



**Kimani v Kenya Bus Management Limited (Cause E1025 of 2021)
[2023] KEELRC 2413 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1025 OF 2021
SC RUTTO, J
OCTOBER 6, 2023**

BETWEEN

GODFREY GITAU KIMANI CLAIMANT

AND

KENYA BUS MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. The Claimant brought the instant suit through a Memorandum of Claim which was filed on 8th December, 2021. It is the Claimant's case that he was employed by the Respondent on or about 18th March, 2019 as a driver. According to the Claimant, the contract of employment was oral. The Claimant avers that upon his employment, he worked faithfully until he and others were told to take a short break after the outbreak of Covid-19. He contends that in a malicious and unprecedented move, when the Covid situation subsided, he was informed that he was over 60 years hence his services were no longer needed. The Claimant further avers that despite his dismissal from employment, the Respondent has totally refused to settle his terminal dues. It is on account of the foregoing that the Claimant seeks against the Respondent several reliefs including a certificate of service, sleep out allowances for one year, notice pay, unpaid leave allowance, unpaid house allowance, service pay, unpaid overtime pay, compensatory damages and National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) monthly contributions.
2. In response to the Claim, the Respondent has denied all assertions by the Claimant and put him to strict proof. It denies employing the Claimant either directly or indirectly and as such, avers that there is no oral or written contract between the parties. According to the Respondent, it is a franchising company engaged in the transport sector whereby it authorises franchisees to use its business name, brand and goodwill in return for a franchise fee paid daily out of the revenue generated. The Respondent further avers that the Claimant was a driver employed by various bus owners and was paid salary by his employers. The Respondent has further denied terminating the Claimant as there



never existed an employment relationship. Against this background, the Respondent prays that the Court dismisses the Claimant's suit with costs.

3. During the trial which proceeded on 17th April, 2023, both sides called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed together with his Claim as exhibits before Court.
5. It was the Claimant's testimony that he was employed by the Respondent and was taken through a rigorous training before starting his job. He further stated that he attended and completed all the expected training sessions. He bought the uniform and was issued with a PSV badge/identity card and started working. According to the Claimant, his salary was initially supposed to be Kshs 25,000/= per month but after employment, he was being paid Kshs 1200/= per day.
6. After working for some time, there arose some unclear incidences and he was informed that he will only be working on some particular days and not every day as before.
7. When the Corona virus hit the country, he was ordered to work at Kawangware -56 terminus, only to be informed that his services were no longer required as he was over 60 years. This came without prior notice. He has severally demanded for all his benefits and a certificate of service but none has been forthcoming. At some point, the Respondent's management had alleged that he was employed by a franchise which is not true. He further recalls that the management had also told him that there was an affiliate company named Msafiri which would subsequently, employ them with better terms but that never happened. It was his evidence that he continued working for the Respondent for the full year.

Respondent's case

8. The Respondent called evidence through Mr. Edward Mwaro who testified as RW1. He identified himself as the Respondent's Human Resource Manager and similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
9. It was his evidence that the Claimant is a franchise driver and was paid salary by his employers. The Claimant worked with bus registration No. KBC 377G and KCA 743E whose owners would pay his wages. The franchisee would register their vehicles with the Respondent and thereafter obtain a Fleet Number and thereafter register their drivers so as to obtain driver numbers. It was his testimony that the said number is not a staff identification number.
10. RW1 further stated that the franchisee would pay the driver their dues out of the revenue for the day. That the Respondent would only be paid a franchise fee. The drivers and conductors would fill in the details of revenue collected in a waybill form which would be submitted to the Respondent for purposes of record keeping.
11. The Respondent's interaction with the Claimant or any of the drivers working under its brand is only to ensure that the franchisee and their employers or agents adhere to the Respondent's safety standards and protocol. RW1 contended that the franchisee is expressly responsible for managing its employees.
12. RW1 further denied the Claimant's assertions that he was trained by the Respondent. In this regard, he averred that the Respondent has a driver and conductor training school which is a commercial venture whereby any member of the public may enrol and obtain training. The Claimant was a student at



- the institution like any other member of the public and was therefore not enrolled as a precursor to employment with the Respondent.
13. With regards to the badge issued to the Claimant, RW1 stated that the same is not proof of employment and that the same is issued by the National Transport and Safety Authority (NTSA) without involvement of the Respondent. It was his contention that the same is not an employee identification card.
 14. As to the driver's checklist, RW1 stated that the same is a document that codifies the Respondent's safety standards to franchisees and therefore the same is used to ensure that the franchisee adheres to the Respondent's safety standards in order to safeguard its brand.
 15. RW1 admitted that during the Covid-19 period, the Respondent was forced to stop operations for a period of time pursuant to the Government Covid-19 containment measures and directives. Every franchisee handled their employees independent of the Respondent. In his view, the Claimant is therefore misleading the Court that the Respondent terminated his employment.
 16. RW1 further contended that the Respondent did not;
 - i. pay the Claimant and other drivers their salaries;
 - ii. supervise them in the performance of their duties;
 - iii. terminate their services for misconduct or for any other reason; and
 - iv. undertake to subject them to a disciplinary process.
 17. RW1 further averred that the Respondent only has a commercial relationship with the Claimant's employer and is a stranger to his claims.

Submissions

18. It was the Claimant's submission that he had proved on a balance of probabilities that he was an employee of the Respondent from 18th March 2018 to March 2020. He further argued that it was upon the Respondent to prove through the MOUs that indeed, he was an employee of a franchisee. He contended that all documents show that he was an employee of the Respondent. In support of the Claimant's submissions, reliance was placed on the case of *Wycliffe Shijedi Jeti v Martin Gathumbi* (2019) eKLR. Citing constructive dismissal, the Claimant invited the Court to consider the determinations in *Godfrey Allan Tolo v Tobia O. Otieno & another* (2022) eKLR and *Nathan Ogada Atiagaga v David Engineering Limited* (2015) eKLR.
19. The Claimant stated in further submission that due process was not followed in terminating his employment.
20. Referencing the case of *Omusamia v Upperhill Springs Restaurant* (Cause 852 of 2017) [2021] KEELRC 3(KLR), the Respondent submitted that the Claimant was never its employee and that there was never an offer for services or otherwise. It was further submitted that the Claimant could neither identify the person who gave him the offer nor elaborate on the terms of the offer.
21. It was the Respondent's further submission that it was never in control of the day to day running of the business and would only obtain a commission on the revenue obtained by the franchisees. That whether a bus would operate or not was in full control of the franchisees and where a certain person would drive a said vehicle was in full control of the franchisee as well as the working hours.



Analysis and determination

22. Flowing from the pleadings on record, the evidentiary material before me and the rival submissions, the following issues stand out for determination: -
- i. Whether the Claimant was an employee of the Respondent;
 - ii. If the answer to (i) is in the affirmative, whether the Claimant's termination from employment was unfair and unlawful?
 - iii. Is the Claimant entitled to the reliefs sought?

Employment relationship?

23. It is the Claimant's case that he was an employee of the Respondent from 18th March, 2018 upto March, 2020. This position has been disputed by the Respondent as it denies the existence of an employment relationship with the Claimant. According to the Respondent, the Claimant was one of the employees of its franchisees.
24. In support of his case, the Claimant exhibited a drivers PSV badge and a driver's checklist. The PSV badge which has been issued by the NTSA identifies the Respondent as an employer. He further exhibited a copy of an Acknowledgement slip with regards to Huduma number. The same bears the name of the Respondent and provides the Claimant's driver number as 1304-1649.
25. On its part, the Respondent exhibited two copies of Memoranda of Understanding (MOU) constituting Franchise Agreements executed between itself and persons identified as franchisees. The respective MOUs provide the registration numbers of the motor vehicles under the franchise arrangement.
26. The *Black's Law Dictionary*, 9th Edition defines the term 'franchise' as follows: To grant (to another) the sole right of engaging in a certain business or in a business using a particular trademark in a certain area.
27. The Respondent averred that the Claimant was driving motor vehicle registration number KBC 377G and KCA 743E. The Claimant refuted this position.
28. As indicated herein, the Claimant was apparently assigned driver number 1304-1649. A perusal of the Daily Bus Revenue Return Form in respect of motor vehicle registration number KCB 028Y, exhibited by the Respondent, provides the driver's number as 1649. The said Daily Bus Revenue Return Form further provides the Franchisee name as Sammy. Further, it is worth noting that the MOU exhibited by the Respondent dated 18th June, 2018 provides the Franchisee's name as Samuel Nyangera Akuma and among the motor vehicles listed under the franchise arrangement, is KCB 028Y. Further the log book in respect of motor vehicle registration number KCB 028Y identifies Family Bank of Kenya and Samuel Nyangena Akuma as the registered owners of the said motor vehicle.
29. Additionally, the Claimant's driver number also appears in the Daily Bus Revenue Return Form in respect of the motor vehicle registration number KBC 377G while the franchisee name provided is Wandago. Notably, the MOU dated 27th February, 2018 identifies Amos Ogutu Wandago as the franchisee and among the motor vehicles provided thereunder is KBC 377G. In addition, the log book exhibited by the Respondent in respect of the said motor vehicle identifies the registered owner as Amos Ogutu Wandago.



30. In light of the foregoing, it is apparent that the Claimant drove the motor vehicles provided under the Franchise arrangement entered into by the Respondent and the respective owners of the said motor vehicles (franchisees).
31. Revisiting the terms of the MOU, it is provided under Clause 5.4 that the Franchisee (business owner) was to employ staff to run own business that meets the Franchisors specifications an approved training and employment agencies.
32. Therefore, the evidence on record leads me to conclude that it is more than probable that the Claimant was an employee of the franchisees who were owners of the motor vehicles under the franchise arrangement as opposed to the Respondent, the franchise owner in this case.
33. With regards to the PSV badge issued to the Claimant in the name of the Respondent, I do not find the same as conclusive proof of his employment relationship with the Respondent. I say so because Clause 4.2 of the MOU provides that the Franchisee was to be allowed to use the Respondent's name, logo, and colours. It further provides that the operation of the franchisee's business will be substantially associated with the Respondent's method, trademark, service mark, trade name, logo type, advertising or other commercial symbol designating the Franchisor.
34. This also ties with the definition of the term 'franchise' which is essentially, a grant (to another), the sole right of engaging in a certain business or in a business using a particular trademark in a certain area.
35. In view of the foregoing, the totality of the evidence on record, leads me to conclude that the relationship that existed between the Claimant and the Respondent fell outside the realm of the Employment Act and was not that of an employee and employer.
36. In arriving at this determination, I am alive to the fact that an employer is under a legal obligation under sections 10 (6) and (7) and 74 of the Employment Act to maintain certain records and has the burden to prove or disprove the existence of a contractual term. However, it is essential to note that this obligation only arises where there is no dispute with regards to an employment relationship or where an employment relationship has already been established.
37. In this regard, the evidence before me tilts in favour of the Respondent that the Claimant was in essence an employee of other persons and not the Respondent. Accordingly, no action can lie against the Respondent as no rights or responsibilities accrued between the parties.
38. Since proof of existence of an employment relationship is the foundation of a case for unlawful termination, the Court cannot determine the fairness or otherwise of a termination from employment without this foundation.
39. Having found as such, it is not necessary to consider whether the Claimant's termination was unfair and unlawful or the reliefs payable.
40. The upshot of the foregoing is that the Claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Gichuki



For the Respondent Mr. Okeche

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

