



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaitano v Western Mills Ltd (Cause 217 of 2017)  
[2022] KEELRC 13 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 217 OF 2017  
NJ ABUODHA, J  
MAY 9, 2022**

**BETWEEN**

**JOSEPH IKOBWA KAITANO ..... CLAIMANT**

**AND**

**WESTERN MILLS LTD ..... DEFENDANT**

**JUDGMENT**

1. The claimant pleaded that he was orally employed by the respondent on 14<sup>th</sup> January, 2016 as rig processor and worked for the respondent until 30<sup>th</sup> May, 2017. His salary at the time of termination was Ksh.14,400/= per month. According to the claimant, the respondent orally terminated his service without any lawful and justification or reason but on allegation that he had absconded duty which according to the claimant was not true. The claimant complained that the termination contravened Employment Act since the respondent never proved the reason for termination was valid and that no notice of termination was issued.
2. During the period the claimant worked, he alleged he never went on leave including sick leave. The claimant further stated the respondent upon termination refused to pay him his terminal dues.
3. The respondent on its part alleged that the claimant was never its employee and that the claim was fraudulent and intended to extort money from the respondent.
4. At the oral hearing the claimant stated that he recorded a witness statement on 27<sup>th</sup> July, 2017 which he adopted as his evidence in chief. According to him, he was employed on 14<sup>th</sup> June, 2006 but was not issued with any appointment letter. His salary was Ksh.14,400/= and that he was terminated on 30<sup>th</sup> May, 2017 because he missed work for one day. According to him, he had been injured and was in pain.
5. During the period he worked he used to report to work at 7.00 am and leave at 7.00pm. he was never paid overtime. As they reported to work, they used to clock in using the biometric system and the supervisor used to cross-check. The claimant further stated that he used to work seven days a week



- without any rest days and were never paid in lieu further during the period he worked he never went on leave.
6. The claimant denied knowledge of Mr. Jackson Ominde and further denied he was an employee of Jokali Limited and never signed any contract with Jokali. he denied the signature on the document was his.
  7. In cross-examination he stated he was never issued with any appointment letter by the respondent. He denied the signature on the contract document with Jokali but said he has never filed any complaint for forgery.
  8. He admitted seeing the NSSF statement and that the account bore his name and the identity card number was his and that the statement stated his employer was Jokali Handling Service.
  9. The claimant further stated that he did not come to work on the material day because he was injured. He however had no document showing he was hospitalized. He just bought medicine from the chemist. About overtime he stated he had nothing in Court to show he worked overtime. He denied knowledge of Jared Lukoye and further stated he could not remember who hired him but he was a tall man and that they were not very close.
  10. The respondent's witness Mr. Jackson Ominde stated that he adopted his witness statement recorded on 14<sup>th</sup> March, 2019 as his evidence in chief.
  11. According to him the claimant was not an employee of the respondent. At the material time the respondent had subcontracted labour services and that the claimant was employed by Jokali Handling Services. The Respondent received copies of contracts signed by employee hired by Jokali. They also ensured that contracted employees complied with statutory requirements. That is to say, they ensured they were registered with NSSF and NHIF. They also agreed with Jokali how the contract could be terminated by Jokali. It was his evidence that the claimant was terminated by Jokali on 1<sup>st</sup> June, 2017.
  12. In cross-examination he stated that he knew the claimant through Jokali. He further stated that the contract between Jokali and the respondent was in writing. It was however not produced in Court. He further stated that the respondent never applied to enjoin Jokali in the suit.
  13. Jackson further stated that the contract between Jokali and the claimant was signed by the claimant and approved by Gilbert and verified by the respondents. The contract was between Jokali and the claimant. The salaries were paid by Jokali. NSSF was remitted by Jokali as the claimant's employer.
  14. The first and critical issue to be decided in this matter is whether there existed employer-employee relationship between the claimant and respondent.
  15. Most jurisdictions apply the "four-fold test" to determine whether an employer-employee relationship exists. First, it is the selection and engagement of the employee. Second, payment of wages, third, power of dismissal and fourth, the employer's power to control the employee's conduct (the control test).
  16. If substantial evidence is presented to show that a person selects and engages another for employment, pays their wages, has power to dismiss them and or controls their conduct, then the Court ought to conclude that there is an employer-employee relationship.
  17. The claimant herein pleaded that he was orally hired by the respondent and further that the respondents in the same way orally terminated his service and declined to pay his terminal dues.
  18. The respondent on the other hand denied the claimant was its employee but an employee of Jokali Holding Ltd which according to the respondent was a labour outsourcing company which procured



labour for them. In support of their defence the respondent produced the contract between the claimant and Jokali Holding Ltd. The respondent further produced a notice of termination issued by Jokali to the claimant informing him of the intention to terminate his service and reason for such termination. The respondent further produced NSSF statement in respect of the claimant showing the claimant was an employee of Jokali Holding and the one responsible for remitting his NSSF deductions.

19. The claimant denied knowledge of the contract of employment and the termination letter but conceded that the NSSF statement was genuine and the details were his. This then begged the question that, if it was true that the claimant was not an employee of Jokali Handling Ltd why would they register him as their employee and remit NSSF deductions on his behalf? The only possible answer to this question would be that the claimant was not being truthful when he alleged the respondent and not Jokali was his employer.
20. It is instructive to note that the respondent filed their statement of response on 18<sup>th</sup> March, 2019 attaching these documents as exhibits in support of their defence. The claimant neither filed a response to the defence denying the allegation in the statement of response or raised any objection to the letter of appointment and letter of termination issued by Jokali Handling Ltd. This could only be deduced to mean that indeed it was true the claimant was not an employee of the respondent but that of Jokali Handling Ltd.
21. The Court having so found, the respondent therefore becomes non-suited against the claimant. The Court will therefore not delve into other claims against the respondent and proceed to dismiss the suit against the respondent with costs.
22. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2022**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**

