



**Ochieng v Lemmy Regau & Co. Advocates (Cause 794 of 2017)
[2023] KEELRC 1760 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1760 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 794 OF 2017**

SC RUTTO, J

JULY 14, 2023

BETWEEN

ELIJAH SUNDAY OCHIENG CLAIMANT

AND

LEMMY REGAU & CO. ADVOCATES RESPONDENT

JUDGMENT

1. The claimant brought the instant suit through a memorandum of claim which was amended on November 1, 2017. It is the claimant’s case that he was engaged by the respondent with effect from November 12, 2013 as an accountant with a starting gross salary of Kshs 35,000.00. He states that he served in the same capacity until December, 2015 when the respondent opted to transfer his services to a sister company known as Yala Beverages Limited which later changed its name to Mainet Limited where he served as Finance and Administration Manager. It is the claimant’s case that he dutifully and respectfully served the respondent until December 31, 2016 when he was verbally terminated from employment. His claim against the respondent is for the sum of Kshs 2,222,060.00 being notice pay, accrued leave for 3 years, house allowance, traveling allowance, service pay, days worked upto and including December 31, 2016, salary balance for the month of October and November, 2017, compensation for wrongful loss of employment, costs and interests of the suit.
2. In response to the claim, the respondent denied all assertions by the claimant and put him to strict proof. Consequently, it has asked the court to dismiss the claimant’s suit with costs.
3. During the trial which proceeded on February 28, 2023, both sides called oral evidence.

Claimant’s Case

4. The claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed together with his claim as exhibits before court.



5. According to the claimant, Lemmy Regau as a person, is a Director at Yala Beverages as he incorporated it with members of his family. He further testified that upon extension of his services to Yala Beverages Limited, he was not issued with a letter to that effect.
6. It was his evidence that at the time of his termination, he was not issued with any letter, notice and or reason and or payment of his terminal benefits including salary arrears owed to him. That he was terminated on December 31, 2017 by the respondent through a text message.
7. The claimant further stated that he was not subjected to disciplinary proceedings prior to his termination.
8. It was his testimony that throughout his employment, he was not allowed to proceed on leave. That further upon his termination, he was not paid salary for the months of October, November and December, 2016. He further stated that the respondent failed to remit his NSSF dues for the months of November and December, 2016.
9. Concluding his testimony in chief, the claimant asked the court to enter judgment against the respondent for unlawful termination of his employment and to grant his prayers as pleaded.

Respondent's Case

10. The respondent testified in support of his case and called an additional witness, Mr Samuel Nyawade. Testifying as RW1, the respondent started by adopting his witness statement to constitute his evidence in chief. He described himself as an Advocate of the High Court of Kenya.
11. It was the respondent's evidence that he knows the claimant as he was one of his employees. That the claimant worked for him from November, 2013 to December, 2015 as an accountant. In January, 2016, the claimant left employment and started working for a company called Yala Beverages Limited as an accountant on full time basis. That at that point, the claimant stopped working in his law firm and therefore, he constructively resigned and/or constructively terminated his employment at the said firm in favour of working with Yala Beverages. He thus denied terminating the claimant's employment as he left on his own volition to work for a company that was paying him a higher monthly salary of Kshs 50,000.00.
12. RW1 further denied transferring or extending the claimant's employment to Yala Beverages Limited. He further denied knowledge of Mainet Limited. The claimant further stated that Yala Beverages Limited is a company incorporated and is no longer in his hands as it is run by other people. That at the time the claimant was terminated from employment, he was no longer his employee. That he is therefore not liable to pay the claimant notice or damages for unfair termination.
13. He further stated that for the 2.1 years the claimant worked for him, his salary was consolidated and included house allowance. That the claimant further proceeded for leave on a minimum of 28 days per year. That he further made contributions to the claimant's NSSF account.
14. Closing his testimony in chief, RW1 asked the court to dismiss the suit with costs.
15. Mr Sammy Nyawade testified as RW2. Similarly, he adopted his witness statement to constitute his evidence in chief. It was his evidence that he was employed by the respondent at his law firm, Lemmy Regau & Company Advocates, as a court clerk. He told the court that he knows the claimant very well as he was his former colleague at the said law firm.
16. That in January, 2016, they agreed with the claimant to leave the respondent's law firm and start working at Yala Beverages Limited. RW2 stated that it is dishonest, deceitful and opportunistic for



the claimant to allege that his employment was transferred or extended or even terminated by the respondent to the new company.

Submissions

17. Placing reliance on the provisions of section 10(2) of the *Employment Act* and the case of *Jackson Muiruri Waitigo t/a Murtown Waitigo v Lilian Mutune* (2021) eKLR, the claimant submitted that the respondent did not disprove his evidence that he was his employee in 2013 and that he worked for him until December 31, 2016.
18. It was the claimant's further submission that the respondent did not prove that his termination was carried out in accordance with fair procedure. On this score, he placed reliance on the case of *Kenfreight (E.A) Limited v Benson K. Nguti* (2016) eKLR and *CMC Aviation Limited Mohammed Noor* (2016) eKLR. The claimant stated in further submission that the respondent did not adduce any form of evidence that he left employment in December, 2015.
19. On the respondent's part, it was submitted that the claimant has not pleaded in his claim that at the time of leaving his employment in December, 2015, he was unfairly terminated. That as of December, 2015, there was no employer employee relationship between the claimant and the respondent. In support of its argument, the respondent invited the court to consider the determination in the case of *Zarika Adoyo v Taj Shunjun & another* (2020) eKLR.

Analysis and Determination

20. Flowing from the pleadings on record, the evidentiary material before me and the rival submissions, the following issues stand out for determination: -
 - i. Whether the claimant was an employee of the respondent at the time of termination;
 - ii. If the answer to (i) is in the affirmative, whether the claimant's termination from employment was unfair and unlawful?
 - iii. Is the claimant entitled to the reliefs sought?

Employment Relationship?

21. It is common ground that the claimant and the respondent were in an employment relationship with effect from November 12, 2013 until December, 2015. What is in dispute is the existence of the employment relationship between the parties past December, 2015 and specifically at the time the claimant avers he was terminated from employment in December, 2016.
22. According to the claimant, his services were transferred and extended by the respondent to the company known as Yala Beverages Limited, which later became Mainet Limited. On the other hand, the respondent contends that the claimant's employment was not extended to the said Yala Beverages Limited and that it is the claimant who left his employment for a higher salary at the said company.
23. In support of his case, the claimant exhibited copies of his pay slips issued by the respondent for the month of November, 2015. He further exhibited copies of his pay slips issued by Yala Beverages Limited for the month of January, 2016. Further exhibited by the claimant, was an employment card issued by Mainet Limited. This evidence confirms the fact that as at January, 2016, the claimant was working for Yala Beverages Limited/Mainet Limited.
24. It was not in dispute that the respondent had a connection with Yala Beverages Limited. Does that then make the respondent liable in the circumstances? The answer to this question lies in the principles



of corporate personality as espoused in the celebrated case of *Salomon v Salomon & Co Ltd* [1897] AC. Flowing from that decision, it is trite that a company is a separate legal entity and thus a juristic “person” in the eyes of the law.

25. This position was amplified in the case of *Victor Mabachi & Anor v Nurturn Bates Ltd* Nrb CA Civil Appeal No 247 of 2005 [2013] eKLR, where the Court of Appeal reiterated the principles set out in the Salomon case as follows, “A company as a body corporate, is a *persona juridica*, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”
26. In view of the finding in the above precedent which I wholly adopt, I find that from the totality of the evidence on record, it is highly probable that at the time of his termination, the claimant was working for Yala Beverages Limited/Mainet Limited which for all intents and purposes, is a separate legal entity from the respondent.
27. Indeed, it is not clear why the claimant did not deem it fit to enjoin the said company as a party to the instant suit. Nothing stopped him from doing so. At least that way, he would have partially salvaged his case.
28. It is also worth pointing out that the burden lay on the claimant to prove that his services were retained by the respondent at the time of his termination. In stating so, I am cognizant of the obligations laid on an employer under sections 10 (6) and (7) and 74 of the *Employment Act* with regards to maintenance of certain records and the burden of proof. However, it is essential to note that this obligation only arises where there is no dispute with regards to an employment Relationship or where an employment relationship has already been established. My thinking on this issue aligns with that of the court in the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR where it was held that: -

“This court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the claimant from the burden of proving their case. Even where an employment contract is oral in nature, the claimant must still adduce some evidence whether documentary or *viva voce* to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”

29. In the circumstances, I am not persuaded that the claimant has established to the requisite threshold, the existence of an employment relationship with the respondent at the time of his termination, moreso noting that the same was fundamental as it lay a foundation for proving unfair termination.
30. In view of the foregoing, the court finds that the claimant has failed to prove his case on a balance of probability to the effect that he was an employee of the respondent at the material time hence no rights or responsibilities accrued between them.
31. Having found as such, it is not necessary to consider whether the termination was unfair and unlawful or the reliefs payable.
32. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

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STELLA RUTTO



JUDGE

Appearance:

For the Claimant Mr. Thuku

For the Respondent Mr. Okoth

Court Assistant Abdimalik Hussein

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

