



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaiga v Das (Employment and Labour Relations Claim 2 of 2023)  
[2023] KEELRC 2194 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2194 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 2 OF 2023**

**JW KELI, J**

**SEPTEMBER 22, 2023**

**FORMERLY BUNGOMA ELRC CLAIM NO.41 OF 2018**

**BETWEEN**

**PRISCILLA KAGONYA KAIGA ..... CLAIMANT**

**AND**

**MR. AND MRS ANUP DAS ..... RESPONDENT**

**JUDGMENT**

1. The Claimant, alleging to be a former domestic help of Mr and Mrs. Anup Das, filed a Statement of Claim dated 16<sup>th</sup> May 2018 against the respondents jointly seeking the following reliefs:-
  - a. That the dismissal of employment contract of the claimant was unfair, unlawful and illegal hence null and void.
  - b. That the respondents pay the claimant the sum of Kshs 433, 787.34 as tabulated above in paragraphs 18(a) and (c)
  - c. That the respondents pay interest on the total amount at court rates.
  - d. That the costs of this cause be provided by both of the two respondents.
  - e. That any other or further relief that deemed fit to grant be granted.
2. The Claimant in addition filed her witness statement dated 16<sup>th</sup> May 2018 together with her National Identity Card and the 2016 National statutory minimum wages circular and what she called background to her personal statement .
3. The Respondents entered appearance and appointed the firm of Akanga Matende & Company advocates on the 21<sup>st</sup> June 2022. The respondents filed memorandum of response dated 21<sup>st</sup> June 2022 and witness statement by Anup Das dated 21<sup>st</sup> June 2022 all received in court on 21<sup>st</sup> June 2022.



4. On the 4<sup>th</sup> April 2022, the Secretary General of Kenya National Union of Domestic Workers filed in court appointment of Jairus Katere Shiamala, Industrial Relations officer, to represent the Claimant in the case. The union on the 22<sup>nd</sup> July 2023 filed reply to response, together with supporting affidavit of Samson Amulaku Eshikumo sworn on the 18<sup>th</sup> July 2022 .

### **Hearing**

5. The Claimant's case was heard on the 20<sup>th</sup> April 2023 ,with the claimant giving evidence and adopting all filed pleadings and documents as her evidence. She was cross-examined by counsel for the respondents.
6. The Respondents' case was heard on the 25<sup>th</sup> May 2023 with one witness of fact Dr. Anup Das (co-respondent ) who adopted his witness statement dated 21<sup>st</sup> June 2022 and was cross-examined by the union representative Mr. Shiamala.

### **Claimant's case in summary**

7. The Claimant as per statement dated 16<sup>th</sup> May 2018 adopted as evidence in chief was that she was employed by the respondents verbally on the 21<sup>st</sup> November 2011 as house help earning Kshs 8,000/- salary per month. That her salary was increased up to 10,500 by time of separation. That she was not paid house allowance and resided separately at Kangemi. That the two respondents decided to terminate her services without notice on the 24<sup>th</sup> November 2017 and refused to pay her terminal benefits. That when she tried to settle the issues amicably the respondents were arrogant and uncooperative. The claimant sought payment of Kshs 433,787.34/- as tabulated under paragraph 18 of her claim. Her claim was also supported by affidavit of Samson Amulaku Eshiku dated 18<sup>th</sup> July, 2022 and received in court on the 22<sup>nd</sup> July 2022.

### **The Respondents' case in summary**

8. The Respondents' case was as per memorandum of response dated 21<sup>st</sup> June 2022 and witness statement of Anup Das adopted as evidence in chief of even date. the claim was against Mr. and Mrs. Anup Das. The claim was opposed. The witness statement of Anup Das was that:- "I wish to state as follows:-' that have never employed the claimant in my household as domestic worker as alleged in her statement of claim."

### **Written submissions**

9. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions were drawn by the Secretary General Kenya National Union of Domestic Workers and dated 8<sup>th</sup> June 2023. The Respondent's written submissions were drawn by Akenga Matende & Company Advocates and dated 20<sup>th</sup> June 2023.

### **Determination**

#### **Issues for determination.**

10. The Claimant addressed the merits of their claimant and the issue of existence of employer employee relationship.
11. The Respondents in their written submissions identified the following issues for determination:-



- i. Whether the claimant and Respondents herein were in an employment relationship between the period 21<sup>st</sup> November 2011 and 24<sup>th</sup> November 2017
  - ii. Whether the claimant's employment was terminated unfairly
  - iii. In the event issue (i) is in the affirmative whether the claimant was underpaid
  - iv. Whether the claimant is entitled to any of the reliefs sought.
12. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the issues in dispute for determination were as follows:-
- i. Whether the claimant and Respondents herein were in an employment relationship between the period 21<sup>st</sup> November 2011 and 24<sup>th</sup> November 2017
  - ii. Whether the claimant's employment was terminated unfairly
  - iii. Whether the claimant is entitled to the reliefs sought.

**Issue (i). Whether the claimant and Respondents herein were in an employment relationship between the period 21<sup>st</sup> November 2011 and 24<sup>th</sup> November 2017.**

**The Claimant's case**

13. The Claimant produced national identity card and national wages order of 2016 as her documents. The claimant further filed supporting affidavit by Samson Amulaku Eshikumo dated 18<sup>th</sup> July 2022. Her employment was denied in defence. At the hearing the claimant told the court she had the phone numbers of the respondents. She did not produce the numbers. The claimant said she was not given any document. Her last salary was Kshs 10,500/ but had no evidence of the same. She reported the case to labour office and was not assisted.
14. Her evidence was that she worked at house of the respondent G1 Taarifa road in December 2013. She used to sign in and was denied records. She was the first employee of Das hence not true he had habit of being sued. The claimant told the court the counsel Akenga had requested her to settle. The supporting affidavit of Eshikumo averred that he was a carpenter working to perform duty on furniture or door or window making where he was employed by owner of Langhurm Court Estate where the respondents resided and other duties of cleaning the compound. That he was on duty when Mr. and Mrs. Anup Das were given a house in that estate and he was instructed to fix doors and windows when the respondents entered the house.
15. That on the 1<sup>st</sup> December 2013 he witnessed the respondents enter the house accompanied by the claimant who worked as house help. That he was still there when she was terminated. That he witnessed the respondent give instructions to security not to open for the claimant as her services were no longer needed and the caretaker Ms. Onyango not to allow visitors with the claimant to the compound through the main gate. He stated he was ready to appear in court.

**The Respondents' Case**

16. The Respondents called Dr. Anup Das who testified on their behalf. He adopted his witness statement dated 21<sup>st</sup> June 2023. The witness repeated his statement that he had never employed the Claimant.
17. Having denied the employment relations, the union informed the court they would rely on the affidavit of Samson Amulaku Eshikumo dated 22<sup>nd</sup> July 2023. Counsel for the respondent objected on basis that the affidavit was not produced by the author. The court ruled that the affidavit would be taken



in advice. The counsel further stated Dr. Anup Das testified on behalf of the other respondent. In submissions the respondents relied on several decision on the existence of employer employee relations being essential in employment claim to support their defence. In [Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith limited](#) (2013) eKLR to the effect that the court must be fully satisfied an employment relationship between the parties actually exists in a claim for employment rights. Further in [Joseph Munene Murage v Salome Ndung'u](#) (2019) where court stated that determination for other heads of claim would depend on whether the court finds existence off employment relationship and related decision in [Mary Mmbone Mbayi v Chandubhai Patel & another](#) (Industrial Cause No. 761 of 2011) to effect that where no documentary evidence the claimant retained burden of prove of their case via viva voce evidence.

## Determination

18. The courts holds that the existence of employer -employee relations is primal to any employment claim. The jurisdiction of the court flowing from article 162(2)(b) of the [Constitution](#) and section 12 of the [Employment and Labour Relations Court Act](#) is premised on the existence of employer employee relationship.
19. The respondents denied the claimant was ever their employee. The burden of proof of the employment relationship lay with the claimant. The claimant led evidence on the residences of the respondents where she had worked and payments over the years starting with Kshs 8,000/- when employment in 2012 to Kshs 10,500/- at time of termination on 24<sup>th</sup> November 2017. She was also specific on dates of employment and of termination. The claimant further informed the court the counsel cross-examining her had offered to settle. The claimant further relied on the filed supporting affidavit of Samson Amulaku Eshikumo dated 18<sup>th</sup> July 2022 and received in court on the 22<sup>nd</sup> July 2022. At the trial, the court, on objection by counsel for the respondents to the affidavit not having been produced by author ruled the affidavit would be taken in advice. The court finds that evidence may be produced orally or by affidavit under order 19 of the [Civil Procedure Act](#) and in so holding is guided by decisions cited in [Khen Kharis Mburu & another v James Karong Ng'ang'a & another](#) [2021] eKLR to wit:- ‘ Similarly, in [G G R v H-PS](#) [2012] eKLR, the court stated:

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross-examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.” (Emphasis).<sup>28</sup>. And in *Baby v Sekar*, Petition M.P No 1 of 2014 (2 December 2014), the High Court of India sitting at Madras while dealing with Order 19 rule 2 of the India *Code of Civil Procedure* which is similar in all fours to ours, stated:

...[i]t has been stated that the party has to make out a case for the exercise of that power by the court and absolute discretion is vested with the court either to allow it or reject the same. Further, a reading of Order XIX Rule 2 of the *Code of Civil Procedure* makes it clear that



when any evidence is given by affidavit, the court may at the instance of either party order the attendance for cross examination of the deponent.””

20. The court finds that at the oral hearing on the 20<sup>th</sup> April 2023 the claimant adopted as her evidence all pleadings filed. The said affidavit of Samson Amulaku Eshikumo dated 18<sup>th</sup> July 2022 and received in court on the 22<sup>nd</sup> July 2022 was on record. The law has allowed evidence to be proved by way of affidavit. The respondents had opportunity to call the deponent for cross-examination under Rule 2 of Order 19. They did not apply to cross-examine Eshikumo. The affidavit contents are thus uncontroverted evidence. Under the supporting affidavit Eshikumo averred that he was a carpenter working and performing duty as a furniture, door or window making where he was employed by owner of Langhurum Court Estate where the respondents resided and other duties of cleaning the compound.
21. That he was on duty when Mr. and Mrs. Anup Das was given a house in that estate and he was instructed to fix doors and windows when the respondents entered the house. That on the 1<sup>st</sup> December 2013, he witnessed the respondents enter the house accompanied by the claimant who worked as house help. That he was still there when she was terminated. That he witnessed the respondent give instructions to security not to open for the claimant as her services were no longer needed and the caretaker Ms. Achola Onyango not to allow visitors with the claimant to the compound through the main gate. He averred that he was ready to appear in court.
22. The court relying on the uncontroverted facts in the affidavit of Eshikumo on the employment of the claimant, on the offer to settle by the respondents through their counsel, and the fact that the claimant at oral evidence identified the residences of the respondents with specificity finds on balance of probabilities she was an employee of the respondents as pleaded. The court upholds the jurisprudence in the decisions cited by the respondent on existence of employer employee relationship being the foundation of any claim for employment rights In Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith limited (2013)eKLR to the effect that the court must be fully satisfied an employment relationship between the parties actually exists in a claim for employment rights. Further in Joseph Munene Murage v Salome Ndung’u(2019) where court stated that determination for other heads of claim would depend on whether the court finds existence off employment relationship. In the instant case the court holds, on a balance of probabilities, there was past existence of employer employee relationship between the parties.

**Issue (b). Whether the termination of employment of the claimant by the respondents was lawful and fair.**

23. The court in determination of the issue was guided by the provisions of section 45 of the Employment Act which states:- ‘Unfair termination 45(1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason— (i) related to the employee’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure.’”

**Claimant’s Case**

24. On the validity of the reasons for the termination of the employment, the claimant submits that the termination was unfair as she was not heard before termination. That she failed to report to work the previous day and when she reported next day she was told if not interested with work she stays away is she so wished. Eshukumo in his affidavit alluded she was locked out.



## Respondent's Case

25. DW denied knowing the claimant at all so no evidence was led on the termination.

## Decision on Substantial Fairness- Valid of Reason

26. The court finds that the claimant on her own voluntary evidence disclosed she absconded work the previous day and that led to the termination. Absconding of duty is a reason for summary termination under section 44 of the *Employment Act*. Thus the reason for termination was valid.

## Procedural fairness

27. Procedural is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The procedural fairness for gross misconduct is as defined under section 41(2) of the *Employment Act* to wit:- '41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.' The court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR observed on procedural fairness :-'13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The *Act* also provides for most of the procedures to be followed ...'(emphasis mine)

28. Section 41 of the *Employment Act* provides for the procedure for fair termination as follows:- '41. (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.' The court finds that there was no prove of hearing before the termination. The court noting the uniqueness of domestic employment in a household finds that notice pay of one month salary is adequate compensation for the procedural unfairness.

## Issue (c). Whether the Claimant was entitled to Reliefs Sought

29. The Claimant submitted that she was underpaid and produced minimum statutory wage order for 2016. The court finds that the claimant having produced wage order for 2016 the underpayment could then only apply for 2016 and 2017. The claimant admitted she was paid at time of separation Kshs 10,500/-. The minimum statutory wage applicable to Nairobi house helps in 2016 was Kshs 12,926.55/-. The underpayment is limited to years 2016 and 2017. The claimant was dismissed in November 2017. Thus Kshs12,926.55- Kshs10,500 total underpayment of Kshs 2426.55x23 months total 55,810.65/- award of underpaid wages.

30. Claim for House allowance. The claim was no controverted. The claim is limited to 3 years. Housing allowances under the wages order is 15% of basic salary thus 15/100x 10,500x12months (18,900)+15/100x 12,926.55x24 months (46535.58) total unpaid house allowance award of Kshs 65,435.58/-



31. Claim for service pay. The claim was not controverted. Section 35 (5) of the Employment Act provides for payment of service pay as follows:- '(35)(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.' Service pay at rate of 15 days for every year served is payable in absence of payment of NSSF, Pension, gratuity or provident fund as stated under section 35(6) of the Employment Act. The claimant served for 6 years. The service pay is calculated at last salary (statutory minimum wage of Kshs 12,926.22) thus Kshs 38,779.35 as prayed.

### **Conclusion and Disposition**

32. The court having found existence of employer employee relationship, having found valid grounds for termination but no procedural fairness enters judgment for the claimant against the respondents jointly and severally as follows:-

- a. Award Notice Pay Kshs 12,926.55
  - b. Award Underpayment of wages awarded at Kshs 55,810.65/-
  - c. Award unpaid house allowance award of Kshs 65,435.58/-
  - d. Award Service pay for Kshs 38,779.35
  - e. Costs assessed by court for reasonable disbursements payable to the claimant of Kshs10, 000/-.
  - f. Total award(a-e above) to the claimant of Kshs 182,952.13
  - g. If the amount awarded is not paid in full in 30 day of the judgment interest to apply at court rate from date of judgment until payment in full.
33. Right of appeal in 30 days
34. Stay of 30 days
35. It is so ordered

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 22<sup>ND</sup> SEPTEMBER 2023**

**JEMIMAH KELI**

**JUDGE**

In The Presence Of:-

Court Assistant : Lucy Macheso

For Claimant : Absent

For Respondent: Akanga Advocate

