



**Owiti v C & A Security Services (Cause 2402 of 2016)  
[2022] KEELRC 4104 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4104 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2402 OF 2016  
SC RUTTO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**PHILIP ONYANGO OWITI ..... CLAIMANT**

**AND**

**C & A SECURITY SERVICES ..... RESPONDENT**

**JUDGMENT**

1. The instant suit was commenced by the claimant through a memorandum of claim dated November 21, 2016, through which he avers that he was employed as a security guard on a monthly salary of Kshs 6,000.00. He further states that he was forced to resign on or about August 20, 2016, as a result of the respondent's failure to pay salary. In addition, the claimant has cited the respondent for other breaches to the contract of employment. To this end, his claim against the respondent is for the sum of Kshs 200,894.20 being underpaid salary, unpaid house allowance, unpaid leave, unpaid rest days, and unpaid overtime.
2. The respondent entered appearance but did not file a response in answer to the memorandum of claim. Through an application dated October 18, 2021, the respondent's advocate successfully sought to cease acting, hence moving forward, the respondent was unrepresented.
3. The matter proceeded for hearing on June 8, 2022 and the respondent was not present in court. The claimant through his Advocate produced an affidavit of service sworn by one Alfred Kioko Jones on June 8, 2022, wherein he deponed that he had effected service of the day's hearing notice upon the respondent.
4. Being satisfied with the return of service, the court directed the matter to proceed, the respondent's absence notwithstanding.



## Claimant's Case

5. At the start of the hearing, the claimant adopted his witness statement as well as the documents filed together with his claim to constitute his evidence in chief.
6. It was the claimant's testimony that he was being paid a monthly salary of Kshs 6,000.00, which payment was made in cash. He further told court that he was neither paid house allowance nor for the days he worked on Saturdays and Sundays. In further testimony, the claimant stated that the respondent would deduct all his money, being remittances to the National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) but would not remit the same as required. That further, he tried to implore the respondent to increase his salary but it refused. The claimant further testified that he was forced to resign from employment on August 20, 2016, and by then, the respondent had failed to pay his house allowance, leave days, rest days and overtime. He concluded his testimony by stating that the respondent was in breach of the employment contract.

## Submissions

7. The claimant submitted that it was incumbent upon the respondent to reduce the contract of employment into writing. To support this position, the claimant cited the case of *Naomi Okoth vs Creative Consolidated Systems Limited* (2021) eKLR. In further submission, the claimant stated that the law placed the respondent under a duty to assist the court in determining the issue before it by availing the employment records. He sought to rely on the authority of *Abigael Jepkosgei & another vs China Hanan International Co Ltd* (2018) eKLR.
8. It was the claimant's further submission that the respondent conducted itself in a manner that made it intolerable for him to perform his obligations hence he was left with no option but to resign. To buttress this position, the claimant invited the court to consider the determination in the case of *Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga* [2015] eKLR.

## Analysis and Determination

9. Flowing from the claim, the evidence on record and the claimant's submissions, I understand the following issues to be falling for the court's determination: -
  - a) Whether an employment relationship between the claimant and the respondent has been proved?
  - b) If the answer to (a) is in the affirmative, whether the claimant is entitled to the reliefs sought?

## Existence of an Employment Relationship

10. In light of the fact that the respondent did not file a response to deny or confirm the employment relationship, this issue remains grey. Consequently, it is imperative to determine the same at the outset, as this will ultimately form a basis and justification for award of the reliefs sought by the claimant against the respondent.
11. It is trite law that he who alleges the existence of a fact must prove. This is in tandem with the provisions of sections 107 and 108 of the *Evidence Act*. Consequently, the burden of proof rests on the party who alleges. In this case it is the claimant. The burden only shifts upon the claimant discharging the same by proving the facts alleged.



12. Under section 47 (5) of the *Employment Act*, the employee bears the burden of proving the fact of termination. The provision reads 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.”
13. 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 an employee’s case.
14. In the case herein, the onus of proving that the claimant was indeed an employee of the respondent, lay squarely with him.
15. It is the claimant’s case that he was an employee of the respondent with effect from September 9, 2015 or thereabout and that he resigned on August 20, 2016.
16. In a bid to prove existence of the employment relationship, the claimant exhibited a contract of employment. The problem with the said contract of employment is that the same does not contain any particulars specific to the claimant, for instance his name or identification number. As a matter of fact, the contract of employment being blank, may have as well been attributable to any other person besides the claimant.
17. Further, the claimant did not exhibit any other document to prove that there was an employment relationship between him and the respondent.
18. Over and above, I take note from the claimant’s testimony that he is the one who terminated the employment relationship. The question that lingers thus, is how the claimant communicated the termination of the employment as he did not exhibit a letter of resignation or such other document indicating his intention to bring the employment relationship to an end.
19. As it is, there is absolutely nothing to prove that there was an employment relationship between the two parties. Needless to say, the claimant has failed to draw a nexus between himself and the respondent in terms of an employer-employee relationship. It was only upon proving the employment relationship that the claimant could lay a basis for claiming the reliefs he now seeks against the respondent. Indeed, the same could only accrue where an employment relationship existed. And in this case, I have found none.
20. It was not enough for the claimant to merely assert without evidence that he worked for the respondent. Why did he not for instance, call oral evidence through a former co-worker to prove the fact of employment? He knew very well the gaps in his claim but failed to go an extra mile to obtain the evidence necessary, to enable him establish his case against the respondent.
21. In light of the foregoing, I find that the claimant failed to discharge his burden by proving on a balance of probabilities, the existence of an employment relationship between him and the respondent.
22. Having so found, it is not logical to determine whether the claimant is entitled to the reliefs sought as the basis for such award is unfounded.

## **Conclusion**

23. In the end, I cannot help but dismiss the claim in its entirety. There will be no order as to costs.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Kisiangani

For the Respondent No appearance

Court assistant Abdimalik Hussein

**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**

