



REPUBLIC OF KENYA



KENYA LAW
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Mutashi v Enterprises (Cause 2110 of 2016)
[2023] KEELRC 2471 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2471 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2110 OF 2016
JK GAKERI, J
OCTOBER 17, 2023

BETWEEN

ROYLAND INDANGASI MUTASHI CLAIMANT

AND

KISHOR KERAI T/A AMITY ENTERPRISES RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim alleging wrongful dismissal by the Respondent and non-payment of terminal dues.
2. The Claimant prays for;
SUBPARA a.
A declaration that termination of his employment was unfair and unlawful.
SUBPARA b.
Terminal benefits amounting to Kshs.941,867/= comprising;
SUBPARA i.
One month's salary in lieu of notice Kshs.13,606/=.
SUBPARA ii.
Salary balance for November Kshs.7,500/=
SUBPARA iii.
Underpayment for 42 months Kshs.181,902/=.
SUBPARA iv.



House allowance at 15% Kshs.74,550/=.

SUBPARA v.

Leave allowance for 3¹/₂ years Kshs.47,621/=.

SUBPARA vi.

Off-duty for years worked Kshs.87,915/=.

SUBPARA vii.

Public holidays 25th and 26th December, 2015 Kshs.2,092/=.

SUBPARA viii.

Service gratuity Kshs.20,409/=.

SUBPARA ix.

Overtime at 3 hours per day Kshs.343,000/=.

SUBPARA x.

12 months compensation Kshs.163,272/=.

SUBPARA c.

The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

SUBPARA d.

Costs of this suit.

SUBPARA e.

Interest at court rates.

DIVISION - The Claimant's case is pleaded as follows;

3. That he was employed by the Respondent on or about 12th July, 2012 as a Turn boy at a monthly salary of Kshs.7,500/= exclusive of house allowance.
4. That at the time, the Respondent was carrying on business in the name and style of Ramviir Enterprises and later changed to Amity Enterprises, and he served diligently until 5th January, 2016 when the Respondent terminated his employment unlawfully as he was neither given notice, show cause letter setting out the allegations nor accorded a hearing and the Respondent did not pay terminal dues which precipitated the instant suit.
5. That in response to the demand letter dated 17th February, 2016, the Respondent's advocate denied that the Claimant had been an employee of Amity Enterprises.

Respondent's case

6. The Respondent did not file a response to the claim and its Notice of Motion Application dated 9th June, 2022 seeking leave to do was adjudged, unmeritorious and dismissed on 21st March, 2023 and the suit proceeded for formal proof.
7. The Respondent's counsel, however, cross-examined the Claimant.



Claimant's evidence

8. The Claimant adopted the unauthenticated written statement dated 12th October, 2016 which rehearses the contents of the statement of claim and was cross-examined.
9. The witness confirmed that he was employed by one, Mr. Kishor, a Director and Supervisor of Ramviir Enterprises but had no documentary evidence to establish the relationship. He however confirmed that he knew the man's face and he appeared to be the Managing Director.
10. The witness confirmed that he had no documentation to show the registration status of Ramviir Enterprises or that there was a company by the name Amity Enterprises or that Mr. Kishor was the owner of the alleged company and he had not issued a notice to produce to the Respondent for the relevant documentation.
11. The witness testified that his salary was paid through MPESA but had no record of payment.
12. That the Respondent registered employees with National Social Security Fund but the witness had no document of his contributions to the Fund.
13. That he was the driver of Motor Vehicle Reg. No. KAG 495E but had no evidence to substantiate the claim.
14. A few minutes later, he testified that he was the turn boy not the driver.
15. The witness was emphatic that he had no evidence of the salary he used to receive and had not indicated the year in which the salary for November was not paid or the number of leave days claimed or evidence of when he travelled on assignment.
16. On re-examination, the witness testified that he was neither given a termination letter nor a payslip.
17. That his employer was Kishor Kerai and the employer had not filed any document.

Claimant's submissions

18. Counsel isolated four issues for determination on whether the Respondent had a valid reason to terminate the Claimant's employment, observed procedural fairness and entitlement to the reliefs sought and costs.
19. As regards the reason(s) for termination, counsel cited Section 43(1) of the *Employment Act* to submit that the Respondent had failed to demonstrate that it had a valid reason to terminate the Claimant's employment as the Claimant was not given the reason(s).
20. In counsel's view, the termination was unconstitutional as it violated Article 41 of *the Constitution* of Kenya, 2010.
21. On procedural fairness, reliance was made on the provisions of Section 41 of the *Employment Act* to urge that the Respondent did not comply with the mandatory procedure prescribed by law.
22. Counsel submitted that the termination lacked substantive and procedural fairness.
23. On reliefs, counsel urged that since the termination of employment was unfair, the Claimant was entitled to the reliefs sought and costs of the claim.



Respondent's submissions

24. Counsel isolated four issues for determination, namely;
 - i. Whether there was an employment relationship between the Claimant and the Respondent.
 - ii. Depending on the answer in (i), whether the court had jurisdiction to hear and determine the suit.
 - iii. Whether termination of the Claimant's employment was unfair.
 - iv. Whether the Claimant was entitled to the reliefs sought.
25. On the first issue, counsel submitted that the Claimant had not proved that there was an employment relationship between him and the Respondent and had averred that the Respondent had indeed denied that there as such a relationship.
26. Basing his argument on the facts as revealed on cross-examination, and the sentiments of the court in Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School [2022] eKLR, Samuel Wambugu Ndirangu v 2NK Sacco Society Ltd [2019] eKLR, Casmir Nyankuru Nyaberi v Mwakikar Agencies Ltd [2016] eKLR and Joseph Munene Murage V Salome Ndung'u [2019] eKLR, counsel submitted that consistent with the mantra that he who alleges must prove, the Claimant had not discharged the evidential burden of proof that the Respondent was its employer as he had neither tendered evidence that his employer was Ramviir Kishor Kerai nor Amity Enterprises.
27. Counsel further submitted that the employer's obligation to keep records in law did not extend to situations where the person alleging to have been an employee was not and failure to file documents cannot be construed to mean that the Respondent had admitted the existence of the relationship.
28. Counsel urged that, if indeed the Respondent had documents, the Claimant ought to have invoked the provisions of the Evidence Act with a Notice to Procedure.
29. On jurisdiction, counsel urged that as the Claimant had failed to prove an employer/employee relationship between him and the Respondent and the court had no jurisdiction to proceed further as held in Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR.
30. The decisions in David Radu v Malindi Water & Sewerage Co. Ltd [2013] eKLR, Linic Enterprises Ltd v Savannah Cement Ltd [2022] eKLR and George Onyango Ochieng v Chemilil Sugar Co. Ltd [2014] eKLR were relied upon to urge that the court had no jurisdiction to hear and determine the instant suit.
31. On termination, counsel submitted that since the Claimant had failed to prove the relationship between Kishor Kerai and Ramviir Enterprises or Amity Enterprises, the alleged employer, the question of termination of employment could not arise and he had not proved that the alleged termination of employment was unfair as demanded by Section 47(5) of the Employment Act, 2007 and as held in Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia [2021] eKLR.
32. On reliefs, counsel submitted that the Claimant was not entitled to any as held in the Protus Wanjala Mutike's case (Supra).



Determination

33. The issues that commend themselves for determination are;
- i. Whether there was an employer/employee relationship between the Claimant and the Respondent. Depending on the answer to (i);
 - ii. Whether termination of the Claimant was unfair; and
 - iii. Whether the Claimant is entitled to the reliefs prayed for.
34. As to whether the Claimant was an employee of the Respondent, counsel for the parties have adopted opposing positions. While the Claimant avers and submits that he was an employee of the Respondent, the Respondent on the other hand maintains that he was not as he had not demonstrated his employment status.
35. In determining this issue, it is critical to determine what constitutes an employment relationship.
36. Section 2(1) of the *Employment Act*, 2007 defines an employee to mean “a person employed for wages or salary and includes an apprentice and indentured learner.”
37. The term employer on the other hand is defined in very broad terms and means “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, Manager or factor of such person, public body, firm, corporation or company.”
38. The foundation of an employment relationship as discernible from the foregoing definitions is a contract of service which under Section 2 of the *Employment Act* is “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 . . .”
39. Clearly, for an employment relationship to come into existence, there must have been a meeting of the minds consensus ad idem.
40. In determining this issue, the court is guided by the sentiments of Onyango J. in *Humphrey Muniyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* [2020] eKLR, where the learned judge stated as follows;
- “In the case of *Monica Kanini Mutua v Al- Arafat Shopping Centre and another* [2018] eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
41. Similarly in *Casmir Nyankuru Nyaberi v Mwakikar Agencies Ltd* (Supra), cited by the Respondent, the court went further stating that;
- “This court is well aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its



possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.

In the instant case, the Claimant told the court that he had been issued with an employment card but he did not produce it . . .”

42. As correctly held in *Joseph Munene Murage V Salome Ndung’u (Supra)*, it is the burden of the Claimant to prove the existence of an employment relationship and the unfair termination thereof.
43. As to the existence of an employment relationship between the Claimant and the Respondent, the Claimant testified that he was employed by a Mr. Kishor Kerai whom, he only knew from identification and nothing else.
44. That Ramviir Enterprises was dissolved in January 2016 giving way to Amity Enterprises but provided no evidence that such business names or companies existed at any point in time. His evidence is silent on the place of business of the company or enterprise or when he used to report and leave the work place.
45. Puzzlingly, the Claimant adduced no evidence on the circumstances in which the termination took place and what he did in response.
46. Although the Claimant alleged that the Respondent registered the employees with National Social Security Fund, he did not avail a statement from the Fund for perusal by the court.
47. It was his testimony that payment of salary was through Mpesa or receipt but had no receipt or Mpesa statement from the service provider and did not issue the Respondent with a notice to produce, a fact he admitted on cross-examination.
48. Similarly, the Claimant adduced no evidence on the nature of his work, daily schedule of reporting or exit, who his driver was or the supervisor, who paid and when.
49. In a nutshell, other than the oral testimony adduced in court, that the Claimant was an employee of the Respondent, the Claimant availed no corroborative evidence to reinforce his testimony. He relied on his words in court exclusively, the fact that the suit was undefended notwithstanding.
50. Contrary to the Claimant’s testimony on re-examination that the Respondent did not file a letter of appointment or payslip as evidence, the burden of establishing that he was an employee of the Respondent lay on him as he was the one who alleged to have been the Respondent’s employee.
51. In any event, he did not testify that the relationship was based on a written agreement.
52. The foregoing finds support in the sentiments of the court in *Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School (Supra)* as follows;

“It is not enough for a party to make an allegation and expect the court to find in its favour, without substantiating such an allegation and supporting the same with oral and/or documentary evidence. This is more so where an allegation is expected to be supported by documentary evidence to establish payment of salary or underpayment thereof . . .”
53. Puzzlingly, since the Claimant’s written statement was unauthenticated, his only evidence was the oral testimony in court which lacked corroboration.
54. It is intriguing that the Claimant having worked for almost 4 years, as alleged had nothing to show the salary he used to receive per month or anything connecting him with the Respondent at all.



55. More significantly, in the letter dated 20th June, 2016, the Respondent’s counsel was categorical that the Claimant had never been an employee of the Respondent which did not even exist in 2012, a fact the Claimant admits in paragraph 6 of the Statement of Claim.
56. Consistent with the provisions of the Evidence Act, it was incumbent upon the Claimant to search and avail credible evidence to substantiate his claim.
57. In its current state, the oral testimony adduced in court falls below the threshold prescribed by law.
58. It is trite law that the standard of proof in employment disputes is on a preponderance of probabilities. The court must be satisfied that the allegations made are more probable than improbable.
59. For the foregoing reasons, it is the finding of the court that the Claimant has failed to show on a balance of probabilities that there was an employment relationship between him and the Respondent.
60. Needless to emphasize, this court derives its jurisdiction from the Constitution of Kenya, 2010 and the Employment and Labour Relations Court, 2011 which is limited to employment and labour relations and connected purposes and in the absence of an employment relationship between the Claimant and the Respondent, this court is obligated to down its tools as “jurisdiction is everything” as stated by Nyarangi JA in Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (Supra).
61. Having found as above, it is evident that the instant suit is for dismissal and it is accordingly dismissed with no orders as to costs.
62. As the remaining two issues were dependent on the 1st issue, they are no longer amenable to determination.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF OCTOBER 2023

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

