



**Adeya v Quick Mart Limited (Cause E156 of 2022)  
[2023] KEELRC 3261 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3261 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E156 OF 2022  
B ONGAYA, J  
DECEMBER 7, 2023**

**BETWEEN**

**DICKSON CHAHENZA ADEYA ..... CLAIMANT**

**AND**

**QUICK MART LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim dated 13.11.2021 through Munyao Muthama & Kashindi Advocates. The claimant prayed for judgment against the respondent for:
  - a. A declaration that the claimant was an employee within the meaning of the [Employment act](#) 2007.
  - b. A declaration that the termination of the claimant's employment on account of poor performance was unfair, wrongful and unlawful.
  - c. An award for payment of twelve (12) months compensation for unlawful termination (700,000 × 12) Kshs.8,400,000
  - d. An award for payment of house allowance @ 15% of basic salary per month for the period of employment.
  - e. A declaration that the respondent ought to have contributed for the claimant's NHIF and NSSF contributions.
  - f. An award for payment of overtime pay.
  - g. Damages for breach of the claimants legitimate and reasonable expectations.
  - h. Damages for breach of the claimants constitutional rights



- i. Interest and costs of this suit.
  - j. Any other or such further relief as this honourable court may deem just and fair to grant.
2. The respondent's response to statement of claim dated 14.04.2022 was filed through Nicholas Gitonga & Associates Advocates. The respondent prayed that the suit be dismissed with costs.
3. The claimant's case was that he is a qualified human resource practitioner. That on 14.10.2019 he got into a contract of service with the respondent for a period of six months effective 14.10.2020 to 13.04.2020.
4. The contract provided for renewal or conversion to permanent appointment and it was issued 17 days after commencement of the engagement.
5. The respondent had advertised the vacancy through a recruitment firm, Summit Recruitment, for head of human resource manager and the claimant submitted his application. He was interviewed for the position of Head of Human Resource and was selected as the suitable candidate but in a twist of events, he was issued with a 'consultancy agreement' subject to review after three months of engagement.
6. The recruitment was rigorous and lengthy involving the following stages:
  - a. He was first interviewed by Summit Recruitment which was contracted to undertake the talent search to fill the position of Head of Human resource.
  - b. He was thereafter interviewed by Adenia Partners Representative who eventually shortlisted and forwarded his name to the CEO Quickmart.
  - c. The last stage of his interview was conducted by the CEO and the general manager who settled on him as the suitable candidate for the role.
7. The claimant states that he performed his duties diligently and faithfully as Head of Human Resource until he received a termination notice dated 28.02.2020. The said notice indicated that his last working day was 31.03.2020.
8. The claimant pleaded that although the contract referred to him as a consultant, the nature of the engagement and the performance of his duties and obligations were inconsistent with a consultancy relationship. That he had a contract of service with the respondent and was indeed an employee of the respondent for the following reasons;
  - a. He had a contract of service and was paid a monthly basic alongside other employees.
  - b. The contract provided for conversion into a permanent engagement. This is inconsistent with consultancy engagement as a consultant does not convert to permanent terms.
  - c. The respondent provided him with a working station at its premises in Tumaini offices and he also worked from time to time at the Quickmart offices when asked to do so by the management.
  - d. The respondent provided him with meals including tea and lunch like all other management employees.
  - e. His working hours were regulated by the management and from time to time he worked overtime on Sundays and during holidays.
  - f. He reported to the Chief Executive Officer of the respondent and worked purely at the discretion and direction of the management. He also took instructions from the general



manager – Tumaini who was charged as the Post merger integration officer. He was at times directed to work alongside Boston Consulting Group (BCG) and Bowmans Law teams on the merger integration assignment.

- g. He was provided with work tools which included a laptop and work uniform.
  - h. He worked under the instructions and direct control of the respondent at all material times including attending early and late meetings. He was required to attend new store openings, worked night shift during the Christmas eve on 24.12.2019 and further directed not to proceed on Christmas since ‘that is the norm in retail over Christmas’. He diligently performed the assigned duties.
  - i. Participated in interviewing candidates for promotion at the respondent’s premises who were eventually redeployed by the respondent.
  - j. He participated in structuring staff exits, new staff hiring and redundancies and was fully integrated in the management of the respondent.
  - k. The respondent’s organogram jointly developed with BSG had his name affixed to it as the Chief Human Resource Officer.
9. The termination notice indicated that the termination was on grounds of poor performance, however, the respondent did not give valid reasons warranting the termination.
10. Clause 5 of the contract of service provides that the respondent would conduct an evaluation of his performance after three months of engagement. This evaluation was not done and there was no performance related discussion during his employment.
11. The claimant states that he was not at any given time informed that his performance was wanting and neither was he placed under a performance improvement plan.
12. The claimant maintains that having diligently performed his duties and obligations, he had reasonable and legitimate expectations that the contract would be converted to permanent terms in line with the agreement.
13. The job advertisement provided for a gross monthly salary of Kshs.700,000. However, the respondent unilaterally varied the salary to a net monthly salary of Kshs.450,000 by imposing withholding tax of 5% instead of 30% PAYE.
14. The claimant urged that the respondent unfairly terminated his employment contract contrary to the law and in breach of the fair labour practices as well as fair administrative action guaranteed under Article 41 and 47 of *the Constitution*.
15. On the part of the respondents, it is stated that the Tumaini Self-service Limited was acquired by Adenia Partners through an agreement dated 25.09.2018, and, that Quickmart Limited was also acquired by Adenia Partners through an agreement dated 19.07.2019.
16. That Quickmart limited later merged with Tumaini Self-service Limited as provided in the merger approval letter by the Competition Authority of Kenya dated 26.08.2019.
17. The merger between Quickmart Limited and Tumaini Self-service Limited required several professional teams for human resource integration, legal integration, financial integration and system integration.



18. That for the human resource integration the respondent company required a Human Resource Consultant to carry out the human resource consultancy project.
19. The claimant through the consultancy agreement executed on 31.10.2019 was engaged as a consultant under a contract for services for an initial period of six months from 14.10.2019 to 13.04.2020 which term had an option of renewal and which contract was properly terminated in accordance with its terms.
20. The claimant who is a seasoned human resource practitioner and expert at all material times was aware of the nature of the engagement the respondent intended to get into and he clearly and intentionally negotiated and entered into a consultancy agreement through the execution of the contract dated 31.10.2019.
21. At all times the claimant was the human resource consultant advising on human resource integration for the merger between Quickmart Limited and Tumaini Self service Limited and that he fell short leading up to the decision not to retain his consultancy services as was communicated through the termination letter of 28.02.2020.
22. The claimant raised monthly invoices as a consultant and the respondent settled the invoices so raised and withheld only 5% of the fees as provided by tax laws consistent with regard to consultant payments.
23. The respondent maintains that the relationship with the claimant did not bring it within the ambit of Articles 41 and 47 of *the Constitution* of Kenya which would be applicable in an employer – employee relationship. The relationship between the parties was that of a consultancy and the consultancy was for an initial term of six months.
24. The parties filed their respective submissions. The court has considered the parties’ respective cases and makes finding as follows.
25. The 1<sup>st</sup> and main issue for determination is whether parties were in a contract of service. The undisputed evidence is that parties signed on 31.10.2019 a contract titled “Confidential Contract of Service”. Clause 1 referred to “... a fixed term contract of service of (6) months as a Consultant Head of Human Resource effective 14<sup>th</sup> October, 2019 to 13<sup>th</sup> April 2020.” The parties used in the document both the terms consultancy and contract of service. The contract provided that it would be renewed based on performance and it served as a probationary contract for regularization and conversion to permanent service if the claimant was found fit. The contract provided for remuneration and on monthly basis styled as “...monthly consultancy fees of Kshs.472,500=” It stated it was inclusive withholding tax of 5%. The working hours were prescribed and he would be supervised by the respondent’s management. His performance was to be evaluated at the end of initial three months and at the end of the last three months. The claimant was to submit to the management within 90 days the evaluation format for the parties to consider and mutually agree on the evaluation criteria. The termination clause stated, “This consultancy contract may be terminated by either party giving 30 days’ notice in writing or payment of 30 days’ consultancy fee in lieu thereof.” It could be terminated upon mutual agreement of the parties; disability of the consultant in event of illness or incapacity; or termination for non-performance such as neglect of duty, non-performance or breach and the reasons would be given in writing; or by lapse or end of contractual period. The Court has considered the evidence. The Court finds that while parties agreed on consultancy fees and the claimant was paid against the invoices as for a consultant, it is clear from the contract that it was a contract of service being a probationary contract of service as a prelude to what the parties called regularization and conversion to permanent service if the claimant’s service was satisfactory. The contract was such that the respondent controlled the claimant and the claimant was fully integrated in the respondent’s



establishment including wearing uniform, performance appraisal, and using the respondent's office or equipment. He was as well listed in the respondent's approved organisation structure. He was an employee for all purposes and serving a six-months' probation period. The claimant's submission is upheld to that extent.

26. The 2<sup>nd</sup> issue is whether the termination was unfair. The contract was terminated by the letter dated 28.02.2020 while it was lapsing on 13.04.2020 and there were about 2 months to go. The letter notified that the contract would be terminated effective 01.03.2020 per the terms of the contract. It was submitted that based on the assessment of claimant's performance per the meeting of 24.02.2020 the performance for the first three months had not met the expectations. Further, as agreed at the review the last day of the engagement would be on 31.03.2020. he was to return all the materials. RW testified that the termination took effect per paragraph 1 of the letter being on 01.03.2020 and not on 31.03.2020 being a three-days' notice. The Court finds that the procedure adopted to terminate the contract was unfair per section 45 of the Act because the mandatory contractual one month's notice was not served. Even if the performance was wanting, the wording of the contract was that the 30 days' notice had to be served. That was not done. It was a breach making the termination unfair.
27. The 3<sup>rd</sup> issue is on remedies. The Court returns as follows:
- a. The claimant has established to declarations as prayed for.
  - b. The compensation is prayed for at maximum 12 months. The Court has considered the factors in section 49 of the Employment Act. The claimant was not given due notice, He had less than two months of service. The respondent while alleging poor performance the same was not demonstrated by evidence. The Court considers that two months' gross salaries less tax will meet the ends of justice making Kshs.472,500 x2 =Kshs.945,000.00 less tax.
  - c. Overtime and house allowance claims papers not to be based on contract or statutory provision and there was no evidence in that regard. They are declined. The claimant has not shown that the agreed remuneration was not reasonably accommodative of provision for housing as envisaged in section 31 of the Employment Act.
  - d. While NHIF and NSSF were available, the same ought to have been pursued under the relevant statutory provisions and no specific liquidated claims were made in that regard. The declaration will issue.
  - e. The claimant only established breach of contract and not violation of any specific constitutional provision. Reliefs under contract are found sufficient in the instant case.
  - f. The claimant has succeeded and is awarded costs of the suit.
28. In conclusion judgment is hereby entered for the claimant against the respondent for:
- a. The declaration that the claimant was an employee within the meaning of the Employment Act 2007.
  - b. The declaration that the termination of the claimant's employment on account of poor performance was unfair, wrongful and unlawful.
  - c. The award for payment of Kshs.945,000.00 less tax for the unfair termination payable by 01.02.2023 failing interest to run thereon at Court rates from today till full payment.
  - d. The declaration that the respondent ought to have contributed for the claimant's NHIF and NSSF contributions.



e. The respondent to pay costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7<sup>TH</sup> DECEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

