



**Angaluki v Waruhiu Kamau Gitoka t/a Sakam Engineering Contractor
(Cause 1670 of 2016) [2022] KEELRC 26 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 26 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1670 OF 2016
SC RUTTO, J
APRIL 28, 2022**

BETWEEN

SILVANOS CHADIMBA ANGALUKI CLAIMANT

AND

**WARUHIU KAMAU GITOKA T/A SAKAM ENGINEERING
CONTRACTOR RESPONDENT**

JUDGMENT

1. The claimant avers that he was employed by the respondent as a store keeper with effect from 10th April, 2013 until 1st July, 2015 when his employment was terminated without any explanation. As a result, he seeks an award in the sum of Kshs 246,986.12 being notice pay, compensatory damages, house allowance, overtime, accrued leave days and severance pay.
2. The respondent opposed the claim and denied the existence of the employment relationship. The respondent averred that the claimant was an employee of Kenafric Industries Limited, where he had been contracted to supervise employees. That as such, he did not terminate the services of the claimant. The respondent asked the court to dismiss the claim with costs.
3. The matter proceeded for hearing on 1st December, 2021 and each side called oral evidence.

Claimant's case

4. At the outset, the claimant adopted his witness statement dated 3rd August, 2015, as well as the bundle of documents filed together with his claim, to constitute part of his evidence in chief.
5. It was his testimony that on 30th June, 2015, he was informed by his supervisor not to report for duty on 1st July, 2015. That he was not given a letter of termination, nor reasons for termination nor a notice to that effect. He denied being employed by Kenafric Industries. He further stated that the respondent is the one who deployed him to work at Kenafric Industries and that he was the one who was responsible



for paying his salary. He further told Court that while working for the respondent, he was not allowed to proceed on leave and neither was he paid for the days worked overtime. He asked the court to allow his claim.

Respondent's case

6. The respondent testified on his own behalf. He told Court that he is a labour contractor and in this regard, he is engaged by various companies including Kenafric Industries Limited. He averred that the claimant was working for Kenafric Industries where he had been contracted to supervise employees. That his role was to pay for the services offered by the claimant and other employees of Kenafric Industries but was not responsible for the day to day management of any labour related issues. That in this case, he did not terminate the services of the claimant as he was never his employer.
7. He stated that the claimant had wrongly sued him instead of his actual employer, Kenafric Industries.

Submissions

8. The claimant submitted that he was an employee of the respondent. That the contract between the respondent and Kenafric Industries formed the basis of this employment relationship.
9. It was further submitted that the respondent exercised control over the staff at Kenafric Industries hence demonstrating that he was his employee having been deployed to perform identified assignments at the said premises under the job contract. The case of *Samuel Wambugu Ndirangu vs 2NK SACCO limited* (2019) eKLR and *Martin Juma Kundu v Kemu Salt Packers Production Limited* [2016] eKLR were cited in support of this argument.
10. The claimant further submitted that the respondent had not demonstrated the reasons for his dismissal and that the same was unprocedural. He cited the authority of *Walter Ogal Anuro vs Teachers Service Commissions* (2013) eKLR, in support of his submission.
11. On behalf of the respondent, it was submitted that he was an agent of Kenafric Industries and had not employed the claimant. That as such, his contract with Kenafric Industries was a contract for service, which essentially, creates independence, lack of control and the employee is not integrated into the workforce of an employer for purposes of acquiring certain rights and responsibilities. That being an agent, it could not be sued where there is a disclosed principal. The respondent placed reliance on several authorities including *Kenya Hotels & Allied Workers Union vs Alfajiri Villas (Magufa) Ltd* (2014) eKLR, *Gilbert Sule Otieno vs Seventh Adventist Church (East Africa) Ltd (sued on behalf of SDA Church, Kiamunyi East)* (2014) eKLR, *Bowstead and Reynolds on Agency Seventeen Edition*, Sweets Maxwell page 1-001 and *Victor Mabachi & another vs Nurtun Bates Ltd* (2013) eKLR.
12. The respondent further submitted that the claimant was a third party in the principal agency relationship that existed between him and Kenafric Industries. He cited the case of *Fredrick Byakika vs Mutiso Menezes International Unlimited* (2016) eKLR.
13. That in the circumstances, he could not have unfairly terminated the claimant when he was not his employee.

Analysis and determination

14. Having considered the pleadings, the evidence and submissions on record, the issues calling for resolution by the Court are:
 - a. Whether there was an employment relationship between the claimant and the respondent?



- b. If the answer to (a) is in the affirmative, whether the claimant's termination was unfair and unlawful?
- c. Is the claimant entitled to the reliefs sought?

Whether there was an employment relationship between the claimant and the respondent?

- 15. The claimant avers that he was employed by the respondent and it is in this regard that he has brought the instant suit against him. The respondent disagrees and has termed the claimant as a third party to the principal agent relationship that existed between him and Kenafric Industries.
- 16. In support of his case, the claimant produced a job card which contains the name "Kamau Contractors" and "Kenafric Industries". The claimant has also produced a copy of his bank statement which indicates that the respondent was paying his salary.
- 17. On the other hand, the respondent has disputed the employment relationship and to prove his case, he produced a job contract executed between himself and Kenafric Industries, as well as a work sheet record of the claimant from Kenafric Industries.
- 18. It bears to note that the job contract between the respondent and Kenafric Industries describes the respondent as a "contractor" and "Kenafric" as the "principal". At clause 2, it states that "the contractors....are willing to provide their services for various types of job work at mutually agreed rates as per the schedule appendix "I", "II", "III" and "IV".
- 19. It is also notable that the services to be provided by the contractor were not specified under the job contract.
- 20. Be that as it may, the respondent stated in his testimony before court, that he was a labour contractor and in that regard, he took casual employees to work at Kenafric Industries. Therefore, it is apparent that the staff referred to under clause 3 and 4 of the job contract are the said employees.
- 21. Clause 3, 4 and 5 of the job contract provides in part: -

"(3) The principal shall provide the contractor with:

- (d) Confectionary and foot wear finished goods for packing in various packages of various sizes, weight and pieces in bags and cartons;
- (e) Adequate working area within the premises situate at...
- (f) Wholesome drinking water and toilet facilities for their staff members.

(4) the contractor shall observe and adhere to the below mentioned terms and conditions:

- (l) the contractor shall provide their own staff members with identification cards, good quality and clean company uniforms, safety gears, job cards approved by the principal and shall submit to the respective officer each time the staff enter the principal's premises;



- (m) The contractor shall ensure their Staff members are well disciplined and coordinate well with the employees of the principal....
- (n)
- (p) The principal reserves the right to take necessary in case of misbehaviors of the contract staff members.....
- (r) the contractor shall be solely responsible for damages for any injuries sustained by their staff members within the principal's premises...

Clause 5

“The principal shall not be responsible to paying the contractors staff members for any contractual work done by them but will inspect the records to ascertain no underpayment is done as the employment contract.”

22. The inference that can be drawn from the foregoing clauses is that: -
- a. the staff referred to, constitute the workforce/employees sourced and sent by the respondent to work at Kenafric Industries;
 - b. the claimant fell under the staff referred to in the job contract. In fact, the claimant stated in his testimony before court that he was hired by the respondent and sent to work at Kenafric industries;
 - c. the employees rendered their services at Kenafric Industries;
 - d. the respondent was responsible for ensuring the discipline of the employees while at the Kenafric Industries;
 - e. the respondent was responsible for issuing job cards, work apparel etc to the employees. Indeed, the claimant produced a job card which contained the names of the respondent and Kenafric Industries. Therein, the claimant's designation reads “contractor” thus implying that he was at Kenafric Industries as a staff of the respondent, pursuant to the job contract so he came as one of the staff;
 - f. the contractor was responsible for paying of the staff;
 - g. the contractor was liable for injuries sustained by the employees while at Kenafric Industries;
23. It is no doubt that the foregoing constitutes the ingredients of an employment relationship. Further, it is evident that the staff sent to Kenafric Industries under the job contract were employees of the respondent. In this regard, the respondent being the contractor supplied the labour and which labour was his own workforce.
24. According to Section 2 of the *Employment Act* an “employee” means “a person employed for wages or a salary and includes an apprentice and indentured learner.”
25. The same provision specifies that an “employer” 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.”



26. From the job contract, Kenafric Industries does not seem to have anything to do with the employees of the respondent save that they were rendering services under the said job contract.
27. As such, the claimant who was one of the employees sent to work at Kenafric Industries, was an employee of the respondent and not Kenafric.
28. As I see it, the alleged principal agent relationship is not coming out well in the job contract. Instead, what is apparent is that there was a contract for the supply of labour by the respondent. He could choose who to hire and who not to hire. All that Kenafric Industries expected of him under the job contract was provision of labour services.
29. If indeed, Kenafric Industries were to assume the role of an employer of the staff dispatched, then nothing would have been as simple as specifying the same under the job contract. Instead, the contract continuously referred to the staff as belonging to the contractor.
30. Ultimately, the respondent cannot run away from the fact that he hired the claimant. The respondent's assertion that he was merely supervising employees at Kenafric, does not hold water. The job contract sates otherwise and indicates that his role went beyond mere supervision and clothed him with the necessary rights and responsibilities of an employer.
31. The total sum of the foregoing is that the claimant was an employee of the respondent and not Kenafric Industries.
32. Having determined the employment relationship, was the claimant unfairly and unlawfully terminated?

Unfair and unlawful termination?

33. The claimant has stated that he was terminated and was not given any reasons for the termination. The respondent disputed the employment relationship and thus argued that it could not have terminated the claimant when it did not employ him.
34. There is no letter of termination on record or such other evidence to prove that there was termination.
35. Section 47 (5) of the *Employment Act* (Act) places the burden of proving the fact of termination on the employee. It provides thus:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

36. In the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal had this to say in regards to the said section 47(5): -

“So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

37. In the instant case, the claimant did not prove the fact that he had been terminated. Granted. He was not issued with a letter of termination. Nonetheless, there were other avenues and means through



which he could have proved this fact. For instance, he could have called oral evidence through a former coworker who had knowledge of that fact.

38. The learned Court in the case of Pius Machafu Isindu (*supra*) further held: -

“We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer’s response under section 43.”

39. The claimant having presented no evidence to discharge his evidential burden, I will similarly find that there is no basis upon which to require the respondent to prove the reasons for termination.

40. There is a philosophy behind the evidential requirement under section 47(5) of the Act. An employment relationship may end for other reasons and not necessarily termination. For instance, an employee may opt to walk away from the employment relationship on his own volition or the employment contract may run its full course and terminate by effluxion of time. It is therefore imperative that an employee alleging unfair termination, to prove that fact at the outset.

41. Further, despite the claimant stating that he was terminated, there is no evidence that he promptly acted following the said termination for instance, a complaint to the labour office in that regard. Indeed, and as I note, the demand letter issued to the respondent by his Advocates was done after lapse of nearly eight months following the alleged termination.

42. Still on the case of Pius Machafu Isindu (*supra*), the Court reckoned as follows: -

“One may indeed wonder what the appellant did after the alleged termination of his employment. He certainly did not make any immediate protest in writing or at all, either to the respondent, the labour officer or even his workmate, John Elayesa Likhalmi who testified on his behalf. John testified that he only heard from undisclosed sources that the appellant had been dismissed. It was only in March 2012, more than five months later that the appellant’s lawyer addressed a demand letter to the respondents. Three more months later in June 2012, he filed the claim in the Industrial Court. This is hardly the conduct of an employee whose services were summarily and rudely terminated. On a balance of probability, he was not pushed. He jumped.”

43. In light of the foregoing, I find that the claimant has not proved that he was terminated thus requiring the Court to enquire into and analyse the circumstances leading to the said termination and the fairness or validity thereof.

Reliefs

44. As there has been no finding of unfair termination, the relief for notice pay, severance pay and compensatory damages is declined.

45. The claim for overtime and accrued leave days is similarly declined on account of lack of evidence.

46. The claim for accrued leave days and week off days is similarly denied on account of lack of supporting evidence.

Conclusion

47. In the final analysis, the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIOBI this 28th day of April, 2022.



.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Wangira

For the Respondent Mr. Kabaiku

Court assistant Barille Sora

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

