



**Ngunyi v International Finance Corporation (Cause 468 of 2018)
[2023] KEELRC 1392 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1392 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 468 OF 2018**

**B ONGAYA, J
JUNE 2, 2023**

BETWEEN

ALPHONCE KINGORI NGUNYI CLAIMANT

AND

INTERNATIONAL FINANCE CORPORATION RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on April 5, 2018 through Wachira Ndung’u & Company Advocates. His case was pleaded as follows.

The respondent is an international company offering investment advisory and asset management services to institutions in developing countries. The claimant is a qualified accountant and was employed by the respondent as an Assistant Financial Consultant from November 20, 2006 until termination of his services on October 2, 2017. The contract of service was a pure private commercial engagement. On October 2, 2017 the claimant was called to a meeting by the respondent’s Country Director and allegations were levelled about misuse of the respondent’s phone and subsequently the claimant was ordered out of the workplace without being accorded a hearing or an opportunity to respond to the accusations. He was not given a termination letter or paid terminal dues. Prior to termination he was not subjected to the respondent’s internal dispute resolution mechanism and it is his case that the termination was unfair. As at termination he earned Kshs 9, 640.00 per day working 12 days per month thus a salary of Kshs 115, 680.00 per month.

2. The claimant claimed against the respondent as follows:

- a. 12 days worked from August 20, 2017 to 18.09.2017 Kshs115, 680.00.
- b. 10 days worked from 19.09.2017 to 02.10.2017 Kshs96, 400.00.
- c. Thus total claim for salary August, September, and October 2017 Kshs 212, 080.00.



- d. Unpaid extra 6 days worked each month for 9 years 8-months inclusive weekends and public holidays Kshs 6, 801, 984.00.
 - e. One month pay in lieu of notice Kshs 115, 680.00.
 - f. 12-months' salaries compensation for unfair termination $12 \times 115,680.00 =$ Kshs 1, 388, 160.00.
 - g. Sum of money claimed = Kshs8, 517, 904.00.
 - h. Certificate of service.
3. The claimant prayed for judgment against the respondent for:
- a. Kshs8, 517, 904.00.
 - b. Certificate of service.
 - c. Costs of the suit.
 - d. Any other relief the court may deem just to grant.
4. The respondent's statement of claim was filed on 11.07.2023 through Messrs Ochieng', Onyango, Kibet & Ohaga Advocates. It was pleaded for the respondent as follows. The respondent is a private sector arm of the World Bank Group with full legal personality and operates within Kenya pursuant to provisions of the [*International Finance Corporation Act*](#) (Cap. 466) Laws of Kenya.
5. The respondent pleaded the right to invoke or waive the immunity from suit and legal process which it enjoys pursuant to the [*Privileges and Immunities Act*](#) Cap 179 and [*International Finance Corporation Act*](#) Cap 466 of Laws of Kenya.
6. The respondent further pleaded as follows. The claimant was employed by the respondent as a short term consultant on a yearly basis for a maximum of 150 days per annum renewable annually and which contract was renewed for 9 years and 8 months under the terms and conditions contained in his letter of appointment dated 20.11.2006. Part of the claimant's monthly function was to scrutinize telephone bills of all staff in the Nairobi Office and pay Safaricom for each bill of each staff member. In 2017 the respondent discovered some discrepancies in the allocation of its airtime bundles by the claimant from his personal phone to other staff members' telephone bills leading to a huge loss by the respondent. The respondent summoned the claimant to a meeting with the Country Manager and the World Bank Group Ethics and Business Conduct Office Counsel with a view to explaining those discrepancies. During the meeting the claimant admitted being responsible for the alleged discrepancies and explained that one of his children gifted data bundles from his IFC-issued phone to his friends and associates. He further explained that he tried to cover up those by allocating the charges for the data bundles to other IFC staff. The respondent had to undertake independent investigations into the matter. The claimant was suspended from duty to protect integrity of the investigations per the respondent's Best Corporate Practice. The claimant was allowed to take his personal belongings and was escorted out of the premises on suspension and not termination as he alleges. The suspension was pending the investigations. The claimant failed to hand over the respondent's telephone and laptop and has not returned them.
7. The respondent further pleaded that the World Bank Group Ethics and Business Conduct Office initiated formal investigation into the claimant's conduct as required under the World Bank Group Staff Rules and Principles of Employment. Prior to the investigations the claimant was issued with a notice of allegations which he refused to acknowledge and the notice was as well sent to his lawyers. The investigators invited the claimant to to an interview and to supply a written response to the allegations



but the claimant failed, ignored or deliberately refused to heed the notice and thereby constructively deserted his engagement. The investigations proceeded in his absence. The report was then submitted to the World Bank Human Resource Vice President which in line with the respondent's relevant policies, will notify the respondent's management of the outcome. The respondent denied termination as alleged for the claimant and further denied that the internal dispute resolution mechanism had not been invoked.

8. The respondent further pleaded that the claimant being engaged as a short term consultant, he was paid for the actual hours worked and therefore no payment is due or owed to him for any hours not actually worked. It is true that the claimant worked for 12 hours and 6 days in August and September 2017 respectively but, the pay had been withheld pending the outcome of the investigations. Further, short term consultants are employed to work for a maximum of 150 days in any financial year running from 1st July to 30th June of the following year and are paid on hourly basis for work actually done. Should need to work overtime arise, the same can only be undertaken upon the express written authority of the relevant Manager and the pay structure is scheduled so that overtime done is paid in the next payroll circle. Any overtime as claimed must have been so expressly authorised and then paid in the relevant payroll circle – the claim for overtime therefore is denied.
9. The respondent's further case is that the claimant opted not to honour respondent's notices to attend the investigations into acts of fraud alleged against him and the claim for unfair termination is devoid of any legal or factual substrata.
10. The respondent reserved a right to file a counterclaim depending with the outcome of the investigations and prayed the claim against it be dismissed with costs.
11. The claimant filed on October 18, 2018 the reply to the statement of response. The claimant pleaded as follows. He denied ever admitting to responsibility for discrepancy with respect to telephone payments to Safaricom as was alleged for the respondent. The claimant admitted to a meeting taking place for about 20 minutes and after being informed of the allegations levelled against him he was manhandled out of the respondent's premises and disconnected by the Information Technology Department and could no longer communicate with the respondent. It was his case that he was not suspended but that he was dismissed as his remuneration was terminated forthwith. He received no communication to attend an interview with the investigators as alleged for the respondent. Further, overtime was procured through duress and compulsion by respondent's senior managers and the overtime was captured in the claimant's entry card in the respondent's possession that captured the arrival and departure times for the staff and the claimant is entitled to compensation thereof. The claimant prayed that the statement of response be dismissed with costs.
12. The claimant filed a notice of change of Advocates to S. Ng'ang'a Ndung'u & Company Advocates as dated October 11, 2022.
13. The claimant testified to support his case. The respondent did not call a witness. The final submissions were filed for the parties. The Court has considered the material on record. The Court returns as follows.
14. To answer the 1st issue, the Court returns that the respondent has waived or abandoned immunity as there is no submission made for the respondent in that regard. As submitted for the claimant, in *Tononoka Steels Limited v Eastern and Southern Africa Trade and Development Bank* [199]eKLR the Court of Appeal held the immunity was not absolute thus,

“I do not think that Parliament in its wisdom could have granted absolute immunity from suit and legal process to such a body or organisation if it was going to engage in purely private



commercial activities and which had nothing whatsoever to do with member states. This would be prejudicial to the interests of Kenya and would be contrary to public policy.”

Further, in *Ministry of Defence of the Government of the United Kingdom v Joel Ndegwa* [1983]eKLR as cited with approval in *Karen Njeri Kandie v Alssane B & Another* [2015]eKLR the Court of Appeal stated,

“...We, too, agree that the doctrine of absolute immunity would be anachronistic, and has been for some time now. What immunity there is must be restricted or qualified so that private or commercial activities cannot be immunized.”

The Court finds that the parties were in a commercial private contract of service and the statutory immunity did not apply.

15. To answer the 2nd issue, the Court returns that the parties were in a contract of service and not a short term consultancy as pleaded for the respondent. The initial contract dated 20.11.2006 states that it was a short term temporary appointment for services for 29 days from 21.11.2006 to 31.12.2006. It then stated,

“Please note that total World Bank Group Short Term Consultant assignment may not exceed 150 days or 1, 200 hours per fiscal year.”

While using the word consultancy in that sentence, the rest of the contract was a typical contract of service in the following respects:

- a. If a former staff, Staff Rule 4.01 limitations applied to the reappointment.
- b. By signing the letter of appointment the claimant agreed to be bound by the attached terms of reference.
- c. The appointment was subject to local recruitment and subject to World Bank Group as prevailing or amended from time to time.
- d. Remuneration was Kshs 475.00 net of tax per hour.
- e. The appointment would terminate at the end of the period unless it was extended or a new appointment was made. Further, “The World Bank Group has no obligation to extend the appointment or to offer a new appointment, even if your performance is outstanding, but it may do so if agreed to in writing at the time of the expiration of the appointment.”
- f. The claimant was subject to World Bank Group’s Staff Rules in effect at the time of the appointment or as amended from time to time. While on authorised travel, policies on travel and subsistence were governed by the World Bank Group’s Operational Travel Policy Administrative Manual Statement 3.00).
- g. Insurance policy for accidental death and baggage while on travel was provided. Workers’ compensation insurance was provided.
- h. All materials produced or acquired under the terms of the appointment, written, graphic, film, magnetic tape, or otherwise, shall remain the property of World Bank.

The Court has considered those terms and conditions of the appointment and returns that the claimant did not work for himself but was an employee subject to the respondent’s control and fully integrated in the respondent’s operational requirements and procedures. He was an employee per section 2 of the *Employment Act, 2007*. In any event the respondent pleaded waiver of immunity and



further made no submissions on the issue of immunity suggesting abandonment of that defence. The Court finds the suit was not barred by plea of immunity, accordingly.

16. The 3rd issue is whether the claimant was unfairly terminated. The material on record shows that on 02.10.2017 parties held a meeting about discrepancies in the telephone accounts. The claimant was escorted away from the workplace. The respondent alleges it amounted to a suspension pending an invitation of the claimant to participate in the investigations. The respondent has not provided and produced or exhibited a notice to the claimant about the allegations and invitation to attend investigation proceedings. The Court finds that indeed the claimant was told about the allegations but was not given an opportunity to discuss the same. While alleging investigations, nothing was said about the outcome as at the hearing. The Court returns that the claimant was entitled to consider himself terminated on 02.10.2017 when he was escorted out of the respondent's premises. The respondent offered no evidence of the reasons for the termination of the contract as envisaged in section 43, 45 and 47(5) of the Employment Act, 2007. The Court further returns that the termination was free from due process of a notice and proper hearing per section 41 of the Act and, the procedure adopted by the respondent to terminate the contract of employment was unfair.
17. The Court has considered the factors in awarding compensation under section 49 of the Act. The last contract exhibited was dated October 29, 2015 for an extension of 800 hours being 100 days from November 1, 2015 to June 30, 2016. As at termination on October 2, 2017, that last exhibited contract appears to have lapsed long ago on June 30, 2016. From the material on record, the prevailing contractual terms of service are not clear. The claimant has exhibited his bank account statement from Family Garden Branch showing that he continued to earn from the respondent and in particular, on August 1, 2017 he earned Kshs 115, 488.00 from the respondent. At paragraph 6 of the statement of response the respondent states that during the course of 2017 is when the discrepancies were discovered about the telephone accounts. It appears that the parties continued in a contract of service upon the previously prevailing terms and conditions per the letter of extension dated 29.10.2015. Thus the respondent has set out in the statement of response the investigative disciplinary regime that was invoked against the claimant. Be it as it may the Court awards the claimant only one month for unfair termination making Kshs 115,680.00 being the last payment to the claimant by the respondent and which, in absence of any other material, the Court fixes as the last monthly net pay free of tax per regime of the short term contracts between the parties – the respondent having admitted at paragraph 18 of the statement of response the claimed salaries for 12 days at that figure. While making that award, the Court has considered that if the discrepancies in telephone accounts were to be established but which was not done, the claimant would otherwise have significantly contributed to his predicament. The Court considers that looking at the terms of engagement where the claimant was to work for the respondent for designated and agreed hours, the claim for notice payment has not been established at all. The same is declined as not justified.
18. The 6th issue is whether the claimant is entitled to the other remedies as prayed for and Court has considered all material on record and returns as follows:
 - a. As submitted for the respondent, the claim for unpaid 9 years and 8 months has no basis. The claimant has not shown by evidence that he worked for the extra hours as claimed and the period he worked has not been pleaded and established by way of evidence. The claim was one for liquidated damages and it required pleading of the particulars and then to be strictly proved. That was not done and it is declined.
 - b. At paragraph 18 of the statement of response the respondent admitted the claimant worked and was not paid as claimed in paragraph 10(i) of the statement of claim. The claimant is awarded Kshs 212, 080.00 as claimed and prayed for.



- c. The claimant is entitled to the certificate of service per section 51 of the *Employment Act, 2007*.
- d. The claimant has substantially succeeded and is awarded costs of the suit.
In conclusion judgment is hereby entered for the claimant against the respondent for:
- 1) Payment of Kshs 327,760.00 by August 1, 2023 failing interest to be payable thereon at Court rates from the date of this judgment until full payment.
 - 2) The respondent to deliver the claimant's certificate of service by July 1, 2023.
 - 3) The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 2ND JUNE, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

