



Kenya Building Construction Timber Furniture Industries Employees Union v Asapura Company Limited (Cause 67 of 2019) [2023] KEELRC 2375 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2375 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 67 OF 2019
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN
**KENYA BUILDING CONSTRUCTION TIMBER FURNITURE INDUSTRIES
EMPLOYEES UNION CLAIMANT**
AND
ASAPURA COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant is a registered union and filed the claim on behalf of its member, Garama Kahindi Menza (the grievant). The respondent is a registered company.
2. The parties have no recognition agreement or a collective agreement (CBA) and the grievants and claimant members re regulated under the Regulation of Wages (General) Orders of 2018 and the [Employment Act](#).
3. The claim is that the grievant was employed by the respondent as a joinery carpenter on 9 July 2013 earning ksh 890 per day which was paid weekly. The grievant worked until 11 August 2018 when he was informed by the respondent’s clerk not to report back to work the following day. he reported to the respondent’s office on 13 August 2018 to settlement of his dues and in the company of the claimant’s official but the issues were not resolved.
4. The claimant reported a dispute to the Minister but there was no resolution.
The claim is for payment of the following terminal dues;
 - a. 2 months’ notice pay at Ksh 46,280;
 - b. Unpaid 52 leave days Ksh 46,280;
 - c. Service gratuity at 15 days every completed year Ksh 145,960;



- d. Certificate of service; and
 - e. Costs.
5. The grievant testified to support his case that he worked for the respondent at different work sites and his wages would be paid in cash by a clerk, Frederick Malenya. Another person, Musyoka would also pay him while he was at a different site in Shanzu. He was never paid at the respondent's offices. The respondent had a director, Nishani who would get contracts from different sites and the supervisor would allocate the grievant work. Initially, Fred Masanju had invited him for the carpenters' job and Nihani remained the overall boss. In the daily wages paid at Ksh 890 there was no NSSF or NHIF.
 6. The grievant also testified that the respondent did not issue him an employment letter. His work would be allocated at the work sites and would be paid every Saturday.
 7. In reply, the respondent's case is that there was no employment between the parties as alleged and the claims made are without merit and should be dismissed with costs.
 8. The respondent filed various work records for its employees, the Muster roll for the years 2016-2018, NHIF remittances records and that the grievant was not one of its employees.
 9. In evidence, the respondent called Kazungu Kea Mzungu working as a clerk with the respondent and testified that the grievant was not an employee and does not appear on its records which are produced. The respondent's practice is to issue all its employees with a written contract and operate from its offices. Due to the nature of its business, the respondent is able to secure construction sites and allow the contractor to hire its employees. Kazungu testified that he is the supervisor at the respondent's workshop and the grievant was not among the employees working under him and cannot tell where he was employed because the respondent had secured different sites and outsourced to different contractors.

At the close of the hearing, both parties filed written submissions.

10. The grievant's evidence is that he was a carpenter and working at different sites under different supervisors and paid a daily wage weekly but never by any officer of the respondent. He was supervised by Frederick Masanju and was invited for work by Musyoka and other colleagues.
11. On 11 August 2018 the grievant was called by Masanju and advised not to report back to work the next day.
12. The Muster roll filed by the respondent, the grievant, Frederick Masanju and Musyoka are not among the employees.
13. The NHIF records do not have the same persons listed as respondent's employees.
14. The claimant got involved in the matter on 13 August 2018 to try and resolve the dispute. Without a recognition agreement, there is no record that the grievant was part of the respondent employees recruited by the claimant as part of its unionisable employees.
15. Due to the nature of the respondent's business in construction, it is a plausible explanation that they would secure different sites and outsource labour and where the grievant was hired by Fred Kisanju and Musyoka.
16. Despite the matter being reported to the labour officer, a resolution could not be established for lack of proof of employment which matter is crucial and foundational to a party filing a claim before this court which must exist and where there is none, the court is denied jurisdiction.



17. without the claimant establishing an employment relationship, the grievant's evidence clear to the extent that his services were secured by different people to work at different sites, the court finds the response by the respondent that there was no employment correct.
18. Without any employment relationship between the grievant and the respondent being established, the court is without jurisdiction and to assess the claims made will be purely academic. The court must stop at this point.

The claim herein is dismissed. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

