a condition for payment of the facilitation costs. She was sexually harassed on 17th June 2019, 2nd July 2019 and 22nd July 2019.
3. The petitioner further averred that the 1st respondent had no Policy on Sexual Harassment and she could not report the vice until when it became unbearable and she reported to the respondents' chairman. However, she was confronted by the 2nd respondent on the following day and was dismissed without following the due process set out in the Company HR Manual. Therefore by her Amended petition she seeks the following relief:-



- i. A declaration and finding that the termination of the Petitioner’s employment with the Respondent was unlawful and unfair.
 - ii. A declaration that the termination of the Petitioner’s employment constituted a violation of the petitioner’s right to fair administrative action.
 - iii. An order directing the respondent to reinstate the petitioner to her employment without loss of position, status or benefits or in the alternative payment of Kshs.8,160,000.00 back-dated to date of termination.
 - iv. Special damages to the petitioner for Kshs.8,440,300.00 as pleaded in paragraph 40 above.
 - v. General damages against the Respondents for sexual harassment and violation of the petitioner’s constitutional rights to fair administrative action.
 - vi. Exemplary damages against the Respondents for sexual harassment and violation of the petitioner’s constitutional rights to fair administrative action.
 - vii. Costs and interest on (iii), (iv), (v) and (vi) above at court rates from the date of filing this claim until payment in full.
 - viii. Certificate of service.
 - ix. Costs of this petition.
 - x. Any other relief that this Honorable court may deem fit to grant in the interest of justice.
4. The petition is supported by Affidavit of the Petitioner and the Amended witness statement by Grace Kagure Mbutia. The supporting affidavit repeats the facts set out in the petition summarized above. The witness basically stated that she was a student near 1st respondent’s office in Nairobi and she used to visit the petitioner in the respondents’ office during lunch breaks whenever she got a chance. During such visits the 2nd respondent would call her to his office and use flirtatious and suggestive language which made her feel uncomfortable and unsafe. He would constantly offer to take her out for coffee, persistently ask for her contact, and remind her that he is rich and could take care of her.
 5. She specifically identified 24th November 2018 when the 2nd respondent repeatedly made unwelcome and inappropriate sexual advances by insisting to take a photo with her while at the beach, inappropriately touching her waist and insisting that she books a room next to his in the hotel. Such persistent advances and sexual innuendos made her stop visiting the petitioner at her office and instead begun to meet her away from the office.
 6. The petitioner further relies on the Bundle of documents annexed to the petition.
 7. The Respondents filed an Amended defence dated 16th September, 2022. In brief the respondent avers that the petitioner was not their employee but an independent contractor earning a commission for identifying purchasers and selling land to customers. The commission was only payable for each completed and successful sale of land. The issuance of the petition and other Sale Representatives with Business Cards was meant to assure customers that they were not dealing with fraudsters. Further that the position of sales executives does not feature in the company’s organogram.
 8. The respondents averred that the petitioner regulated her own business programmes and hours as a Real Estate Agent and after a successful transaction, she invoiced the company for commission which would be paid without deducting PAYE, NHIF or NSSF. She was not entitled to annual leave and any reporting made to Sales Manager was in respect of her performance as an independent contract and



- not as an employee. The petitioner had no desk in the company's office and therefore she could not have been chased from the office as alleged.
9. As regards the alleged sexual harassment, the respondents averred that the petitioner like all other sales representatives dealt with the sales Manager one Lilian Muriithi in the company's Board room, who facilitates the sales executives. They contended that, the 2nd respondent being the General Manager and CEO, did not at any point facilitate a sum Kshs.2000 to the petitioner. They denied the alleged sexual harassment and put the petitioner to strict proof.
 10. The respondents further averred that the petitioner was engaged by the company from November 2018 to January 2019 when she ceased reporting to the company office after failing to secure customers. Her whereabouts was unknown until she filed this suit. Therefore they averred that the petitioner was not a sales executive for the company on 18th June 2019, 2nd July 2019 and 22nd July 2019 when she alleges to have been harassed by the 2nd Respondent.
 11. The 2nd Respondent has cross petitioned against the petitioner alleging that the accusations of sexual harassment made against him by the petitioner are false and have lowered his human dignity before the 1st respondent, family, friends and acquaintances and further threatens his chances of present and future employment opportunities as they paint him in bad light. Therefore the 2nd Respondent prays for the following reliefs against the petition:-
 - a. A declaration and finding that the false sexual harassment accusations are violation of the 2nd Respondent's rights to Human Dignity as provided under Article 28 of the Constitution of Kenya, 2010.
 - b. Damages against the Petitioner for violation of the 2nd Respondents Constitutional Rights to have Human Dignity respected and protected.
 - c. Costs of this cross petition.
 - d. Any other relief that this court may deem fit to grant in the interest of justice.
 12. The respondents relied on the Amended Affidavits by Hann Njeri 1st respondents Finance and Administration Manager, Morris Njagi (2nd respondent) and Lilian Muriithi Sales Manager all sworn on 16th September 2022. In brief they reiterated the facts set out in the Response to the petition summarized above.
 13. They all agreed that the petitioner was not an employee of the 1st respondent but rather an independent contractor purely on commission and not salary; that she carried her duties of selling land without any control by the respondents and she used her own methods; that her working hours fixed by herself; that she was not paid salary but commission for every parcel of land sold; and that no PAYE, NSSF and NHIF deductions were made from the commission paid.
 14. Further no letter of appointment or payslip was issued to the petitioner as prove of employment. She also did not have a desk in the company's office but worked from another place where she operated and she was only engaged on need basis. She operated her business of Real Estate Agency also serving other customers apart from the 1st Respondent.
 15. The alleged sexual harassment by the 2nd respondent was denied and the witnesses stated that the 2nd respondent never dealt with sales executive. The sales executives were dealt with by the Sales Manager with respect to weekly reviews and facilitation. Finally they stated that the petitioner has not produced evidence of the alleged sexual harassment and therefore her allegation amounts to defamation of the 2nd respondent and also infringement of his right to dignified treatment under Article 28 of the



Constitution. The witnesses denies knowledge of Grace Kagure Mbuthia who was never employee of the respondent. She also never made any allegation of sexual harassment against the 2nd respondent. They all agreed that the company had a sexual harassment policy.

Petitioner's submission

16. The petitioner submitted that she was not an independent contractor but an employee of the 1st respondent serving as a Sales Representative. She relied on the Business card as evidence to prove that there existed an employer-employee relationship between her and the 1st Respondent. She submitted that, assigning of Business cards and emails by the 1st respondent confirmed that the petitioner was its employee.
17. Further she submitted that her Tax deductions card (Form P9) produced as Exhibit 2 is proof that she was an employee and not an independent contractor. She also submitted that the Respondents Board Strategic Planning Report for the year 2020 (Exhibit 3A) identifies sales executives as staff members and includes them in the organogram besides providing job description. Finally she cited a number of paragraphs of the Replying Affidavit which according to her supports her case that she was an employee of the 1st respondent and not an independent contractor.
18. As regards termination of employment, it was submitted that despite her giving evidence that she was unceremoniously chased out of 1st respondent's office on 24th July, 2019 by the 2nd respondent, the respondents have failed to prove that there was a valid reason for the termination and that a fair disciplinary process was followed. Therefore in her view, the termination was unfair for violating section 41, 43 and 45 of the Employment Act.
19. For emphasis reliance was placed on the case of Onesmus Munga v Jaribuni Timbo (2017) eKLR, Pius Machafu Isindu v Lavington Security Guards Ltd (2017) eKLR and Kenya Airways Ltd v Aviation Workers Union Kenya & 3 Others (2014) eKLR where the courts were unanimous that the law required that there be a valid reason for termination and the employee is entitled to a fair hearing before the decision to termination is made.
20. As regards the alleged sexual harassment, the petitioner submitted that the evidence by the respondent was mere denial. She reiterated that there was no clear procedure put in place in a sexual harassment policy and that is why she reported orally to the Board chairman Mr. Anthony Irungu. She contended further that her witness Ms. Grace Kagure Mbuthia, corroborated her case of sexual harassment by the 2nd respondent, who was also a victim of the same vice.
21. She faulted the company for not protecting her from the harassment and instead allowed the 2nd respondent to unceremoniously chase her away from the office. No evidence was adduced to prove that the employer conducted any investigations after the report was made to the chairman of the company. She maintained that this case is not the first to be filed in court.
22. The petitioner further submitted that the sexual harassment amounted to violation of her constitutional rights by the respondents since the employer failed to protect her from sexual harassment and bullying at the work place, and further failed to investigate her complaint on the same. Reliance was placed on the case of Lydia Mogina Mokaya v St. Leonard's Maternity Nursing Home Ltd (2018) eKLR, SWM v Hardware Trading Stores Ltd & Another (2021), Ruth Nyabio v Berely Schools of Kenya Ltd (2021) eKLR and P.O v Board of Trustees, A F & 2 others (2014) eKLR where the courts dealt with sexual harassment allegations.
23. Based on the above submissions, the petitioner submitted that she is entitled to the reliefs sought and urged the court to grant the same as prayed.



Respondents' submission

24. The respondents maintained that the petitioner was engaged as an independent contract for a commission. They submitted that the claimant acknowledged the said relationship in paragraph 9 of the Amended petition and paragraph 3 of the supporting Affidavit, and also produced Tax deduction card that supports the position that the petitioner was not an employee of the 1st respondent. They further relied on the 1st respondent's Land Buying, Selling and Exit Policy (petitioner's Exhibit 3) which provided in clause 6.0 (d) that selling agents will be remunerated on commission basis.
25. They further submitted the petitioner worked independently from the respondents control, she was paid a commission, no PAYE, NSSF or NHIF was deducted from his pay, she was not entitled to payslip, she was not in the company payroll, she had not written contract of employment, she was a Real Estate broker working at her own hours and for other Real Estate Agencies at the same time and she had no desk in the 1st respondent's office.
26. As regards the alleged unfair termination, the respondents submitted that, there cannot be unfair termination of a contract of employment which never existed. Therefore they contended that the said claim was unsustainable.
27. As regards the alleged sexual harassment it was submitted no such allegation has been made by any of the company employees; that there is a sexual harassment policy under the company's HR Manual which provides the procedure of seeking redress and offers protection to employees from reiteration for making reports in regard to sexual harassment claims; and that employees are encouraged to report sexual harassment.
28. Reliance was placed on the case of *SWM v Hardware Trading Stores Ltd & Another* (2021 eKLR where the court held that the burden of proof of sexual harassment at the workplace lies with the employer. In this case however, it was submitted that the petitioner has not proved that she reported the alleged sexual harassment in writing. Further reliance was placed on the case of *JWK v Multimedia University College of Kenya & Another* (2019) eKLR.
29. The court was further asked to reject the evidence by one Grace Kagure Mbuthia who is a stranger to the respondents and never worked for the company but allegedly a student at the Alliance Francaise between September 2018 and August, 2019. The said witness could not have witnessed the alleged sexual harassment because the petitioner was never an employee of the respondents. In view of the submissions above, the respondents submitted that the petitioner is not entitled to the reliefs sought because the petitioner was not employee of the 1st respondent and her constitutional rights were not violated by the respondents.

Issues for determination

30. Having considered the pleadings, evidence and submissions, the following issues arose for determination:
 - a. Whether the petitioner was engaged by the 1st respondent as an employee or an independent contractor.
 - b. If an employee, whether the contract was unfairly terminated.
 - c. Whether the 2nd respondent sexually harassed the petitioner.
 - d. Whether the petitioner's constitutional rights were violated by the respondents.



- e. Whether the reliefs sought in the petition and the cross petition are merited.

Employee or Independent contracts

31. Section 2 of the *Employment Act* defines Employee as “a person employed for wages or salary”. Employer is defined under the same section 2 as a person who has entered into a contract of service to employ an individual. The same section 2 then defines a contract of service as an agreement whether expressed or implied, to employer or to serve as an employee for a period of time.
32. Halsbury’s Laws of England Vol 126, 4th edition paragraph 3 identifies the factors for determining whether a person is an employee thus:-
- “The factors relevant in a particular case may include, in addition to control and integration, the method of payment; any obligation to work only for the employer, stipulation as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; who, ultimately bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration.”
33. The factors to consider in determining whether a person is an employee Arising from Section 2, supra and the above paragraph are:
- a. Whether the person is paid salary or wages.
 - b. Whether the payment is subjected to income tax, social security and national insurance deductions.
 - c. Whether the employee is provided with tools and equipment by the employer.
 - d. Whether employee is entitled to overtime pay, holidays and leave.
 - e. Whether the employee has obligation to work for that employer only.
 - f. Whether the duties of the employee are integral part of the employer’s business or he is independent
 - g. Whether the employee works under the control of the employer
 - h. Whether the employee can delegate work.
 - i. Who bears the risk or the chance of profit.
 - j. The nature of the work itself.
34. In the present case there is no letter of appointment, or evidence from a fellow employee or at all to prove that the petitioner was employed by the 1st respondent under a contract of service. There is also no pay slip or bank statements or at all to prove that the petitioner received regular and consistent payment from the 1st respondent.



35. However the petitioner confirms in paragraph 9 of the Amended petition that she was employed on commission basis. The paragraph states that:-

“That further, at the time of her employment the petitioner was purely on a commission basis for properties sold.”

36. Further the petitioner deposed as follows in paragraph 3 of her Amended Affidavit in support of the petition:

“That, it was the Company Land Selling Policy to engage the services of partner organizations or selling agents who were to be remunerated on commission. (copy of the 1st respondent’s Land Buying, Selling and Exit Policy is hereby annexed and marked as “3” (see clause 6.0 (d) on page 7)).”

37. In paragraph 4 of the said Affidavit she stated:-

“That, further to paragraph 3 above, I managed to sell one plot in Vivingo to which I received a commission of Kshs.45,000.00 for the sale of the same. (copies of the Agreement for sale dated 13th December 2018, cheque dated 28th January 2019 and withholding Tax are hereto annexed and marked as “4” “5” and “6” respectively).”

38. The above evidence is a clear admission that the petitioner was not engaged by the 1st respondent as an employee but an independent contractor. She was not employed to earn any salary but purely on contract basis and in respect of any land parcel sold by her on behalf of the company. The remuneration paid to her was not subjected to income tax (PAYE), Social Security and National Insurance deductions. Instead it was subjected to withholding tax at the rate 5% of the gross commission earned.

39. There being no employer-employee relationship between the parties herein, I find that the court lacks jurisdiction to determine the dispute herein. Consequently, I must down my tools but not before striking out both the petition and the cross petition. Each party to bear own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 5TH DAY OF MAY, 2023.

ONESMUS N MAKAU

JUDGE

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

