



Kutu v Anaali Kenya Ltd (Employment and Labour Relations Cause E128 of 2021) [2023] KEELRC 2061 (KLR) (8 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2061 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E128 OF 2021
AN MWAURE, J
AUGUST 8, 2023**

BETWEEN

MARK KIPRUTO ARAP KUTU CLAIMANT

AND

ANAALI KENYA LTD RESPONDENT

JUDGMENT

1. The Claimant vide his Statement of Claim February 17, 2021 averred that the Respondent has illegally and without any reasonable cause failed/ refused to make payment of his salary arrears sum of Kshs 1,320,000/-. The Claimant prays for Judgement against the Respondent for the following orders:-
 - a. Payment of salary arrears of Kshs 1,320,000/- plus interest at court rate with effect from July 10, 2020 until payment in full.
 - b. General damages and maximum compensation of 12 months.
 - c. An injunction be and is hereby granted to prevent the Respondent's Director, Ramchandani Chandru Ishwardas of Passport No Z2323855 and Special Pass File No R 680048 from travelling outside this jurisdiction of this court until payment of any amount ordered by the court.
 - d. An Order directing the Director of Immigration to prevent the Respondent from travelling outside jurisdiction of this court without permission of the Court.
 - e. Any other further relief that this Honourable Court may deem fit to grant.
 - f. Interest on above and costs of this Claim hereof.



The Claimant's Case

2. The Claimant avers that sometime in 2018, he entered into an oral employment agreement with the Respondent and he proceeded to render various employment services to the Respondent until August 2020 where he worked diligently and honestly. The Claimant further avers that the Respondent vide a letter dated July 10, 2020 undertook to pay the Claimant his salary arrears sum of Kshs 1,320,000/- due once it gets paid for the road works that had been completed.
3. The Claimant further stated that he was instructed by the Respondent to negotiate the sale contract for road bitumen products and issuance of postdated cheques in favour of Danbridge Enterprises Limited. He said he further made a lot of correspondences with the Respondent in respect to his employment contract.
4. The Claimant avers that the Respondent through its director unjustly and unfairly stated that it will pay the Claimant once it receives payment from Kenya Rural Roads Authority ('KERRA') and the Respondent has without any reasonable cause failed/refused to make the said payment causing great loss, mental and psychological anguish to the Claimant.

In support of his claim, the Claimant filed his statement and list of documents dated February 17, 2021.

The Respondent's Case

5. The Respondent, in response to the Claimant's claim filed a reply to the statement of claim dated April 5, 2021. It denied the claim and put the Claimant to strict proof.

The Respondent averred that the letter dated July 10, 2020 among the Claimant's list of documents referring to owed salary arrears was a forgery and the same has been reported to the police at Kilimani Police Station through OB No 83/01/03/2021.

Claimant

6. The Claimant's case was heard on July 14, 2022. The Claimant relied on his witness statement dated February 17, 2021 as his evidence in chief. On cross examination, the Claimant testified that he was employed by the Respondent on April 2018 but however he was not given any appointment letter to that effect. He further testified that he used to work with the Respondent's director Mr Chandru who was to pay him, but in August 2019 he informed the Claimant that there was no more work and that he will settle the salary arrears as acknowledged in the letter vide an email dated July 10, 2020. The salary arrears refer to his employment from April 2019 to February 2020. Conversely the Claimant testified that he had no records of NSSF and NHIF payments. He stated that the Respondent had no money to even pay salaries.
7. The Claimant testified that although he has a mechanical engineering background, he worked as the Respondent's business development manager and also handled its legal department. Further to this he handled the Respondent's immigration matters and debt collection. However, he left his employment with the Respondent in February 2020 when he joined politics.
8. The Claimant further testified that the Respondent created a company emails kutomark@yahoo.com markkuto@legaldept@anaali.com and issued him with business cards for him to execute his duties. Further to this he was also a member of the Respondent's whatsapp group.



Respondent's evidence

9. The defence hearing was on January 17, 2023. The Respondent witness relied on his witness statement dated April 29, 2021 as his evidence in chief. On cross examination, the Respondent's witness Chandru Ramchandru testified he is a director of the Respondent and that he knows the Claimant but however he avers that the Claimant was never employed by the Respondent and was never assigned any duties as an employee.
10. The Respondent's witness further testified that he is not aware of the said Company Whatsapp group as averred by the Claimant and that the said group has associates and friends. He continued to testify that he never signed a letter to pay the Claimant and that the said letter dated July 10, 2020 was a forgery reported at Kilimani Police Station and that he is not aware if the police conducted forensic examination on the same.

Submissions

11. The court considered the claimants submissions dated January 31, 2023. The respondent also filed his submission dated March 15 2023.
12. Issues for determination
 1. Whether the Claimant was employed by the Respondent
 2. Whether the Claimant is entitled to the orders sought for in the Claim

Whether the Claimant was employed by the Respondent.

13. The main issue for determination in this case is whether there was an employment relationship between the Claimant and the Respondent. Section 2 of the [Employment Act](#), 2007 defines an employee as:

"a person employed for wages or a salary and includes an apprentice and indentured learner"

The same section defines an employer as:

"any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual"

And contract of service is defined as:

"An agreement whether oral or in written and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learner."

14. In [Omusamia vs Upperhill Springs Restaurant](#) (Cause 852 of 2017) [2021] KEELRC 3 (KLR) (5 October 2021)(Judgment) the court relied on the decision made in [Ready Mixed Concrete \(South East\) Limited vs Minister of Pensions and National Insurance](#) which clarified the factors to consider in determining whether one was an employee and therefore under a contract of service as where: -
 - i. The servant agrees to provide his own work and skill by providing services for this matter, in consideration of wages or other remuneration.
 - ii. The servant agrees that in the performance of that service they will be subject to the master's control. Control includes the power of deciding the things to be done, the way in which it shall be done, the means to be employed and in doing it, the time and place where it shall be done.



- iii. The contract of service complies with the terms of an employment agreement. This entails complying with the statutory requirements in the *Employment Act* including minimum wage, provision for leave and payment of income tax.
15. The court continued to hold that:-
- ".....Two things emerge from the claimant's material, first, that they are in consonance with the elements of a contract of service, and second that the claimant discharged the burden of establishing that he was an employee of the respondent."
- Further to the above, the court of Appeal in *William Mutbee Muthami versus Bank of Baroda* (2014) eKLR, stated that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration.
16. In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an aggrieved party can bring a claim against the party in breach.
- Similarly, in *Charles Mwirigi Miriti versus Thananga Tea Growers Sacco Limited and Another* (2014) eKLR the court of appeal stated that it is trite that there are three essential elements for a valid contract. That is an offer, acceptance and consideration.
17. Section 10(7) of *Employment Act* provides:
- If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
18. The respondent needed to produce documents or some clear evidence that there was an employer an employee relationship with the claimant in this particular case.
- The respondent is categorical that he had no employer and employee relationship with the claimant.
19. The claimant produced some emails and sms messages purporting to establish an employee relationship. The same are however do not refer to any employment relationship.
20. The copy of a letter he has produced dated July 10, 2020 whereby he purports the respondent offered to pay him salary arrears of kshs 1,320,000/- was vehemently refuted by the respondent both in the pleadings and in the court.
21. Actually the respondent claims the said letter was forged and as a result there is a criminal case reported at Kilimani police station OB Number 83/01/03/2021.
22. The said letter in itself even if it was authentic which is not proved would not have been sufficient to establish there was an employment relationship but may have alluded to any general debt.
23. In the case of *Kenya Union of Commercial Food & Allied Workers vs Mwana Black Smith Ltd* (2013) eKLR the court held:
- "That settled, I will now deal with the status of the vis a vis Charles Asiaba. The claimant did not produce a single document to prove an employment relationship between the grievant and respondent not even the letter of resignation which the grievant claimed to have written to the respondent."



24. The court went further to state

“an employment has serious implication on the parties. The court must therefore be fully satisfied that it actually exists. A claimant claiming employment rights must prove the existence of an employment relationship.”

25. The Claimant in fact failed to prove the validity of an oral contract or at all. He did not say specifically when he was employed, what his salary was and how it was specified. The court is hand put to establish that in this case the claimant had an employee relationship with the respondent.

26. Having therefore failed to prove existence of an employment relationship the claimants claim fails and is dismissed and all the orders prayed in the claim are disallowed.

27. Each party will meet their costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF AUGUST, 2023.

ANNA NGIBUINI MWAURE

JUDGE

