



**Kyalo v Kantaria Commercial Stores (Cause 1665 of 2017)  
[2022] KEELRC 3789 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3789 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1665 OF 2017  
SC RUTTO, J  
JULY 29, 2022**

**BETWEEN**

**NICHODEMUS KYALO ..... CLAIMANT**

**AND**

**KANTARIA COMMERCIAL STORES ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers through the instant claim that he was employed by the respondent as a shop assistant on or about 1<sup>st</sup> October, 2007. He states that on or about 3<sup>rd</sup> January, 2017, the respondent unfairly, wrongfully and unlawfully terminated his services. Consequently, the claimant seeks the sum of Kshs 442,787.80 against the respondent.
2. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim hence the claim proceeded as undefended.

**Claimant's case**

3. The claimant testified in support of his case and at the start of the hearing, sought to adopt his witness statement dated 27<sup>th</sup> February, 2017, as well as the demand letter from his advocates to the respondent, which was filed together with his claim, to constitute his evidence in chief. Further, the claimant produced the said demand letter as his exhibit before Court.
4. It is the claimant's case that he was an employee of the respondent with effect from 1<sup>st</sup> October, 2017 or thereabout. He stated that on 11<sup>th</sup> December, 2016, he was granted leave for 21 days and upon resuming, he was told to go back home. That he went back to his employer after one week and was told that his work had ended. That the termination was effected despite his protestation and utter disregard of his right to be heard.



5. He further testified that he was not given any notice or warning letter prior to being terminated. That further the respondent did not remit his NHIF and NSSF dues. That he used to work from 8:00 am to 7:00 pm but was not compensated accordingly. He asked the Court to allow his claim as prayed.

### **Submissions**

6. It was submitted on behalf of the claimant that he was not issued with any document during the course of his employment and that he was terminated verbally. That the assertion that there was an employment relationship was never rebutted by the respondent. The claimant cited among others, the case of *Naomi Okoth vs Creative Consolidated Systems Limited* (2021) eKLR and *Abigael Jepkosgei & another vs China Hanan International Co. Ltd* (2018) eKLR. The claimant urged the court to hold that based on the employment relationship, there existed an employment relationship.
7. It was the claimant's further submission that the respondent had the burden of proving that there was reason for termination of his employment. That further, there was no proof that he was subjected to due process prior to termination.

### **Analysis and determination**

8. I have carefully 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 have singled out the following questions for resolution by the Court: -
  - 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?
9. As I have stated herein, the claim was undefended hence there was no admission or denial by the respondent as regards the existence of an employment relationship. As such, this is an issue that requires determination at this preliminary stage.
10. The claimant has averred that he was an employee of the respondent with effect from 1<sup>st</sup> October, 2007 or thereabout until 3<sup>rd</sup> January, 2017 or thereabout.
11. The claimant's assertions notwithstanding, he did not place before this court any evidentiary material, albeit remotely, to prove a link in the nature of an employment relationship between him and the respondent.
12. Indeed, there is no trace on record of any connection between the claimant and the respondent. This is rather odd considering that the alleged employment relationship spanned close to ten years.
13. In *Monica Kanini Mutua vs Al-Arafat Shopping Centre & another* [2018] eKLR the Court held that: -

“In an undefended claim, it is trite that the claimant establishes all the facts of the claim. The claimant must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment. In the present case the only documents submitted by the claimant are demand letters from Kenya Scientific, Research International, Technical and Institutions Workers Union (KSRITA IWU) and from counsel for the claimant. She also submitted a document with



the logo of City Council of Nairobi under the title “To whom it may concern.” The said documents do not establish any employment relationship between the claimant and the 1st respondent, which is fundamental in a claim of unfair termination of employment.”

14. The claimant has submitted that he was not issued with any employment contract by the respondent and that he was terminated verbally. The claimant further submitted that the respondent being the employer, had the responsibility of maintaining employment records. It is instructive to note that the claimant did not make this averment in his claim hence I consider it an afterthought.
15. Granted. It may be true that the respondent never issued the claimant with an employment contract. Nonetheless, having worked for ten years for the respondent, there must have been some form of documentation creating a nexus between him and the claimant for instance an employment card or tag. As it is the claimant only annexed a copy of the demand letter dispatched to the respondent by his advocates. By all means, that piece of evidence was not sufficient to establish an employment relationship.
16. Besides, there are other avenues that exist through which the claimant could have proved his employment relationship with the respondent. Being cognizant of the gaps in his own 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.
17. In the circumstances, it is my view that the claimant has not established an employment relationship seeing that the same is key as it lays a foundation for proving termination.
18. Indeed, 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.”
19. In light of the provisions of section 47(5) above, it follows that in order to prove termination, one has to first prove existence of an employment relationship. That was the fulcrum of the claimant’s case and without, it is not practical for the Court to move forward and determine the fairness or otherwise of the alleged termination.
20. In view of the foregoing, I cannot help but find that the claimant has not proved on a balance of probability, the existence of the employment relationship between him and the respondent.
21. Having found as such, the other issues fall by the wayside and cannot be logically determined.

### **Conclusion**

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

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**



For the Claimant Ms. Kisiangani

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

