



**Makokha v Vel Constructions Co. Ltd (Cause 1739 of 2017)
[2022] KEELRC 1498 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1498 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1739 OF 2017**

**SC RUTTO, J
JUNE 23, 2022**

BETWEEN

JOSEPH OJIAMBO MAKOKHA CLAIMANT

AND

VEL CONSTRUCTIONS CO. LTD RESPONDENT

JUDGMENT

1. The claimant brought the instant suit vide a memorandum of claim dated August 31, 2017 through which he claims the sum of Kshs 168,400/= being notice pay, payment of untaken leave days, service pay for the entire duration of employment and compensatory damages.
2. The claimant avers that he was employed by the respondent as a steel fixer and worked continuously with due diligence to the satisfaction of the respondent and his last monthly salary was Kshs 9,600/=.
3. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. On record, is an affidavit of Service deposed by one Mr. Peter Ngeno on June 30, 2018, through which he states that he effected service of the statement of claim and summons to enter appearance upon the respondent. Annexed to the affidavit of Service is a copy of the copy of the Summons which bears the receiving stamp of the respondent.
4. On January 22, 2019, the matter was certified ready for hearing and the court directed that the same to proceed as an undefended cause.
5. The matter proceeded for hearing on March 16, 2022 and the claimant testified in support of his case.

Claimant's case

6. The claimant adopted his witness statement dated 3 August 1, 2017, as well as the bundle of documents filed together with his claim, to constitute part of his evidence in chief. The claimant further produced the said documents as his exhibits before court.



7. It is the claimant's case that he was employed sometimes in 2013 by the respondent as a steel fixer. That he was working as a casual employee and was being paid at the rate of Kshs 400 per day. It was his testimony that he worked for the respondent continuously from 2013 until his termination from employment.
8. The claimant further told court that on February 18, 2016, while in the course of duty, a metallic wire pricked his middle finger thus occasioning him serious injuries. That after treatment, he resumed work and was allocated lighter duties. That in October, 2016, he was paid salary for one week and told that his services were no longer required and that he stood dismissed.
9. It was his testimony that his termination was unfair and unlawful as he was not given any reasons for termination or notice prior to his termination. That further, the respondent did not subject him to due process.
10. In further testimony, told court that he was not paid his final dues upon his termination. He further cited the respondent for not remitting his NSSF dues.
11. He asked the court to grant his claim as prayed.

Submissions

12. It was submitted on behalf of the claimant that he was dismissed without just cause as required under section 43 of the *Employment Act*. That further, he was not subjected to due process as mandated under section 41 of the *Employment Act* hence his dismissal was unfair and unlawful. Reliance was placed on sections 41, 43, 45 (2) of the *Employment Act*, as well as the authorities of *Mary Chemweno Kiptui vs Kenya Pipeline Company Limited* (2014) eKLR, *Walter Ogal Anuro vs Teachers Service Commissions* (2013) eKLR and *Kenya Union of Domestic Hotels Educational Institutions & Hospitals vs Mombasa Sports Club*, Cause No. 440 of 2013.

Analysis and determination

13. I have painstakingly considered the pleadings before me, the evidentiary material in support of the claimant's case, his testimony before court and submissions on record, and I find that the issues calling for resolution by the court are: -
 - a. Whether an employment relationship between the parties has been established?
 - 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 an employment relationship between the parties has been established?
14. As stated herein, the claim was undefended. As such, there was no response from the respondent either admitting or denying the employment relationship. This arduous task has therefore been left to the Court. Why do I say so? There is hardly any evidence to assist in the resolution of this question.
15. The claimant has averred that he was an employee of the respondent since February 2013 or thereabout until October, 2016 or thereabout. He stated that he served on a casual basis but his engagement was continuous.
16. Despite his assertions, the claimant has not placed before this court any evidentiary material, albeit remotely, to prove a link between him and the respondent.



17. As it is, there is not trace on record connecting the parties. It is quite odd that despite the claimant stating that he worked for the respondent for a period of close to three years, nothing exists to prove that employment connection.
18. It may be true that the respondent never issued the claimant with an employment contract. Nonetheless, it was his own admission that he served on a casual basis hence ordinarily, he may have had in his possession a casual labourer's card. Otherwise I wonder how he gained access the respondent's premises on a daily basis.
19. Further, there were other avenues and means through which he could have proved this fact. Knowing the gaps in his claim, he ought to have gone an extra mile in order to prove the same. For instance, he could have called oral evidence through a former coworker who had knowledge of that fact.
20. As I see it, no employment relationship has been established.
21. 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.”
22. The starting point in proving that a termination has occurred, is proving the existence of an employment relationship. That is the foundation upon which the case can stand on. Without that foundation being established, it is not possible to prove that there was termination and that the termination was either fair or unfair.
23. The claimant having presented no evidence to prove the existence of an employment relationship, I find that he has failed to prove his case on a balance of probabilities.
24. Further, despite the claimant stating that he was terminated upon sustaining injuries, 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 seven (7) months following the alleged termination.
25. The court of Appeal in the case of *Pius Machafu Isindu* (supra), 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.”
26. In light of the foregoing, I find that the claimant has not proved on a balance of probability, the existence of the employment relationship between him and the respondent.
27. Having found as such, the other issues cannot be logically determined and they fall by the wayside.



Conclusion

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

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Alividsa

For the Respondent No appearance

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

