



**Kahemba v Kencall EPZ Limited & 3 others (Cause E685 of 2021)
[2023] KEELRC 2789 (KLR) (3 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2789 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E685 OF 2021
AN MWAURE, J
NOVEMBER 3, 2023**

BETWEEN

ANTONY MUTAHI KAHEMBA CLAIMANT

AND

KENCALL EPZ LIMITED 1ST RESPONDENT

FIRST CALL LTD 2ND RESPONDENT

GEORGE PATRICK NESBITT 3RD RESPONDENT

NICHOLAS ALEXANDER NESBITT 4TH RESPONDENT

JUDGMENT

1. The claimant filed a Memorandum of Claim dated August 9, 2021.

Claimant's case

2. In his Memorandum of Claim the claimant states that on April 2015 he was engaged by the 1st respondent to carry strategic audit and it was in two cycles to be issued on May 29, 2015 and second report to be issued on June 30, 2015.
3. He says upon expiry of the agreement he was offered a job as a financial controller for a three-year contract at a salary of kshs 274,674/-. The contract was to come into force in September 2015.
4. The claimant says though he had a contract with the 1st respondent he was also performing duties for the 2nd respondent. He says he was to receive moneys on behalf of the 1st and 2nd respondent. He says he reduced the money owed by Machakos County government from kshs 28,000,000 to kshs 16,000,000/-.



5. Claimant says respondent did not pay his salary consistently but was erratic and irregular. He says in February 2016 he was appointed Chief Executive Officer and was to be collecting debts. He was promised mileage allowance at kshs 40/ per kilometre at any work that involved travel outside respondent's premises as he was using his vehicle. He says he used to cover 120 kms to Machakos. He was also promised airtime refund. He says the total amount then amounted to kshs 771,340.
6. He says he was promised once Machakos County paid the money they owed he would be paid his dues but that never happened.
7. He says he was then promised he would be given a plot for compensation but even that did not materialise.
8. He says that even though he signed a contract with the 1st respondent the fruits of his efforts were enjoyed by all the four respondents. He says the four never intended to pay him.
9. He prays that the court finds his constitutional rights were violated and he should be paid outstanding dues amounting to kshs 4,669,000/- plus interests and costs.

Respondent's case

10. The respondent in his response dated March 8, 2022 denies the averments in the Memorandum of Claim.
11. The respondent no 1 says the claimant only worked for him and not the 2nd to 4th respondents.
12. The 1st respondent also deny that the claimant even was appointed a financial director of the respondent and never collected debts on behalf of Machakos county government on behalf of the 2nd respondent.
13. It is the respondent's averments that the claimant was paid all his dues for work done until he was discharged on expiry of the employment contract.
14. In total the respondent states the claimant's suit lacks merits and prays the same be dismissed with costs to the respondent.

Claimant's evidence in court

15. The claimant in his testimony said he had a contract with the 1st respondent and it was for three years. He said he never received payment of kshs 6,797,000 for the period he worked for the respondents. He says even when he was on consultancy he was paid kshs 300,000/- instead of kshs 600,000/-.
16. He says the chairman wrote to Machakos county that he (claimant) would be collecting the debt from Machakos county. He says he has not written documents confirming he would be paid but was all verbal. He also says he was promised a piece of land but he never got it.

Respondent's evidence

17. Nicholas Alexander Nesbitt was the respondent witness (4th respondent) and he confirmed he testified on behalf of all the other 3 respondents as well as on his behalf. He says he was the director of Kencall but is no longer the director. He says claimant was paid all his dues.
18. He says he has a letter of authority to represent the other respondents. He says Kencall was shut down and employees were released. He also says money owed to the claimant was kshs 403,000/-.



19. He also says there was no agreement to compensate claimant with land but were only exploratory discussions. At some point the witness said claimant was a part time employee. He says claimant did not perform all his work.
20. He says in his re-examination in chief that they paid claimant kshs 6,797,000 for part time work. He says total due to claimant was kshs 7200,000 if he did full item work but he only worked for 2 days.
21. He further says Kencall closed in 2016 (1st respondent). Claimant contract according to this witness ended in September 2019. The witness says the claimant had no contract with 2nd respondent and his claims are not genuine.

Submissions

22. The court has considered the claimants submissions dated June 14, 2021.

Respondent's Submissions

23. The court also considered the respondent's submissions dated July 17, 2023.

Analysis and determination

24. The issue for determination is whether the respondent owes the claimant kshs 4,669,840/- being unpaid salary and dues.
25. In section 17(1) of *Employment Act* provides;-

“subject to this act an employer shall pay the entire amount of wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract for service directly in the currency of Kenya. Section 18(2)(c) the same *Employment Act* provides the wages in the case of an employee employed for a period of more than a period exceeding one month be paid at the end of each month or part thereof.
26. The claimant claims during his tenure of employment by the respondents for three years he was paid his salary irregularly and erratically and at the expiry of his contract in September 2018 he was owed kshs 4,702,743/-.
27. The 4th respondent who testified on behalf of the 1st, 2nd and 3rd respondent as per their letter authorising him to represent them and dated December 15, 2021 stated the claimant was employed by the 1st respondent Kencall limited and that they had paid him all his salaries as at the time of expiry of his contract. During his evidence in court however the respondent witness says they owed claimant kshs 403,000/-.
28. It is not in contentious the claimant was employed by the first respondent for a contract of three years. Some documents addressed to Machakos County government show claimant was following moneys owed by Machakos County Government on behalf of the 1st and 2nd respondent.
29. The court have evidence that claimant had an employee/employer relationship with the 1st respondent who had a fixed contract with him for three years. The issue for determination by the court is whether the claimant was paid his full salary for 36 months worked for the 1st respondent at kshs 279,674/- from September 1, 2015.
30. It is the 4th respondents' evidence while testifying in court that the claimant was paid all his dues until his term expired. He says they paid him a total of kshs 6,797,000/- leaving a balance of kshs



- 403,000/-. He says they paid him through DTB bank kshs 2,030,000/ and kshs 4,757,000/- via mpesa and 10,000/- cash. He says they also paid him other refunds including requests for travel to Machakos. These amounts are not specified.
31. The witness says they never offered claimant a family property on behalf of the company but in his evidence in court he states there were exploratory discussions about Umoja property.
 32. The evidence and the pleadings by the fourth respondent on behalf of the other three respondents is not consistent. In his evidence he says they paid the claimant all his dues. But he later changes the testimony and says they owed him kshs 403,000/-. This is also contained in his witness statement dated April 24, 2022.
 33. Furthermore in his aforesaid witness statement he avers that they paid the claimant kshs 6,797,000 out of kshs 7,200,000 which then left a balance of kshs 403,000/-.
 34. There is no proof to date the kshs 403,000 was paid. There is also no documents or clear accounts of what was paid to the claimant over the three years. No wonder the claimant says his payment was uncertain and erratic and at times he was paid even 2,000. The contract of employment provided he would be paid kshs 279,000 at the end of every month. The referred erratic payment by the 1st respondent must have brought confusion as to what was owed to the claimant and what was paid to him.
 35. Failure to pay an employees' salary after services are rendered is inhuman practice and is no doubt an unfair labour practice contrary to article 41 of the [Constitution of Kenya 2010](#).
 36. In the case of [Kusow Bilow Isaac vs Ministry of Interior & Coordination](#) (2021) eKLR the court observed "failure to pay salary to an employee after rendering services amounts to subjecting him to degrading inhuman and torfous condition contrary to article 28 and 30 of the [Constitution of Kenya 2010](#)".
 37. The evidence from the claimant is clear the claimant was not paid all his salary during the period he worked for the respondents. The respondent witness also admitted the company closed in 2016 but claimant was the only staff left until his contract expired in 2018. The respondent avers the claimant did not continue working full time after 2016 but there are no records to show how many days he worked or not. As earlier observed there is no evidence adduced exactly how much money he was paid or not and how many days he worked per month.
 38. As earlier noted the respondent at some point said they paid claimant all his salary but later said they owed him kshs 403,000/-.
 39. Having navigated through all the pleadings and documents which seem quite conflicted on the part of the respondents who had a duty to keep the records of their employees the court is satisfied the claimant was owed part of his salary for the three years he has worked for the 1st respondent.
 40. At some point to emphasize this finding the respondent witness admitted in his evidence that they were exploring how to compensate the claimant with their family's Umoja property. However, he said it was a mere exploratory process. There must have been a debt owed to have embarked even on that exploring expedition.
 41. The struggle the court is having is to ascertain what was owed to the claimant as the bank statements produced by the respondents have not summarised exactly what was owed to the claimant. There is a figure of kshs 403,000 but is not exactly shown as to how it is arrived at. In any case the respondent witness at some other point declared they paid the claimant all the dues that were owed to him.



42. The summary of the moneys due to the claimant in his exhibit no 58 is as follows:
1. Total amount related to contract kshs 600,000/-
 2. Total amount related to salary kshs 8000,000/-
 3. Other claims kshs 771,340/-
 4. Amounts receivable kshs 9,371,340/-
 5. Total amounts paid September 2015 to September 2018 kshs 4,701,500
 6. Balance payable kshs 4,669,840/-
43. The court will at the best not award the kshs 600,000 as that was declared as payment in a consultancy contract not part of the Employment Act.
44. Also the other expenses or allowance are not specified how they are arrived at and so are not awarded.
45. General awards are not awarded as this contract terminated by effluxion of time not unfair termination.
46. The total debt owed to the claimant by the 1st respondent is kshs 3,298,500/-.
47. Interest is awarded from date of judgment till full payment.
48. Costs are awarded to the claimant
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

