



**Mwairimba Mining Company Limited v Lokuku. (Appeal
E76 of 2021) [2022] KEELRC 1679 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1679 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E76 OF 2021**

B ONGAYA, J

MAY 27, 2022

BETWEEN

MWAIRIMBA MINING COMPANY LIMITED CLAIMANT

AND

JOHN LOSUTU LOKUKU. RESPONDENT

JUDGMENT

1. The appellant filed the memorandum of appeal on 25.10.2021 through Rachuonyo & Rachuonyo Advocates. The memorandum of appeal has enumerated six grounds of appeal to the following effect:
 - 1) The learned trial magistrate erred in law and in fact in specifically finding and holding that the appellant had on a balance of probability proved he was an employee of the respondent.
 - 2) The learned magistrate erred in law and in fact in finding and holding that the respondent was unfairly dismissed from employment by the appellant without evidence, considering the true circumstances of his lawful refusal of access or entry to the appellant's premises upon the demise of the independent contractor and service provider (George Loketoi Echu). Had the appellant not refused access or entry, it would have been impliedly deemed by the employment law to have directly engaged the services and employment of the respondent as a security guard, a matter of judicial notoriety, that escaped the learned magistrate.
 - 3) That the learned magistrate erred in law and in fact in considering and awarding manifestly excessive, unlawful and unwarranted claims for salary in lieu of notice, unpaid leave, working off days and overtime, service pay and compensation for unlawful termination when such claims had not been strictly proved and established in evidence as mandatorily required of the respondent by established law and evidentiary rules, and when the reliefs sought had been unfairly and unlawfully awarded; without jurisdiction in law, in the absence of an established and unfairly terminated employer-employee relationship; and without a lawful



basis at all taking into account the short period the respondent was contractually engaged by an independent third party service provider and seconded to the appellant's premises, being less than eight(8) months and hardly lasting a full compensable service year.

- 4) The learned magistrate erred in law and fact by in unnecessarily, unjustifiably and unfairly shifting the burden of proof of the existence of an employee-employer relationship from the respondent to the appellant by requiring the appellant to prove that the respondent was not its employee; that the appellant had to prove the independent contractor George Loketoi Echu had indeed become deceased; to prove that the unidentified and unproduced Kennedy Mwaora who made a single unexplained financial payment to the respondent and made certain correspondences was not indeed the appellant's agent; and that the appellant had a burden to produce further additional employment records such as workers' lists and attendance signing sheets when existence of such documents had not been established and proved in evidence and discovery was not sought and the respondent had produced uncontested employment records in its custody.
 - 5) The learned trial magistrate erred in fact and in law by making various awards of damages in a vacuum and without any basis in law and all of which are in the obtaining circumstances grossly exaggerated, unsubstantiated and undeserved.
 - 6) The entire judgment is distorted, inaccurate, biased, unbalanced, ill-considered and appraised, against the weight of unchallenged evidence submitted at the trial and the true obtaining circumstances of the respective unproved claims of the respondent and the proved and merited rebuttal and defence of the appellant. The impugned judgment and its foundation ought to be set aside in its entirety as it sets a bad precedent against the recognised usual trade, custom, and practice on the uncontested place of a procured, hired and independent third-party contractors in the employment industry and established laws and practice.
2. The appellant prayed for orders:
- i. That the appeal be allowed and the judgment and decree of the Honourable Mr. F.M. Nyakundi (SRM) dated and delivered on 27.09.2021 be and is hereby set aside.
 - ii. That the claimant's memorandum of claim dated 07.07.2020 be and is hereby dismissed with costs.
 - iii. That costs of the appeal be awarded to the appellant.
3. The dispute between the parties was commenced in the lower Court by the memorandum of claim filed on 08.07.2020 for the respondent through Machora Motuka & Company Advocates. The respondent pleaded that at all material times between September 2018 and November 2019 he was an employee of the appellant within the meaning of the *Employment Act*, 2007 and was engaged by the respondent as a security guard. Further, he pleaded that in the entire period between September 2018 and November 2019, his engagement and attendance at work was at all times regular and continuous and at no point was his name ever missing from the workers' list. Further, he worked diligently and executed his duties as engaged. Further, the appellant subjected him to harsh and unfair working conditions particularised as follows:
- a) No rest day in every seven days as required in law and not compensated in lieu of such rest days.
 - b) Working on public holidays without due rest or pay in lieu of such rest.
 - c) Working from 6am to 6pm in the evening all days of the week from Sunday to Sunday without payment of due overtime.



- d) No annual leave as stipulated by the law and no payment in lieu of such leave.
 - e) Working continuously between September 2018 and November 2019 but was not recognised as a permanent employee.
4. The respondent pleaded that as at termination, his gross monthly salary was Kshs. 20, 000.00. He further pleaded that on 08.10.2019 he proceeded on leave which ended on 06.11.2019. Further, on 07.11.2019, he reported to work to resume his normal duties only to be dismissed and was instructed to go home, effectively terminating him without justifiable reason or notice. The particulars of wrongful, unfair, unlawful and unprocedural termination on the part of the appellant were pleaded as follows:
- a) Failure to issue termination notice.
 - b) Failure to furnish reasons for termination.
 - c) Failure to afford him a hearing prior to termination.
 - d) Failure to comply with mandatory statutory provisions on termination.
 - e) Failure to issue certificate of service.
 - f) Failure to pay terminal dues.
 - g) Breach of *Employment Act*, 2007, rules of natural justice.
5. The respondent claimed against the appellant as follows:
- a) Salary in lieu of notice (1 month) Kshs.20, 000.00.
 - b) Unpaid leave 23.15 days Kshs.22, 047.60.
 - c) Unpaid off days (65 days) Kshs.150, 072.00.
 - d) Unpaid overtime Kshs. 182, 828.00.
 - e) Service pay for 1 year and 1 month Kshs.24, 662.30.
 - f) Compensation for unfair and unlawful termination Kshs.240, 000.00.
 - g) Total claimed Kshs.639, 610.00.
6. The respondent prayed for judgment against the respondent for:
- a) A declaration that the termination by the respondent was contrary to the *Employment Act* and the same amounted to wrongful, unfair, and unlawful termination.
 - b) Issuance of a certificate of service.
 - c) Compensation as claimed being payment of Kshs.639, 610.00.
 - d) Costs of the suit plus interest.
 - e) Any other relief the Honourable Court may deem fit to grant.
7. The appellant entered appearance in the lower Court and filed an answer to memorandum of claim on 19.08.2020 through Rachuonyo and Rachuonyo Advocates. The appellant pleaded as follows. The respondent had never been its employee earning Kshs.20, 000.00 as pleaded. The appellant had never been responsible for any statutory obligations relating to the claimant in any capacity and in particular as an alleged employee. Further, the appellant owed the respondent no statutory dues or



obligations to the respondent. Further, between September 2018 to November 2019 the respondent was in the appellant's premises as a private contractor employed by a third party George Loketoi Echu who was an independent contractor who engaged the respondent and seconded him to render security services as a security guard at the appellant's mine. Thus, the appellant dealt with the independent contractor George Loketoi Echu under the relevant contract between the said Echu and the appellant to the exclusion of the respondent. The respondent was not privy to the contractor contract between Echu and the appellant and the respondent had no rights against the appellant. The appellant paid the contractor (Echu) in one lump sum at the end of each calendar month and the appellant had no interest or role in application of the paid out contractual sums including any obligations to or communication with any of the ultimate beneficiaries thereto, including the respondent. The respondent's own exhibits showed that he received monthly payments from the said independent contractor and not the appellant so that the said Echu was the respondent's sole employer.

8. The appellant further pleaded that the said independent contractor George Loketoi Echu (deceased) died in November 2019 and thereafter the respondent employed another independent contractor. Thus the appellant pleaded that he owed the respondent no sums of money as claimed and prayers as were made in the memorandum of claims – the same being in a vacuum in absence of employer-employee relationship between the parties in the suit. The appellant admitted receiving a demand notice but rejected it as not justified at all. The appellant disputed the trial Court's jurisdiction on account no contract of service existed.
9. The parties filed their respective submissions on the appeal and orally highlighted the submissions on 24.05.2022. Mr. Odhiambo Advocate urged the appellant's case and Mr. Motuka Advocate made the respondent's submissions. The Court has considered the record of appeal and the submissions and makes findings as follows.
10. First, as submitted for the respondent, this being a first appeal, the Court will examine, re-evaluate, re-analyse and re-consider the evidence before the trial Court and draw its own conclusions bearing in mind that it did not by itself take the evidence of witnesses and did not see or hear the witnesses – and the Court will make due allowance in that respect. That guiding principle is not in dispute as was held by the Court of Appeal as the role of the appellate court in a first appeal per *Gitobu Imanaya & 2 Others – Versus- Attorney General* [2016] eKLR and in *Abok James Odera T/A A.J Odera & Associates –Versus- John Patrick Machira T/A Machira & Company Advocates* [2013] eKLR.
11. Second, the main issue in dispute is whether the parties were in contract of employment or not. The Court considers that in deciding that issue, the parties are bound by their pleadings as well as the definition of employer and employee in the *Employment Act*, 2007. Under the Act "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner. On the other hand, the Act provides that "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. In the instant case, the appellant's case is that it had outsourced security services under a contract between the appellant and one George Loketoi Echu (deceased). Further the respondent was an employee of the said George Loketoi Echu (deceased) and consequential to the death of the contractor in November 2019, there was no basis for the respondent to continue reporting on guarding assignment at the appellant's mining site. The respondent's case is that he was employed by the appellant as a security guard for 1 year and 1 month as pleaded.
12. Now, what was the evidence before the trial Court in that respect? The respondent while testifying that he was employed by the appellant in September 2018, he did not disclose the appellant's official



or authorised person who had orally employed him - without a written contract. In cross-examination the respondent testified in the following effect and terms:

- a) He was brought to the appellant company by one George.
- b) He had nothing to show that he was part of the respondent's permanent staff.
- c) The appellant used to pay George then George would pay the respondent and the respondent did not know about the basis of that arrangement in his payment as he did not know why George was given the money to subsequently pay the respondent.
- d) George had been given a permanent contract to do the work and the appellant had never paid the respondent's salary. The respondent knew George had a contract with the appellant.
- e) Oscar Mwangela was the respondent's manager who asked the claimant to stop going to work and that was on 06.11.2019 and it was at a time George had already died.
- f) The respondent's name used to be in a book at the appellant's premises but which the respondent had not produced or exhibited.

13. The appellant's witness was the appellant's General Manager one Oscar Mwangala. His testimony was as follows:

- a) The appellant had exhibited in the filed documents the list of its employees and the respondent was not one of them.
- b) The appellant outsourced many employees. The appellant had no connection with the respondent as the General Manager had never engaged the respondent.
- c) He was not Kennedy Mwaroa but he knew the said Kennedy Mwaroa who was appellant's administrator who M-pesa statements showed had send to the respondent Kshs. 1, 850.00 but the witness had no written documents about respondent's employment with the appellant. The said Kennedy signed letters on behalf of the appellant. The witness further stated that he knew Kennedy Mwaroa as the appellant's director and he did not know why he may have send money to the respondent.
- d) George was given a contract to provide security services and he deployed the respondent accordingly. George passed away in 2019 and at paragraph 17 of the witness statement, the witness stated that Lokoro Achuka was thereafter engaged to provide it with independent security services.

14. The trial Court in resolving the issue of whether a contract of employment existed stated the party who carries the burden of proof and expressed itself thus, "In the case of *Evans Otiemo Nyakwana vs Cleophas Bwana Ongaro* [2015] Eklr the court stated inter alia, as a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(1) of the *Evidence Act*. It is the responsibility of the claimant to prove that he was employed by the claimant (supposing respondent) and in the alternative; the respondent has also to prove that the claimant was an independent contractor."

15. The Court holds that as found by the trial Court, it was the burden of the respondent to prove that the appellant employed him. Now, did the respondent establish by evidence that the appellant employed him. The trial Court found that on a balance of probability the respondent had done so because by respondent's exhibit 6, one Kennedy Mwaroa purporting to sign for the respondent's manager with appellant's stamp wrote to whom it may concern acknowledging that the respondent was the



appellant's employee and on leave from 28th January 2019 to 18th February 2019. The trial Court also found that the appellant had provided no evidence to show that the appellant had initially contracted George Loketoi Echu (deceased) to provide guarding services but the exhibited contract was for Lokoro Achuka dated 15.01.2020. Further the trial Court found that the appellant had failed to produce a document to show George Loketoi Echu was a sub-contractor and adverse inference had to be made against the respondent in failing to produce documents in its possession and as was held in *Kenya Akiba Micro Financing Limited –Versus- Ezekiel Chebii and 14 Others* [2021]eKLR. The trial Court found that no document had been exhibited showing that the sub-contractor had died. The trial Court then concluded as follows, “The contract of service as far as section 2 of the act that an employer-employee relation of the parties herein can be inferred from their conduct which included the claimant undertaking to work for a remuneration of Kshs.20, 000.00, the signing of attendance sheet each day and instructions directed to him from the respondent each and every day he reported to different fields in the premises of the respondent. There is also a recognition vide exhibit 6 that indeed the claimant was an employee of the company and if there was any problem to refute the same, then the respondent could have denied that the writer of the said exhibit 6 was not a shareholder as indicated in the letter he wrote confirming that the claimant was the worker of the respondent. This is a civil suit and the claimant has proved his case on a balance of probability that he was employed by the respondent.”

16. The trial Court proceeded to compensate for wrongful, unfair, unlawful and un-procedural termination as follows:
 1. Salary in lieu of one-month notice Kshs. 20, 000.00.
 2. Unpaid leave 23.15 days Kshs. 22, 047.00.
 3. Unpaid working off days Kshs. 150, 072.00.
 4. Service pay for one year and one month Kshs. 24, 662.00.
 5. Unpaid overtime Kshs. 150,000.00.
 6. Total Kshs. 516, 781.00.
 7. Costs and interest to the claimant.
17. It is submitted for the appellant that the learned magistrate erred in drawing an inference that the respondent had been engaged by George Loketoi Echu (deceased) acting as the appellant's agent as there was no basis to do so. The Court agrees with that submission. The appellant exhibited its records of the employees and the said George Loketoi Echu (deceased) as well as the respondent were not listed as the appellant's employees. The respondent does not plead that the said George Loketoi Echu (deceased) employed him on behalf of the respondent. The particulars of the oral contract of service are not pleaded at all. The respondent then testified thus, “George Lukutoi (read Loketoi) had a contract with the company. I did not know whether George was a part of management. He wrote and employed me as an employee of the company not for him. He stated that the company employed us and it is the office to write their off. I was told that the person to pay me is George. We were in the front. The defendant never paid for my NHIF and NSSF...” It should be apparent from that evidence that the respondent knew George had a contract with the appellant, the respondent did not know George as part of the respondent's management, and while alleging George wrote to employ him on behalf of the respondent, that piece of testimony contradicted the testimony that George had a contract with the appellant. In any event the respondent did not exhibit the written contract he testified to have been written by the said George and employing him on behalf of the appellant. The claimant had earlier at the start of cross-examination testified that the said George brought him to the company, George worked for the company but never stayed at the farm and there was nothing to show that George



worked for the appellant (company). The Court has already found that the appellant had already exhibited records showing that the said George had not been its employee as he had not been listed as such. The claimant confirmed by his evidence that he did not know if George was part of management. It is true that the appellant had not exhibited the outsourcing contract concluded with George but, the respondent had testified, though in a contradictory version as already highlighted earlier in this judgment, that he knew the said George had a contract with the appellant. The Court therefore finds that in view of that respondent's testimony being consistent with the appellant's pleaded case and the testimony by the appellant's witness that George had been outsourced, it was not justified for the trial Court to make an adverse finding against the appellant that the outsourcing contract did not exist especially in the circumstances that no otherwise relationship was established between the said George and the appellant.

18. Turning to the undated letter by Kennedy Mwaroa for Manager, it is true that the said Kennedy Mwaroa was listed as the appellant's director per Companies' Registry records as at 09.05.2019 and duly exhibited. The appellant's witness doubted the truthfulness of the undated letter exhibited for the respondent as it was not on the respondent's letterhead and it erroneously described Kennedy Mwaroa signing for Manager while the respondent's witness testified that he was the only respondent's Manager and Kennedy Mwaroa was variously the director and administrator of the appellant. The Court has carefully considered the pleadings and evidence. The claimant repeatedly pleaded that throughout service he was not given leave and then he worked 7 days a week without leave. He claims 23.15 leave days for entire period worked for 1 year and 1 month. Now examine the contents of the undated disputed letter. It purports to confirm that the respondent is the appellant's employee and being on leave from 28.01.2019 to 18.02.2019 (being about 21 leave days but not earned at all if indeed he had been employed in September 2018). The Court finds that the disputed letter served nil probative value in view of the claimant's pleadings and claims about days worked per week, no leave granted, and 23.5 leave days claimed. On a balance of probability, the Court finds that the evidence by the appellant's witness that the disputed letter was not a genuine document from the appellant was in the circumstances credible, as it had the identified discrepancies - undated and most important, inconsistent with the respondent's pleaded case. The claimant's testimony including the contents of that disputed letter that contradicted his own pleadings cannot be trusted.
19. The Court further finds that it was the respondent's evidence that he was paid by George. Further, in its findings the trial Court appeared to refer to the signing of attendance sheet each day and instructions by the appellant to the respondent but, the Court finds that no signed attendance sheets had been exhibited and there was no evidence that the appellant gave the respondent instructions on daily basis. As submitted for the appellant, the respondent never served a notice to produce the alleged check-in registers or sheets and it remained unknown if at all any such registers or sheets existed as part of the appellant's records in that regard.
20. The Court therefore returns that as urged for the appellant, there existed no established employer-employee relationship between the parties in view of the pleaded respective cases and the evidence that was before the trial Court. By his own evidence, the respondent confirmed that he had been employed and paid by George who had brought him on the appellant's premises to work. The respondent by his own evidence confirmed that the said George died and thereafter he was not allowed to work at the appellant's premises. The record of payments to the respondent did not establish the respondent's alleged monthly pay of Kshs. 20, 000.00 and further the one-off payment by Kennedy to the respondent, in the opinion of the Court, could not, on a balance of probability and all circumstances of the case, go to show that indeed, the respondent was employed by the appellant and that the appellant had paid him for 1 year and 1 month as was alleged. As urged for the appellant, the respondent failed to establish that the appellant had engaged the respondent as a security guard at



Kshs. 20,000.00 per month as was pleaded and alleged for the respondent. The Court finds that the respondent failed to establish by evidence that George was the appellant's agent or employee charged with recruiting and paying the respondent. The Court finds that in the circumstances there was no reason to doubt the appellant's case that the appellant had outsourced George to provide guarding services and that after George's death, the respondent's presence at the appellant's premises became moribund – the respondent having testified that he knew that the said George had a contract with the respondent. The Court finds that no employer-employee relationship had been established as existing between the parties per the definitions in the *Employment Act*, 2007.

21. Third, there being no employer-employee relationship, the Court returns that the respondent had failed to justify all his claims as alleged and the prayers as made. The Court has already found that the claimant had contradicted himself on the issue of leave days. While claiming for leave days, he at the same time relied on the disputed letter he exhibited showing he had taken 21 days in January to February 2019 - even prior to earning such leave as allegedly employed in September 2018. Further, in a contradictory manner he pleaded that he was on leave on 08.10.2019 to 06.11.2019 and resumed work on 07.11.2019 only to be told to go home. He then, simultaneously, makes the claim for 23.5 leave days. The Court finds that the respondent's case was incoherent, contradictory and unconceivable. The alleged overtime was not particularised in terms of hours allegedly worked just as the off days were not particularised. The Court finds that the entire suit must collapse on account that there was no contract of service established and the claimant's entire suit was founded upon contradictory pleadings. The appellant's submissions are upheld in that regard. Further, in any event, no justification for the amounts awarded in the judgement was established. The monthly salary was never established as alleged to have been Kshs.20, 000.00 per month. The specific computed time for overtime and off days being not particularised or established at all, the awards were vacuous as per the appellant's submissions. The judgment is liable to being set aside as the appeal is found to succeed on all the grounds of appeal.
22. In conclusion, judgment is hereby entered for the appellant against the respondent for orders:
 1. That the appeal be and is hereby allowed and the judgment and decree of the Honourable Mr. F.M. Nyakundi (SRM) dated and delivered on 27.09.2021 be and is hereby set aside.
 2. That the claimant's memorandum of claim dated 07.07.2020 be and is hereby dismissed with costs.
 3. That costs of the appeal be and are hereby awarded to the appellant.
 4. After close of 15.06.2022, the decretal sum of Kshs. 516, 781.00 deposited in the joint interest earning account in the names of the parties' advocates be released back to the appellant together with the accrued interest thereon.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 27TH MAY, 2022.

BYRAM ONGAYA

JUDGE

