



**Matolo v Kantaria Commercial Stores (Cause 1704 of 2017)
[2022] KEELRC 3839 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3839 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1704 OF 2017
SC RUTTO, J
AUGUST 5, 2022**

BETWEEN

SHADRACK MATOLO CLAIMANT

AND

KANTARIA COMMERCIAL STORES RESPONDENT

JUDGMENT

1. The claimant brought the instant suit through a Memorandum of Claim filed on August 29, 2017, through which he avers that he was employed on or about January 1, 2009 by the respondent. That he worked continuously up to January 3, 2017 when he avers that the respondent wrongfully, unfairly and unlawfully terminated his employment. Consequently, the claimant prays for the sum of kshs 367,867.32 against the respondent being notice pay, compensatory damages, unpaid overtime pay and service pay.
2. The respondent neither entered appearance nor filed a response in answer to the Memorandum of Claim hence the claim proceeded as an undefended cause.

Claimant's case

3. The matter proceeded for hearing on April 25, 2022 when the claimant took the stand and testified in support of his case. He adopted his witness statement 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. The said demand letter was produced as his exhibit before court.
4. He testified that he was working for the respondent as a supplier and his work entailed collecting cheques. That he went on leave in December, 2016 and on resuming work in January, 2017, he was informed that there was no more work for him. That he was not issued with notice nor paid any money in lieu thereof. That the termination took him by surprise as it was unexpected. He further testified



that he used to work from 8:00 am until 7:00 pm and was not given any rest days. That at the time he left employment, he was earning kshs 14,400/= and the same was being paid in cash.

Submissions

5. The claimant submitted that he was never issued with any contract during the course of his employment and that he was terminated verbally. That the assertion that there was a contractual relationship with the respondent was never rebutted. That pursuant to section 9(2) of the *Employment Act*, the respondent was required to reduce the contract of service in writing and having failed to do the same, it is at fault. The claimant cited among others, the authorities of *Naomi Okoth vs Creative Consolidated Systems Limited* (2021) eKLR and *Abigail Jepkosgei & another vs China Hanan International Co Ltd* (2018) eKLR. The claimant urged the court to hold that based on his testimony, there existed an employment relationship.
6. 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 his termination.

Analysis and determination

7. From the pleadings before me, the evidence presented, as well as the submissions on record, the following issues stand out for determination 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?

Existence of an employment relationship?

8. As stated herein, the claim was undefended. As such, the respondent did not appear before court to admit or deny the existence of an employment relationship with the claimant. It is therefore imperative to determine the said issue at this preliminary stage as it will ultimately inform the determination and disposal of the other issues.
9. As was held in *Monica Kanini Mutua vs Al-Arafat Shopping Centre & another* [2018] eKLR: -

“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.” Underlined for emphasis
10. The claimant has averred that he was an employee of the respondent with effect from January 1, 2009, or thereabout until January 3, 2017 when his employment was terminated. Therefore, he avers that he worked for the respondent for close to eight years.



11. The claimant's assertions notwithstanding, he did not place before this court any evidentiary material, albeit remotely, to prove a connection in the nature of an employment relationship between him and the respondent.
12. As it is, there is absolutely nothing to prove that there was an employment relationship between the two parties.
13. It was the claimant's submission that he was not issued with any employment contract by the respondent and that he was being paid in cash. This assertion was not pleaded and only arose at the submission stage, hence I cannot help but deem it as an afterthought.
14. In as much as it may be true that the respondent never issued the claimant with an employment contract, having worked for close to eight years, there must have been some form of documentation creating a nexus between him and the respondent, 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 is not sufficient to establish and demonstrate that there was an employment relationship between him and the respondent.
15. Above and beyond, the claimant could have employed other means to prove existence of the employment relationship with the respondent. For instance, he could have called oral evidence through a former coworker who had knowledge of that fact and who could corroborate his claim. Knowing the gaps in his own case, he ought to have gone an extra mile to prove his claim to the requisite standard.
16. In the circumstances, I am not persuaded that the claimant has established an employment relationship noting that the same is fundamental as it lays a foundation for proving termination.
17. 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.”
18. 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 constitutes the backbone of the claimant's case, without which, it is not practical for the Court to move forward and determine the fairness or otherwise of the alleged termination.
19. In the circumstances, I find that the claimant has not proved on a balance of probability, that an employment relationship existed between him and the respondent.
20. Having found as such, the other issues fall by the wayside and cannot be logically determined.

Conclusion

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

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF AUGUST, 2022.

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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 March 15, 2020 and subsequent directions of April 21 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**