



**Okwemba v Vishnu Builders & Developers Limited (Cause
859 of 2018) [2023] KEELRC 1595 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1595 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 859 OF 2018
SC RUTTO, J
JUNE 30, 2023**

BETWEEN

DAVID MIKOYE OKWEMBA CLAIMANT

AND

VISHNU BUILDERS & DEVELOPERS LIMITED RESPONDENT

JUDGMENT

1. By way of a Statement of Claim amended on 13th July, 2018, the claimant avers that in 1981, the respondent engaged his services as a Foreman. He avers that on 20th June, 2017, while in the course of his duties, at a site in EkaTown area within Kikuyu County, a wall collapsed and fell on him and in the process, he sustained spinal injuries which made him incapable of performing his duties as usual. The respondent accepted responsibility and paid his medical expenses and wages for two months. As he could not perform the duties assigned to him, he was declared redundant by the respondent. His claim against the respondent is for the sum of Kshs 7,238,400.00 being notice pay, house allowance, severance pay, service pay, leave pay for 36 years and compensatory damages.
2. In response to the Memorandum of Claim, the respondent avers that its relationship with the claimant was not that of an employer and employee. It contends that the claimant was an independent contractor who occasionally sourced for subcontracts from the respondent as well as other parties. That the relationship between the claimant and the respondent not being one of employment, could not and cannot therefore be governed by the provisions of the *Employment Act*, 2007. Consequently, the respondent has asked the Court to dismiss the claim with costs.
3. The matter proceeded for hearing on 30th November, 2022 and 6th February, 2023 during which both sides called oral evidence.



Claimant's Case

4. The claimant testified in support of his own case and to start with, he adopted his witness statement and the documents contained in his initial bundle as well as his supplementary bundle, to constitute his evidence in chief.
5. It was the claimant's testimony that he was first employed in 1981 by a company called Saga Builders as a Mason with Mr. Bhimji being his supervisor. It was his evidence that Mr. Bhimji left the said company and established his own company called Vishnu Builders and poached him. He was then employed by Mr. Bhimji as a supervisor and together, they did many projects. Mr. Bhimji later opened a bakery in Eldoret where he appointed him as supervisor for the lorries, salesman and credit controller. He later sold off the business and he (claimant) was forced to return to Nairobi as a supervisor on a construction site.
6. The claimant stated in evidence that on or about 20th June, 2017, he was working at EkaTown area in Kikuyu within Kiambu County, where he had been working for two months, constructing a go down, when he was summoned outside by one Mr. Bhimji. While walking towards the door of the go down, the walls suddenly collapsed and fell on him and another female employee of the respondent who was the quantity surveyor. He was hospitalized in Avenue Hospital, Parklands for two weeks. As a result of the accident, he suffered a fracture on his head which affected his spine and mobility.
7. The respondent only paid his medical expenses for his release from Avenue Hospital but refused to compensate him for the injuries he had incurred. The claimant further stated that the respondent paid his full salary for the month of June and August, and half salary for the months of October and November, upon which he refused to engage him further.
8. He further told the Court that the respondent chased him away and told him never to go back. At the time, he was on a wheel chair.
9. He denied being a contractor and maintained that he was the respondent's employee as he was being paid a salary.
10. Closing his testimony in chief, the claimant asked the Court to allow his claim as prayed.

Respondent's Case

11. The respondent called oral evidence through its Managing Director, Mr. Bhimji Mavji Rabadia who testified as RW1. Similarly, he started by adopting his witness statement and bundle of documents filed on behalf of the respondent to constitute his evidence in chief.
12. It was his evidence that he formed the respondent company in 2012. He further stated that the claimant came into contact with the respondent during the construction of two bungalows at Spring Valley where the respondent had subcontracted the claimant on behalf of Dipesh Shah and Jaynesh Shah the directors of Festive Bread. The claimant duly completed the subcontracted works and was fully paid.
13. The respondent thereafter never subcontracted the claimant until 2017 for the construction of two go downs commissioned by Agripropark Limited.
14. On 20th June, 2017, he was present when an accident occurred while the claimant was exiting one of the go-downs as one of the walls collapsed and fell on him. RW1 stated that it was the claimant's subcontracted responsibility to ensure that the walls of the project and the entire project's main structure was up to standard and at par with the construction laws and procedure.



15. RW1 stated in further evidence that he took the claimant to Kikuyu Hospital which was the nearest and ensured that he got whatever treatment he could receive. The claimant was later subjected to a full scan at Medanta in Westlands and on 21st June, 2017, he was transferred to Avenue Hospital for more specialized treatment where he was admitted for two to three weeks. The respondent paid the claimant's medical expenses upon discharge with the understanding that he would refund the respondent the said amounts.
16. RW1 denied that the claimant was ever engaged by the respondent as an employee and maintained that he was only a contractor and subcontractor. Therefore, the respondent was not capable of terminating the services of the claimant as alleged.
17. It was his further evidence that the respondent is aware of various works undertaken by the claimant as a subcontractor for other contractors in other projects which the respondent is not involved in.

Submissions

18. It was submitted on behalf of the claimant that the respondent did not have a valid reason to terminate him from employment. It was further submitted that there was no communication of the respondent's intention to terminate the claimant's services for any reason. In further submission, it was argued on behalf of the claimant that there was no procedure followed before terminating his employment and that he was not given a notice to show cause why his services should not be terminated in the manner they were.
19. On the part of the respondent, it was submitted that since there was no valid employment contract between him and the claimant, it means there was no valid employment relationship between the parties. It was further submitted that the agreement cannot be construed as an employment contract. In support of this position, the case of *Moses Waitbaka Njunge v Liberty Life Assurance Kenya Limited* was cited.
20. It was further submitted that the claimant has wrongly based his argument on Section 43 of the *Employment Act* and that the correct place to start is in establishing whether the claimant has fulfilled the mandatory burden of proof imposed in Section 47(5) of the *Employment Act*. Citing the case of *Protus Wanjala Mukite v Anglo African Properties t/a Jambo Mutara Lodge*, it was the respondent's position that the claimant has not adduced any evidence to prove the alleged unfair termination.

Analysis and Determination

21. Having considered the pleadings on record, the evidentiary material placed before me as well as the opposing submissions, the questions calling for resolution by the Court can be distilled as follows: -
 - i. Was there an employment relationship between the parties?
 - ii. If the answer to (i) is in the affirmative, was the claimant unfairly and unlawfully terminated from employment?
 - iii. Is the claimant entitled to the reliefs sought?

Existence of an Employment Relationship?

22. At the heart of this dispute is the nature of the relationship that subsisted between the parties at the material time. Whereas the claimant avers that he was employed by the respondent since 1981, the respondent holds otherwise and maintains that it only engaged him as a subcontractor hence he was not its employee.



23. In support of its position, RW1 exhibited a certificate of incorporation which indicates that the respondent was incorporated on 30th July, 2012. Cross examined, the claimant stated that the respondent company was formed in 1983 and that he started working there since 1985. This alone discounts the claimant's assertion that he was employed by the respondent as it is not logical that he was its employee way before its incorporation.
24. In further support of its case, the respondent exhibited a hand-written agreement it ostensibly executed with the claimant. In the said agreement, the claimant who is described as a subcontractor, commits to refund all expenses incurred by the respondent for purposes of his treatment. In the said agreement, the claimant further acknowledges that the respondent had paid Kshs 414,315.00 for his treatment. The agreement was also witnessed by Peter Mikoye Okwemba, a person the claimant later disowned during cross examination.
25. It is notable that the claimant did not seek to void the said agreement hence the Court is enjoined to consider the same as it is.
26. The respondent further exhibited payment vouchers issued in the name of the claimant and in which he is identified as a subcontractor. During cross examination, the claimant attempted to disown the said vouchers and ended up admitting that the same were from his side job with his friend Kanyangi. He went on to state that while working for the respondent, he was allowed to work for other companies.
27. In further support of the respondent's case, RW1 exhibited an agreement executed on 21st September, 2016, between Trident Plumbers Ltd and Amangali Builders Company, as the contractor. It is notable that the claimant has appended his signature in the place of the contractor. Cross examined on this issue, the claimant admitted working for Trident Plumbers and added that he still used to work for the respondent in which case, he would send workers to work in other companies like Trident.
28. What manifests from the foregoing is that the claimant was engaged by the respondent as an independent contractor as opposed to an employee. The *Black's Law Dictionary*, (9th Edition) defines an independent contractor, to mean, "One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."
29. And in the case of *Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa) Ltd* [2014] eKLR the Court had this to say with regards to independent contractors: -

"An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time...."
30. Applying the above determination to the instant case, the element of control is not apparent as the claimant was free to work with other companies and was not entirely bound to the respondent company. This is further buttressed by the fact that in the agreements exhibited before Court, he was described as a subcontractor or contractor. These factors take the parties' relationship outside the realm of employer/employee and it can very well be said that the parties were not in an employment relationship.
31. With regards to the claimant's NSSF statement, he admitted taking out the same in 2021, by which time, he was not working for the respondent. Therefore, the said statement was of little evidential value



to the claimant's case and did not support his claim that he was an employee of the respondent noting that the evidence on record overwhelmingly indicate that he was an independent contractor.

32. The upshot of the foregoing is that the evidentiary material before me supports the case of the respondent that it had no employment relationship with the claimant.
33. Having found that the parties were not in an employment relationship, the dispute falls outside this Court's jurisdiction and logically, the other issues cannot be determined. If I may add, proof of existence of an employment relationship is the foundation of a case for unlawful termination. Without this foundation, the Court cannot determine the fairness or otherwise of a termination from employment.
34. Accordingly, I find that the Claim is without merit and it is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.

STELLA RUTTO

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 March 2020 and subsequent directions of 21st April 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.

STELLA RUTTO

JUDGE

