



**Kenya Union of Commercial, Food and Allied Workers v Narugi  
Development Sacco Ltd (Employment and Labour Relations Cause  
1350 of 2018) [2023] KEELRC 3365 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3365 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1350 OF 2018  
BOM MANANI, J  
DECEMBER 14, 2023**

**BETWEEN**

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED  
WORKERS ..... CLAIMANT**

**AND**

**NARUGI DEVELOPMENT SACCO LTD ..... RESPONDENT**

**JUDGMENT**

1. This action is founded on alleged unfair termination of a contract of service between the Respondent and one John Ndichu Karoki, hereafter referred to as the grievant. The proceedings were commenced by and in the name of the Claimant in its capacity as the Trade Union that represents the grievant.
2. The grievant, who alleges to have been an employee of the Respondent, avers that the Respondent terminated the contract of service between them without valid reasons and in flagrant disregard of due process. As a result, he has filed these proceedings through the Claimant to seek, inter alia, compensation for unfair termination of his contract of service.
3. The Respondent denies that the grievant was its employee. Consequently, it disputes the entire claim and prays that the suit be dismissed with costs.

**Grievant's Case**

4. The grievant contends that the Respondent hired his services as a Stage Warden on 12<sup>th</sup> November 2012. He avers that his starting salary was Ksh. 6,000.00 but this was not increased until his services were terminated. Further, he contends that the Respondent did not provide him with housing or house allowance.



5. The grievant avers that sometime in January 2015, he decided to verify his status with the National Social Security Fund (NSSF). He contends that he wanted to ascertain whether the Respondent was remitting statutory deductions from him to the Fund.
6. The grievant avers that upon checking his status with the Fund, he discovered that it was inactive. The Respondent had allegedly not been remitting the required monthly payments to the Fund.
7. The grievant avers that upon this realization, he raised the matter with the Respondent. According to the grievant, this inquiry infuriated the Respondent's management who warned him that he risked jeopardizing his job security if he insisted on having the issue addressed.
8. The grievant contends that following these threats by the Respondent, he was suspended from duty on 11<sup>th</sup> March 2015. Eventually, the Respondent allegedly terminated his (the grievant) contract of service.
9. Not giving up on the matter, the grievant alleges that he visited the NSSF offices where he was asked to avail his employment records to enable the agency follow up the issue. He avers that the NSSF officials later visited the Respondent's office to discuss the matter but did not brief him on the outcome of the meeting.
10. The grievant asserts that he thereafter reported the matter to the Ministry of Labour which appointed a conciliator to resolve the dispute. However, this exercise was allegedly frustrated by the Respondent's refusal to submit to the jurisdiction of the conciliator. The grievant has thus approached the court for various reliefs as set out in the Memorandum of Claim.
11. During the currency of the alleged contract, the grievant alleges that the Respondent persistently underpaid him in contravention of the law. Further, he contends that the Respondent deprived him of the benefits of house allowance and annual leave.

### **Respondent's Case**

12. On its part, the Respondent denies that the grievant was its employee. The Respondent avers that the documents that the grievant seeks to rely on to demonstrate that he was its employee are forgeries.
13. The Respondent states that it reported the forgery to the police for investigations but the results of the investigations were not yet out at the time that this case came up for trial. As a consequence, the Respondent beseeches the court to disregard the various documents produced in evidence by the grievant.
14. In addition, the Respondent has flagged the issue of locus standi by the Claimant to institute these proceedings. Though the matter was not alluded to in the Respondent's pleadings and only sprung up at the submission stage, I recognize it as a question of law which can be raised at any stage of the trial notwithstanding that it was not pleaded. Therefore, I will comment on it in the course of this decision.

### **Issues for Determination**

15. The following are the issues for determination:-
  - a. Whether the Claimant has locus standi to litigate in this cause.
  - b. Whether there was an employment relation between the parties.
  - c. If the answer to b) is in the affirmative, whether the relation was unfairly terminated.
  - d. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.



## Preliminaries

16. The suit was initially filed against Narugi Sacco Ltd. However, on 25<sup>th</sup> July 2023, the Claimant applied to amend the Statement of Claim to describe the Respondent as “Narugi Development Sacco Ltd” and not “Narugi Sacco Ltd”.
17. The Respondent did not oppose the application. As a result, the court issued an order allowing the request. Accordingly, the Respondent’s name was amended to read “Narugi Development Sacco Ltd”.

## Whether the Claimant has Locus Standi to Represent the Grievant

18. In their submissions, the advocates for the Respondent have challenged the Claimant’s standing to sue on behalf of the grievant. They contend that apart from the membership card, the grievant has not provided any evidence to show that he is a member of the Claimant.
19. In their view, a membership card alone is not sufficient proof of membership of a Trade Union. They submit that in addition to the membership card, a member must provide evidence of payment of monthly subscriptions to the union.
20. The Respondent’s lawyers also argue that the Claimant has no recognition agreement with the Respondent. As such, it (the Claimant) cannot purport to act on behalf of the grievant in the cause.
21. I do not agree with the above contention. Both the Claimant and the grievant confirm the latter’s membership with the Claimant. What then would be the basis of a third party challenging this relation? Of what value is it to insist on further documentary proof of membership of the grievant to the Claimant Trade Union when both the grievant and the Claimant Trade Union have affirmed that the relation exists?
22. Importantly, the grievant produced his membership card with the Claimant Trade Union. The Claimant has not suggested that the card is falsified. What then would be the basis upon which the court will return a finding that the card is falsified?
23. As to whether the Claimant can represent the grievant in the instant cause in the absence of a recognition agreement with the Respondent, the answer is in the affirmative. The legal position is that a recognition agreement is only necessary for purposes of collective bargaining between a Trade Union and an employer. It is not a prerequisite for other engagements between an employer and a Trade Union on behalf of employees who are members of the *Trade Union (Kenya Union of Commercial Food Allied Worker v Fralet Agencies)* (Employment and Labour Relations Claim 29 of 2023) [2023] KEELRC 2208 (KLR) (22 September 2023) (Judgment)). This position is self-evident from section 54 (1) of the *Labour Relations Act*.
24. The question regarding whether a Trade Union can represent its members in court without a recognition agreement was also considered by the Court of Appeal in *Modern Soap Factory v Kenya Shoe and Leather Workers Union* [2020] eKLR. After considering the divergent viewpoints by the Employment and Labour Relations Court on the matter, the Court of Appeal stated that a Trade Union that has no recognition agreement has the locus standi to represent employees who are its members in court. As a result, the objection by the Respondent in this respect is unmerited.

## Whether there was an employment relation between the grievant and the Respondent.

25. The parties have taken diametrically different positions on this matter. On the one hand, the grievant avers that he was an employee of the Respondent. However, he contends that the Respondent did not issue him with a written contract.



26. On the other hand, the Respondent denies that the grievant was its employee. The Respondent contends that the documents that the grievant relies on to assert employment between the parties are forgeries.
27. Whether there exists a contract of service between two individuals is both a matter of law and fact. The presence of such contract must be affirmed using the various tests that have evolved over time. These include: the degree of control test; the degree of integration test; the mixed test; the mutuality of obligation test; the economic realities test among others.
28. In instant the case, the Respondent has vehemently denied employing the grievant. The Respondent contends that all its employees are issued with formal employment contracts. The Respondent contends that if indeed the grievant was its employee, he would have been issued with a similar contract.
29. The Respondent called one Gideon Wenduku who testified that he has served as the Respondent's secretary and chairman at various times. The witness stated that due to his position in the Respondent organization, he was directly involved in the process of staff recruitment.
30. It was the witness's evidence that he signs all contracts of employment for new employees engaged by the Respondent on the Respondent's behalf. The witness denied signing a contract of service in respect of the grievant.
31. The witness confirmed that he knew the grievant as a self-employed person. According to him, the grievant used to operate at the bus stage where the Respondent operates. He stated that the grievant used to assist various vehicle operators to get passengers and that the vehicle operators would pay him directly for the work done.
32. What I understand the defense witness to be stating is that the grievant used to work at the bus stage as an independent contractor or as a self-employed person. I understand this witness to be saying that the grievant was not employed by any particular vehicle operator.
33. Faced with this evidence, it was necessary for the grievant to provide evidence to establish, on a balance of probabilities, that he was an employee of the Respondent. It was for the grievant to provide evidence to demonstrate that he fits in one or more of the various tests that establish existence of an employment relation.
34. The burden of demonstrating existence of the alleged employment relation lay with the grievant. This is in tandem with sections 107, 108 and 109 of the *Evidence Act*.
35. The documents that the grievant sought to tender in evidence as proof of his employment with the Respondent were disputed by the Respondent. According to the Respondent, the documents were forgeries.
36. Although the documents were marked for identification, the record shows that the grievant did not eventually produce them in evidence. In effect, they (the documents) are of no value in establishing the disputed employment status of the grievant.
37. The grievant produced a series of correspondence from the Ministry of Labour that were addressed to the Respondent asking the latter to submit to conciliation. However, there is no evidence that the Respondent received the various correspondence. As a matter of fact, the Respondent's witnesses expressly stated that the Respondent did not receive the correspondence.
38. If the grievant hoped to rely on the correspondence as an affirmation of the alleged employment relation with the Respondent, he ought to have tabled evidence to demonstrate that the letters were



delivered to the Respondent's management and that they (the Respondent's management) did not dispute the content of the correspondence insinuating that he (the grievant) was the Respondent's employee. In my view, this would only have been achieved if the grievant had called an official from the Ministry of Labour to affirm that the letters were delivered to the Respondent. Absent this evidence, the court cannot rely on these correspondence to infer the presence of an employment relation between the parties.

39. Importantly, the Respondent did not acknowledge the correspondence from the Ministry of Labour as an affirmation of the grievant's employment it. As such, the grievant cannot rely on them (the letters) as proof of his employment to the Respondent.
40. The grievant has also produced a statement from the NSSF that was generated on 4<sup>th</sup> June 2018 as proof of his employment status. The statement suggests that the grievant was an employee of the Respondent. However, the record shows that there was an initial statement by the NSSF which covers the same period as the above statement but which did not bear the Respondent's details as the employer of the grievant.
41. The grievant also produced a letter by the NSSF dated 21<sup>st</sup> July 2015. In the letter, the NSSF was asking the grievant to provide proof of employment to the Respondent.
42. What is apparent from this evidence is that as at 21<sup>st</sup> July 2015, the NSSF did not have proof that the grievant was in the Respondent's employment. This explains why the earlier statement by the agency did not bear the Respondent's name as the employer of the grievant.
43. In the face of the foregoing, it is unclear why the NSSF ended up inserting the Respondent's name in its latter statement of 4<sup>th</sup> June 2018 as the grievant's employer. It is possible that the agency was eventually furnished with proof that the grievant was indeed an employee of the Respondent during the period under inquiry. However, this explanation and evidence have not been placed before the court.
44. In my view, the grievant ought to have called an official of the NSSF to explain how the agency ended up entering the Respondent's name in its records allegedly as the employer of the grievant when earlier evidence demonstrates that it (the agency) had no information that there was an employment relation between the two. As the record shows, this was not done. Absent this evidence, the court cannot rely on the entries in the NSSF's latter statement of 4<sup>th</sup> June 2018 to find that there was an employment relation between the parties particularly in view of the Respondent's categorical denial that there was such a relation.
45. The grievant also produced proceedings and judgment in Githunguri Traffic Case No. 196 of 2013 in a further attempt to establish his employment status with the Respondent. However, these documents are of no assistance in resolving this disputed issue.
46. In the proceedings, the grievant described himself as an employee of the Respondent. However, it is noteworthy that there was no independent evidence from the Respondent's officials to affirm this assertion.
47. Further, it is apparent that the traffic proceedings involved one James Kiarie Njogo who was the accused person. The proceedings did not involve the Respondent. There is no evidence that the grievant's involvement in the matter was at the behest of the Respondent. As such, the court cannot rely on the aforesaid proceedings to find that the grievant was an employee of the Respondent.



**Determination**

48. In the ultimate, the court finds that the grievant has failed to prove on a balance of probabilities that he was an employee of the Respondent.
49. Consequently, his claim against the Respondent fails on this ground.
50. Accordingly, the suit is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 14<sup>TH</sup> DAY OF DECEMBER, 2023**

**B. O. M. MANANI**

**JUDGE**

