



**Tsuma v Kombo Msanifu Kombo t/a Mlolongo Community Health Care
(Cause 637 of 2017) [2023] KEELRC 1688 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1688 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 637 OF 2017**

**AK NZEI, J
JULY 10, 2023**

BETWEEN

RIZIKI CHALA TSUMA CLAIMANT

AND

**KOMBO MSANIFU KOMBO T/A MLOLONGO COMMUNITY HEALTH
CARE RESPONDENT**

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated August 14, 2017 and pleaded that she was employed by the Respondent on January 3, 2014 to work as a nurse in the Respondent's Mlolongo Community Health Care, earning a monthly salary of ksh. 20,000, and that the contract of employment was verbal.
2. The Claimant further pleaded:-
 - a. that the Claimant worked for three extra hours, from 7.00am to 7.00pm, without off days and also worked on public holidays.
 - b. that on January 3, 2015, the Claimant, who was then expectant, was due for delivery, but the Respondent re-called her back to work after one week, hence cutting short the Claimant's maternity leave.
 - c. that the Claimant was entitled to house allowance and overtime, which the Respondent refused to pay.
 - d. that in the year 2014, the Respondent was ordered to treat some criminals who had been shot, and that thereafter the Claimant had to testify in a criminal matter in Shanzu Mombasa, where she was placed under witness protection.



- e. that on March 30, 2015, the Respondent terminated the Claimant's contract without termination notice or payment in lieu of notice, and that the Respondent did not give an explanation for terminating the Claimant's employment, and did not accord the Claimant a fair hearing before termination.
 - f. that by December 2014, the Respondent owed the Claimant ksh 9,700, and did not pay her salary from January to March 2015.
 - g. that the Claimant sought assistance from the Labour Officer on May 8, 2015, and that on May 28, 2015, the Respondent and the Claimant entered into an agreement whereby the Respondent was to pay the Claimant ksh 79,900 by instalments of ksh 10,000 per month with effect from June 15, 2015 and on the 5th day of each month until payment in full.
 - h. that the Respondent refused to pay the agreed sum.
3. The Claimant set out her claim against the Respondent as follows:-
- a. NSSF and NHIF
 - b. salary arrears for December 2014.....ksh 9,700
 - c. salary for January, February and March 2015...ksh 60,000
 - d. one month salary in lieu of notice.....Ksh 20,000
 - e. public holiday allowance from January 2014 to March 2015.....ksh 10,000
 - f. leave payksh 20,000
 - g. damages for failure to go for three months maternity leaveksh 60,000
 - h. 12 months' salary for unlawful termination
ksh. 20,000X 12ksh. 240,000
 - i. house allowance @ estimate of ksh. 6000
from January 2014 to March 2015.....ksh 84,000
Total ksh 503,700
4. The Respondent filed Response to the memorandum of claim on October 30, 2017 and denied having employed the Claimant as pleaded and stated that he, the Respondent, was a volunteer worker in the said health facility which was owned by Mlolongo Community.
5. The Respondent further pleaded:-
- a. that having been a worker and a volunteer in the health facility owned by Mlolongo Community, the Respondent would not give a letter of appointment to the Claimant, and was a total stranger to her claim.
 - b. that the alleged agreement between the Claimant and the Respondent was drawn by the Labour Officer without the Respondent's consent, and without establishing that the Respondent was the owner, proprietor and Managing Director of Mlolongo Health Care. That the agreement, was unlawfully and irregularly drawn by the Labour Officer, in a bid to unlawfully assist the claimant.



- c. that the Respondent was acquitted in criminal matter No 370 of 2016 of the offences of failure to pay wages to an employee and failure to pay service pay, and was found not to have been the Claimant's employer.
 - d. that the Claimant's claim is re-judicata, misconceived, bad in law and without merit.
6. When trial opened, the Claimant adopted her written witness statement filed together with the memorandum of claim as her testimony. The said witness statement basically replicates the averments made in the memorandum of claim, which are reproduced in paragraph 2 of this judgment. The Claimant further produced in evidence the documents listed on her list of documents dated August 14, 2017 and filed with the memorandum of claim. The said documents include letters from the Ministry of Labour dated May 28, 2015, and June 26, 2016 respectively, a statement recorded by the Claimant in 2016, and Court proceedings and judgment in Mombasa Chief Magistrate's Court Criminal Case No 370 of 2016, among others.
7. The Claimant also produced in evidence a letter from the National Police Service dated January 29, 2018, listed on her further list of documents dated February 7, 2018.
8. The Claimant further testified:-
 - a. that the Respondent was her employer and that when he failed to pay her, the Claimant reported to the Labour Office, upon which the Respondent was summoned and that he went there with a witness.
 - b. that the Respondent wrote an agreement on how he would pay the Claimant, and that the Respondent's witness (Harun Mutua) signed the agreement as well. That the Respondent's ID Number and phone number are on the agreement dated May 28, 2015.
 - c. that it was agreed that the Respondent would pay the Claimant ksh 79,900 by monthly installments of ksh 10,000 by the 15th day of each month with effect from June 15, 2015; but the Respondent never paid.
9. Cross-examined, the Claimant further testified that the agreement dated May 28, 2015, made at the Labour Office, was drafted by the Labour Officer and stated that it bound the Director of Mlolongo Community Health Care, states what was agreed, and was signed by the Respondent without being forced to do so.
10. Re-examined, the Claimant testified that she was employed verbally and was not given any written contract, and that the agreement drawn by the Labour Officer, a Mr Bakari, was signed by the parties thereto, individually. That in the agreement, the Respondent agreed to pay Ksh 79,900, and that the claim herein includes other benefits.
11. The Respondent adopted his filed witness statement dated December 7, 2017 as his testimony. The Respondent further testified that he was not the Claimant's employer, and that both himself and the Claimant were volunteers in a community organization known as Mlolongo Community Health Care.
12. It was the Respondent's further testimony:-
 - a. that he was in 2016 charged in Court with not paying the Claimant her dues upon termination of employment, and that the Court found that he the Respondent, was not the Claimant's employer and was acquitted of all the charges.



- b. that the agreement dated May 28, 2015 was drawn at Mombasa Labour Office, that the Respondent was coerced by the Labour Officer into signing that agreement, and he was therefore not liable to pay the amounts claimed by the Claimant.
 - c. that the Respondent was not the Claimant's employer, but a co-volunteer in a Community Health Facility.
13. Cross-examined, the Respondent testified that he had nothing to show that he and the Claimant worked at the mentioned health facility as volunteers. The Respondent further testified:-
 - a. that both the Claimant and the Respondent were witnesses in a case regarding some robbery patients who had been treated at the health facility, and that police investigators took some records from the facility.
 - b. that the DCI's letter dated January 28, 2018 was on documents taken, and that the letter confirmed that the Respondent was the proprietor of the health facility, and as having employed the Claimant as a resident nurse.
 - c. that the Respondent had been summoned to the Labour Office and that he went there with a witness, Harun Mutua; and that the Respondent had not called the said witness to testify in this Court. That the Respondent signed the document (agreement) dated May 28, 2015, and that his ID Card Number is on the document. That his witness also signed the agreement.
 - d. that he, the Respondent, was coerced to sign the agreement, but had no evidence to show that he was forced.
 - e. that the Claimant was acquitted by the criminal Court, and that the Court did not make a finding on the issue of coercion; and did not determine the same.
 - f. that the criminal Court said that it was not satisfied that the Respondent and the health facility was one and the same thing and that no records pertaining to the health facility were brought to the criminal Court. That the Court could not determine whether or not the Respondent was a volunteer worker.
 - g. that the Ministry of Labour charged the Respondent in Court, and that the Respondent was acquitted. That the Claimant cannot go back to the Respondent and claim from him.
14. Having considered the pleadings filed and evidence adduced by both parties, issues that present for determination, in my view, are:-
 - a. whether the Claimant was employed by the Respondent.
 - b. whether the Claimant's suit/claim is res-judicata.
 - c. whether termination of the Claimant's employment was unfair.
 - d. whether the Claimant is entitled to the reliefs sought.
15. In her written and filed witness stamen which she adopted as her testimony at the trial, the Claimant stated:-

"I was employed by Mr. Kombo Msanifu Kombo from 3/1/2014 until 30/3/2015 as a nurse at Mlolongo Community Health Centre. Later on, I was engaged in running the entire facility. I was employed under verbal contract/agreement and Mr. Kombo did not issue me



with a contract of employment or any letter of employment for the entire time that I worked at the Health centre.

In the year 2014, my boss called me to attend to criminals who had been shot. I had to testify in a criminal matter in Shanzu concerning the criminals and I was under witness protection this year.....

I went to the Labour Officer who called him to enable settle the dispute. On 28th May 2015, he came to the Labour Office whereby he agreed that he would pay the sum owed to me in instalments of ksh 10,000 on the 15th day of every month.

From 15th June 2015. The agreement was written and signed by both of us. However, the defendant did not comply with the said agreement.

Criminal proceedings were instituted against Mr. Kombo through the Labour Office, but he was acquitted. I have still not been paid the money owed to me by the defendant to date.”

16. The Claimant substantially reiterated the foregoing in her oral evidence in Court as stated in paragraphs, 9 and 10 of this judgment.
17. On his part, the Respondent admitted in evidence to having known the Claimant, but as a fellow volunteer worker at Mlolongo Community Health Centre, which he alleged was owned by the community. The Respondent did not, however, present any evidence to show that the said health facility was owned by a Community, and did not call a witness from the alleged community to corroborate his oral evidence. The Respondent did not also produce any evidence to firm up his oral testimony that he worked as a volunteer in the said health facility, and did not call any witness to corroborate his testimony in that regard.
18. On her part, the Claimant produced in evidence a written agreement signed by both the Claimant and the Respondent in Mombasa Labour Office on May 25, 2015. The said agreement is shown to have been signed/witnessed by the Respondent’s witness, one Harun Mutua, whom the Court was told accompanied the Respondent to the Labour Office on the said date. The Respondent admitted in evidence to having signed the said agreement and confirmed that his said witness had also signed the same. The signatures of both the Respondent and his said witness are clearly endorsed on the said agreement, and their respective identity card numbers and telephone numbers are clearly written on the agreement. The Respondent did not, however, call his said witness to testify in Court.
19. The said written agreement reads in part:-

“it was agreed that the employer Mr. Kombo Msanifu Kombo of ID No....(id no. stated) pays Ms. Riziki Chaka ID No....(id no. stated) ksh. 79,900 being final dues tabulated a below:

1. Balance of wages..... -9,700.
 2. Salary of January, February March ...60,000(@ 20,000 per month)
 3. Service pay @ 15 days per year.....10,000
- 79,700

The money will be paid in eight instalments of ksh. 10,000 per month on every 15th day of the month starting 15th June 2015.



That the said amount shall be deposited at the Labour Offices for collection by the complainant.

This agreement binds the Director of Mlolongo community Health Centre to undertake the terms stated herein.

Mr. Kombo Msanifu Kombo ID (stated)

Signed) 7000 xxxx

Riziki Chaka (signed)

ID (stated) 0703xxxx

Witness by: Harun Mutua (signed)

ID (stated) 0726 xxxx.....”

20. As already stated in this judgment, the Respondent did not dispute either the contents or the signatures on the agreement. All that he stated was that he was coerced by the Labour Officer into signing the agreement. The Respondent did not, however, testify as to how he was coerced, and did not call any witness to corroborate his oral evidence on the alleged coercion. He did not even call as witness the person who accompanied him to the Labour Office (Harun Mutua), and who signed the aforesaid agreement as a witness. Why would the Respondent undertake to pay the Claimant her salary and service pay if she was not his employee.”
21. The Claimant sued the Respondent (Kombo Msanifu Kombo t/a Mlolongo Health Care). The Respondent did not tender any evidence to show that Mlolongo Community Health Care was owned or was operated by a person or entity other than himself. I find and hold that the Claimant was employed by the Respondent. Section 8 of the *Employment Act* states that the Act shall apply to oral and written contracts. It matters not, therefore, that the employment contract between the Claimant and the Respondent was unwritten. Further, the Respondent confirmed this employer-employee relationship by signing the agreement referred to in paragraphs 18 and 19 of this judgment.
22. On the second issue, the Respondent pleaded that he had been acquitted in Mombasa Criminal Case No 370 of 2016 where he had been charged with the offence of failing to pay wages to an employee and failure to pay service pay; and that the present suit is res-judicata.
23. It must be noted that criminal cases/prosecutions and civil suits belong to two different regimes of the law, and that the standard of proof required in the two types of cases is quite different. The Court in *Alfred Lumiti Lusiba -vs- Pethad Ranik Shantilal & 2 Others* [2016] eKLR stated as follows:-

“ But even so, viability of a cause of action in a civil claim does not necessarily stem from the conviction of a defendant in a criminal trial. Further still, the success or failure of a civil suit based on facts similar to those that a criminal prosecution is mounted does not necessarily depend on the conviction or acquittal of the defendant in the criminal trial; the outcome of a civil suit is independent from that of a criminal trial largely because the standard of proof required of a prosecutor in a criminal prosecution is higher than that required of a Claimant in a civil suit. To sustain a conviction, the prosecution must discharge the burden of proof beyond any reasonable doubt that the accused committed the offence with which he is charged. On the other hand, the Claimant in a civil suit will only need to demonstrate, on a balance of probability, that the defendant is the tortfeasor and as a result of his tortious



act or omission, the Claimant suffered some sort of loss or damage that would warrant a remedy...”

24. In the criminal case referred to by both parties herein, Mombasa Criminal Case No 370 of 2016, the criminal Court stated in its judgment shown to have been delivered on April 12, 2017 as follows:-
- “.....in the circumstances therefore, I am not satisfied that the accused and the said Mlolongo Health Care are one and the same. The first issue for determination has not been established beyond reasonable doubt. Having failed to establish as such, the 2nd and 3rd issues for determination automatically fail; and I will not belabor on the same.”
25. According to the criminal Court, the prosecution failed to prove beyond reasonable doubt that the Respondent herein (who was the accused person) was one and the same as Mlolongo Community Health Care. As stated in the Alfred Lumiti Lusiba case (*supra*), the viability of a cause of action in a civil claim does not stem from the defendant’s conviction in a criminal trial, and success or failure of a suit that is based on facts similar to those on which a criminal prosecution has been mounted does not necessarily depend on conviction or acquittal of the defendant.
26. In view of the foregoing, and in view of the provisions of Section 193 of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, the principle of res-judicata cannot be invoked based on previous criminal prosecution of the defendant on matters that are similar or substantially similar to those raised in a subsequent civil suit. I find and hold that the suit herein is not *res-judicata*.
27. On the third and fourth issues, the Respondent admitted liability in a written agreement signed by the Claimant and the Respondent on May 28, 2015, before the Labour Officer (Mombasa) and witnessed by the Respondent’s own witness, and agreed to pay the Claimant ksh 9,700 being December 2014 salary arrears and ksh 60,000 being salary for January, February and March 2015. The Claimant claimed those sums and testified that the same were not paid. The Respondent did not demonstrate that he paid the same. Indeed, he did not even allege to have paid the same. I award the said sums to the Claimant.
28. The Claimant pleaded and testified to having been verbally terminated by the Respondent on March 30, 2015 without notice or payment in lieu of notice, and without reasons for such termination. She maintained that the termination was unlawful, unjustified and unfair.
29. Section 41 of the [Employment Act](#) sets out the procedure to be followed in terminating an employee’s employment. Section 43(1) of the [Employment Act](#) provides as follows:-
- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”
30. The Respondent did not demonstrate fairness in terminating the Claimant’s employment. I find and hold that termination of the Claimant’s employment was unfair.
31. Having found that termination of the Claimant’s employment by the Respondent was unfair, and there being proof of the Claimant’s monthly salary in form of the agreement signed by both parties herein on May 28, 2015, I award the Claimant the equivalent of eight months salary being compensation for unfair termination of employment. That is ksh 20,000X 8 = ksh 160,000.
32. The claim for ksh 20,000 being one month salary in lieu of notice is allowed under Section 35(1) (c) of the [Employment Act](#).



33. The claim for ksh 10,000 being public holiday allowance from January 2014 to March 2015 was not specifically pleaded and was not proved. The same is declined.
34. The claim for leave pay is allowed at ksh 14,000 as the Claimant was entitled to not less than 21 paid leave days by dint of Section 28(1) of the Employment Act. Section 74(f) of the Employment Act obligates an employer to keep records of employees annual leave entitlement, days taken and days due. The Respondent did not produce in evidence such documents to show that the Claimant took her annual leave during the period of her employment.
35. The claim for ksh 60,000 being damages for failure to go for 3 months maternity leave is declined. The Claimant did not produce a copy of any notice issued by her to the Respondent pursuant to Section 29(4) & (5) of the Employment Act, and did not produce any certificate issued by a qualified medical practitioner or midwife pursuant to Section 28(6) of the Act.
36. On the claim for house allowance, the Claimant pleaded that she was not paid house allowance. The Respondent did not demonstrate that the ksh 20,000 monthly salary paid to the Claimant either included house allowance or was consolidated.
37. Section 10(7) of the Employment Act provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) of that Section, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. The claim for ksh 84,000 is, however declined as the Claimant did not demonstrate how that sum was arrived.
38. Consequently, and having considered submissions filed by counsel for both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. salary arrears for December 2014.....ksh 9,700
 - b. salary for January, February and March 2015.....ksh 60,000
 - c. one month salary in lieu of notice.....ksh 20,000
 - d. leave payksh 14,000
 - e. compensation for unlawful/unfair termination of employmentksh 160,000

Total ksh 263,000
39. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH JULY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Ms Okata for Claimant



Ms Abaja for Respondent

