



Westbuild General Contractors Ltd v Ntinyari & 17 others & another (Employment and Labour Relations Appeal E001 of 2023) [2023] KEELRC 2265 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2265 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023
ON MAKAU, J
SEPTEMBER 29, 2023

BETWEEN

WESTBUILD GENERAL CONTRACTORS LTD APPELLANT

AND

JACKLINE NTINYARI & 17 OTHERS 1ST RESPONDENT

NICHOLAS O'DWYER 2ND RESPONDENT

*(Being an Appeal from the Judgment and decree of Honorable D.W.Nyambu,
Chief Magistrate on 20th December, 2022 in Meru ELRC No.27 of 2022)*

JUDGMENT

1. The appellant was contracted by the Ministry of Transport & Infrastructure to construct Kyeni-Kathanjire-Karurumo Road (Lot 1) in Embu Region, and Chuka –Kaanwa-Kareni Road (Lot 2) in Tharaka Nithi Region. The supervisor for the project was the Director General of Kenya Rural Roads Authority who appointed the second respondent. The contract provided for staff for both the contractor and the supervisor's representative.
2. In the year 2018, there were delays in payment of salaries for the staff of supervisor's representative (1st respondent) leading to employees going on strike. The problem persisted until February 2019 when the employees left employment and filed suit alleging that their employment had been unfairly terminated. The suit sought payment of Kshs 9,398,054.00 among other reliefs from the appellant and the 2nd respondent (supervisor's representative).
3. The appellant denied liability and averred that the said staff were not its employees but 2nd respondent's. The 2nd respondent also disowned them and averred that they belonged to the appellant. The appellant further applied to join the contracting Authority as a third party contending that it was entitled to indemnity from the authority for salaries paid on behalf of the 2nd respondent. The third party filed a



- response contending that the said employees were neither civil servants nor state officers and therefore there was no reasonable cause of action against the government.
4. After considering the evidence presented, the trial court (Hon.D.W.Nyambu, CM) dismissed the claim against the Third party and entered judgment against the appellant and the 2nd respondent for the sum of Kshs 7,741,334.72 made up of salary in lieu of notice and unpaid salaries for 16 months. The claim for severance pay and compensation for unfair termination was dismissed. However the claimants were awarded costs and interest.
 5. The appellant was aggrieved and brought this appeal raising 14 grounds but only submitted on the following issues;-
 - a. The Learned Magistrate erred in law and fact by holding that the 1st respondents were employees of the appellant.
 - b. The Learned Magistrate erred in law and fact by neglecting or refusing to join the Ministry of Transport and Infrastructure as a third party.
 6. By the appeal the court is urged to grant the following reliefs:-
 - a. This appeal be allowed and the judgment of the learned Magistrate be set aside.
 - b. This Honourable court be pleased to dismiss the 1st Respondents’ claim against the Appellant with costs.
 - c. This Honourable court be pleased to make a declaration that the 1st Respondents were never employees of the Appellant as alleged or at all.
 - d. The costs of the Appeal be awarded to the Appellant.
 - e. This Honourable court does issue further orders or directions as it may deem fit.

Submissions by the appellant

7. On the first issue, the appellant submitted that the 1st respondents were not its employees and urged the court to re-evaluate the facts of the case since the trial court failed to consider some special circumstances. For emphasis it relied on *Mwanasokoni v Kenya Bus Services Limited* (Mombasa) Civil Appeal No 35 of 1985 (UR) where Hancox, JA held that on a first appeal, the court has the power to examine and re-evaluate the evidence if this should become necessary.
8. The appellant further submitted that the only reason why the 1st respondents alleged that they were its employees was because it was paying them their salaries and wages. However, it submitted that what determines employment relationship is the existence of a contract of service as defined in Section 2 of the *Employment Act*. It further relied on the case of *Stanley Mungai Muchai v National Oil Corporation of Kenya* (2021) eKLR where the court cited *Simon Deakin and Gillian S.Morris, Labour Law*, 3rd Edition page 146-168 while considering the tests used by the courts in determining “employment” or “service” including control and integration.
9. Applying the said tests to the instant case, the appellant submitted that there is no employer/employee relationship between it and the 1st respondents. First it submitted that the 1st respondent were never under its contract but under direct command of the 2nd respondent. It argued that the 1st respondents had admitted in evidence that they were under the 2nd respondent and working in his office in various capacities. The appellant further submitted that the contract between it and the Ministry of Transport required it to pay the costs incurred during the project including wages of the 2nd respondent’s staff



and seek reimbursement from the Ministry. Consequently, the appellant maintained that it was only at paymaster on behalf of the 2nd respondent and not the employer.

10. The appellant further submitted that all the witnesses for the 1st respondent testified under oath that they were employed by the 2nd respondent who also gave them instructions on their day to day work. It observed that Dw1 testified that the appellant used to raise a payment certificate for the 2nd respondents' employees and after approval by the same 2nd respondent the Ministry would release money for reimbursing the wages paid to the employees of the 2nd respondent.
11. In addition, the appellant submitted that there was no mutuality of obligations binding the appellant and the 1st respondents over a period of time. To this extent the appellant submitted that there was no evidence of contract of service produced by the 1st respondents to prove that they were employed by it. It contended that for the period of its project contract, it had independent office from that of the 2nd respondent and it had no commitment to maintain any employment relationship with the 1st respondents. Therefore it urged the court to find that there was no contract of service between it and the 1st respondent.
12. As regards the issue of joinder of the Ministry of transport as a third party, it submitted that the circumstances of the case rendered the intended third party a necessary party to the suit. It contended the contracting authority, PS Ministry of Transport and Infrastructure appointed the 2nd respondent to employ the 1st respondent and supervise the appellant in the construction of the said roads.
13. Under the project contract, the appellant was to act as a paymaster and in turn the ministry would indemnify it the monies used in the payment of wages. Therefore it urged the court to find that the trial court erred in refusing to join the contracting authority as a third party so as to indemnify it for any money paid to the 2nd respondents' employees in the suit.

1st respondents' submission

14. It was submitted for the 1st respondent that the appeal is only based on the ground that the appellant never employed the 1st respondent. In that regard, it was submitted that the appellant through DW1 admitted during the trial that it was only a paymaster while the 2nd respondent's role was to support the contract. It was further submitted that the 1st respondent tendered documentary evidence including tax deduction cards, pay slips, Bank Account, demand letters, employment records and master roll to prove that they were employed by the appellant. Therefore, the court was urged to find that the appellant was the employer of the 1st respondent and dismiss the appeal with costs.

Analysis and determination

15. I have carefully read through the record of appeal and the submissions by the appellant and the 1st respondent. My mandate as a first appellate court is to re-evaluate the evidence and come up with my own independent conclusions while appreciating that I did not have the advantage of seeing the witnesses giving evidence. I should also not interfere with a finding fact by the trial court unless, it is demonstrated that it was not founded on evidence or it was arrived at through misapprehension of a principle of law. The court is also not to consider new evidence unless leave is sought under the relevant law.
16. Having considered the record of appeal and the submissions filed, the following issues comment themselves for determination:-
 - a. Whether the appellant was the employer of the 1st respondent.



- b. Whether the Ministry of Transport and Infrastructure was a necessary party to the suit.
- c. Who should pay the 1st respondent the outstanding salaries and terminal dues?
- d. Whether the award of Kshs 7,741,334.72 should stand.

Employment relationship

17. The appellant's case is that it never employed the 1st respondent and maintained that they were employed by the 2nd respondent. The 1st respondent, however contended that they have tendered evidence to show that they were employed by the appellant. The 2nd respondent did not participate in the appeal.
18. As correctly submitted by the appellant there cannot be employer/employee relationship without existence of a contract of service. Section 2 of the *Employment* defines contract of service as:-

“An agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and it includes a contract of apprenticeship and indentured learnership.”
19. The section then defines an employee as a person employed for wages or salary and includes an apprentice and indentured learner. The burden of proof lies with the person who alleges, and in this case the burden was on the 1st respondent to proof that they were employed by the appellant.
20. Page 85 of the record of appeal is Clause 01-08-030 of the Works Contract between the Ministry of Transport and Infrastructure and appellant. It states as follows:

“Attendance upon the Engineer and His staff

The contractor shall pay wages and house all attendant staff to fulfil the requirements of Clause 137 of the Standard Specifications. The number of staff required for these duties shall be about 4 (four) No office attendants, 6 (six) No Chainmen, 2 (two) No Assistant Surveyors, 4 (four) No Laboratory attendants and 8 (eight) No Labourers.

The contractor will be paid on a prime cost basis plan a percentage for overheads and profits under appropriate items in the Bills of Quantities.”
21. From the heading of the above paragraph, the Engineer who is the representative of the supervisor is an independent entity with a defined number of staff. The said staff does not belong to the contractor but the engineer, otherwise how can a contractor employ such junior staff to supervise it. That would be an outright conflict of interest. In the circumstances therefore, I will not belabor the point but proceed to hold that the appellant was not the employer of the 1st respondent. The said employees belonged to the 2nd respondent who was the representative of the Director General of the KRRA.
22. I must agree with the appellant that its role under the project contract was to pay the staff of the 2nd respondent and then seek reimbursement in addition to profits and overhead costs for rendering the said service to the supervisor. Such contractual obligation does not render the independent contractor become the employer of the supervisor's staff.
23. The foregoing position renders otiose the argument by the 1st respondent that the appellant was their employer because it used to pay their salary, issue them with pay slips, and remit statutory deductions for them. The simple answer to the allegation is that the appellant did all that as an agent of the 2nd respondent. In any event the witnesses to the 1st respondent admitted under oath that they were



interviewed by the 2nd respondent after they saw an advertisement and applied. They further admitted that they were working for the 2nd respondent who gave them instructions on day to day basis. They were not under the command of the appellant. Consequently, I must hold that the trial court erred in law and fact in concluding that the appellant was employer of the 2nd respondent's employees.

Third party proceedings

24. The appellant faulted the trial court for neglecting or refusing to join the Ministry of Transport and Infrastructure as a third party. My reading of the typed proceedings reveals that the court granted the application to join the Ministry as a Third Party to the suit. The joinder was challenged by a notice of preliminary objection but which was dismissed by the court and the Third party filed defence and participated in the trial of the suit. It is therefore not factual for the appellant to fault the trial court for neglecting or refusing to join the contracting Authority to the suit. All what the court did was to dismiss the suit against the third party after the hearing.

Who is liable to pay 1st respondents' dues

25. I have already made a finding of fact that the 1st respondent were employees of the 2nd respondent and not the appellant. It follows that, the duty to pay salary and terminal dues to the 1st respondent is on the 2nd respondent. The 2nd respondent ought to pay its employees their salary and terminal dues. However, under the project contract quoted earlier, the appellant was bound to pay the salaries and other benefits to the employees of the 2nd respondent and seek reimbursement from the contracting Authority.

26. It follows that, and I agree with the trial court, the appellant is also liable to pay the 2nd respondents' staff under the project contract and seek reimbursement from the contracting authority. In that regard the allegation that liability ought to have been apportioned is neither here nor there. In my view the person liable to pay the 1st respondents under the law is the 2nd respondent while under the project contract, the appellant had the duty to pay them and seek reimbursement from the contracting Authority.

The award of Kshs 7,741,334.72

27. The 1st respondent sought Kshs 9,398,054.00 but the trial court awarded them a total of Kshs 7,741,334.72 being salary in lieu of notice and unpaid salaries for 16 months. There is evidence on record that the employees were not paid from November 2018 to April 2019 equaling to six months but not sixteen months. It follows that the award of 16 months' salary was not supported by evidence. Consequently, this court is entitled to interfere with said award and assess the correct award based on the evidence adduced.

28. Each employee is awarded six (6) months' salary from November 2018 to April 2019 plus one month salary in lieu of notice equaling to 7 months gross salary. The claim for unpaid salary increment arrears lacks particulars and evidence and the same ought not to have been awarded and therefore it is set aside.

29. The re-assessed awards are as follows:-

Jackline Ntinyari 36,942 x 7=258,594/-

Judy Wanja Mukuru 36,942 x 7=258,594/-

Linda Muthoni Kaburu 36,942 x 7=258,594/-

Doin Kendi Ndere 30,186 x 7=211,302/-

Samuel Gachagua Mputhia 30,186 x 7=211,302/-

Esther Kagendo Kagundu 30,186 x 7=211,302/-



Samuel Karangania Kuura 30,186 x 7=211,302/-
Joseph M Magana 30,186 x 7=211,302/-
Njeru Jonathan Mukundi 36,943.20 x 7=258,606.40
Eric Nyaga 30,186 x 7=211,302/-
Simon Kavao 30,186 x 7=211,302/-
Esther Mwakina 30,186 x 7=211,302/-
Njoki Mwendu Mwereru 30,186 x 7=211,302/-
Samson Murimi Njoka 30,186 x 7=211,302/-
Mary Kavata Mwangangi 48,578 x 7=340,046/-
David Waweru 45,417 x 7=317,919/-
Joseph Mwioki 30,186 x 7=211,302/-
Emily Mukami David 26,500 x 7=185,500/-
Kshs 4,202,171.40

Conclusion

30. I have found that the trial court erred in law and fact by holding that the 1st respondents were employed by both the appellant and the 2nd respondent. I have further found that the trial court never neglected or refused to join the contracting Authority as a Third party to the suit. I have also found that the award of damages was not supported by the evidence on record and re-assessed the award at Kshs 4,202,171.40 aggregate. In the upshot, the appeal is allowed to the extent highlighted above and judgment by the trial court set aside and substituted there with the following orders: -
- a. The respondents' are entitled to Kshs 4,202,171.40.
 - b. The 2nd respondent and the appellant are liable, individually and severally, to the said sum to the 1st respondent.
 - c. The 2nd respondent and the appellant are entitled to indemnity from the contracting authority, Ministry of Transport and Infrastructure any money they shall pay the 1st Respondent in settlement of the decretal sum above.

The award shall be subject to statutory deductions. Since the appeal has not wholly succeeded, I direct that each party shall bear own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



ONESMUS N MAKAU
JUDGE

