



**Nyakundi v Alborz Kenya Ltd (Employment and Labour Relations Cause 838 of 2017) [2022] KEELRC 14692 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14692 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 838 OF 2017  
AN MWAURE, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**EVANS MUMA NYAKUNDI ..... CLAIMANT**

**AND**

**ALBORZ KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim dated May 22, 2017.

**Memorandum claim**

2. In his claim he says he entered into a consultancy agreement with the respondent for a period of one year from April 1, 2015 to April 30, 2016.
3. The same was terminable with 3 months' notice and was to be paid kshs 4,800,000/- as follows:
  - a. Kshs 400,000 by September 2015
  - b. Balance of kshs 800,000 payable every two months from September 2015 until payment or until contract expired.
4. He says he rendered his services but in September 2015 he was not paid his instalment as agreed.
5. He says on November 1, 2015 he was offered a job on permanent basis at kshs 150,000/- but was to continue offering consultancy services even as he served as a director.
6. He says he worked diligently but three months to the consultancy the respondent faulted in paying him and the arrears accumulated to kshs 1,448,200/- as at 31<sup>st</sup> March 2017 as per the claimant's averments.



7. He says he then instructed his advocate to demand the same by the letter dated March 27, 2017. He says upon receipt of the demand letter the respondent unlawfully and unfairly terminated his employment. This was done via an SMS by respondent's director name Alireza Hasan around April 1, 2017.
8. He says his termination was unfair and unprocedural and he claims for compensation.
9. He says he was not paid salary in lieu of notice after working for the respondent for one year and 5 months.
10. He prays for damages as in the claim

### **Respondent's case**

11. The respondent filed his response to memorandum of claim dated September 19, 2017. He says the allegations by the claimant are all false and denies them and states he will apply for security of costs and counter claim in due course.

### **Claimant's evidence**

12. The claimant in his evidence in court on June 4, 2022 says he got a letter of offer from the respondent and he said he used to pay one Sammy who had no work permit.
13. He says he is demanding kshs 1,488,200/- and kshs 4,888,200 as consultancy fees.

### **Respondent's evidence**

14. The respondent witness is one Boniface Onyiego who says he worked with the claimant at the respondent's employment. He says he did not know the particulars of claimant's employment.
15. There is second respondent witness William Ogunga who confirms he knew the claimant as they worked together in 2015 to July 2017. He says claimant's letter of offer dated December 1, 2015 was not official but was for loan purpose but claimant did not endorse it.
16. Witness no 3 Alireza Ali says he was respondent's managing director and he says claimant was his accountant. He says he did not dismiss him from employment but he deserted his post and took the company's documents.
17. The witness says he reported the matter of loss of his documents to the police. He also says there was a contract signed by the claimant to enable him to get a loan and claimant did not endorse it.
18. He also says claimant was offered kshs 50,000 but was receiving 90,000/-. He further says he paid claimant all his dues including kshs 100,000 for February and March.
19. There is yet another respondent witness Mary Muriuki and she says she was respondent's secretary. She stated that they gave claimant a contract letter to take a loan but was not the official employment letter.
20. She also assets that she made a report at Kilimani Police station as claimant took their documents and a computer. She says claimant was earning kshs 90,000. She also states claimant was the one to pay statutory dues but never paid and so the company was penalised.
21. She further says the claimant endorsed a contract of kshs 150,000/- in order to get a loan.
22. The court considered the claimants submissions dated March 31, 2023 and the respondent's submissions dated April 20, 2023.



## Analysis and determination

23. The pleadings and evidence and the documents as well as the submissions were considered by the court. The claimant's evidence is that he was first contacted by the respondent as a consultant but later was employed as a director finance by a letter of offer dated November 1, 2015. He says that his salary was to be kshs 150,000 as per the letter of offer.
24. He says after working for three months the claimant started faltering his payments and he instructed his advocate to demand for his payment. This was as per his letter dated March 27, 2017. He says once the respondent received the demand letter he received a termination notice via an sms on or around April 1, 2017.
25. The respondent or his part denies all the averments of the claimant and says in due course he will apply for counter claim and security of costs. At the conclusion of the suit no such application had been brought to court.
26. The respondent in his submissions says he had employed the claimant as an accountant initially at Kshs 40,000 salary and later at kshs 90,000 but claimant persuaded him to sign for him a contract of kshs 150,000 to enable him to get a loan to buy a motor vehicle. He says the claimant also convinced him to sign a consultancy agreement to strengthen his application to purchase a motor vehicle.
27. The court noted there is a letter of appointment of kshs 150,000 salary but no letter was availed for kshs 90,000/-. The averment that the claimant persuaded the respondent to sign a false contract and also consultancy agreement does not ring true. In any case if the respondent signed a false contract which obviously bound him he has only himself to blame.
28. Going by the documents on record and the pleadings and submissions the respondent can only blame himself if at all he had not contracted the claimant at the salary in the letter of contract. The court would find no viable reason to find the claimant was not employed by the respondent as per the letter of employment dated November 1, 2015.
29. The court finds that it will not delve into the purview of the consultancy agreement as that is not in the boundaries of an employer and employee and is not to be litigated in this court. The claimant would have to go elsewhere to litigate on the matter of consultancy agreement.
30. As pertains to the contract of employment as an accountant the claimant has evidence he was employed by the respondent. He avers he was terminated for demanding for his salary and his consultancy dues through his advocates letter dated March 27, 2017. He says he was terminated via SMS. It is unfortunate he did not produce the SMS but nevertheless the respondent also just claimed the claimant left employment and took his equipment and records. There is also no evidence produced to establish desertion or to show the documents and equipments the claimant took.
31. The respondent appears to have been upset by the claimant for sending him a demand letter. The court finds the respondent then did not present a credible reason to terminate the claimant as provided in section 45(1) of the [employment act](#). Section 45(1) of the [employment act](#) states as follows:-

"No employer shall terminate the employment of an employee unfairly."
32. It follows therefore that the claimant was not given a valid reason for termination and neither was he put through the mandatory process for disciplining an employee. That procedure is well laid down in section 41(1) of the [employment act](#). The same provides as hereunder.



41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
33. The respondent says the claimant was reported to Kilimani Police Station for taking his documents and equipment. This assertion was only given in court and was not in the pleadings. In any case there is no evidence as to what documents/assets he took and the court would hesitate to take that evidence on its face value without concrete proof.
34. The court finds the respondent did not establish the claimant deserted his employment and did not establish a valid reason to terminate his employment.
35. In the case of *Willie Kipkoch Langat vs Kericho County* No 016 of 2021 the court held:  
“the law is clear that the employer has an obligation to explain the reasons upon which termination of employment is being contemplated.”
36. Case No 59/2019 *Joseph Mwaniki vs United Millers Ltd* the court said:  
“in view of provisions of section 41 of the *employment act* the employee’s right to be heard whenever an employer is contemplating termination is a sacrosanct right and cannot be taken away through involvement of a termination clause.
37. The right to be heard is therefore a mandatory right. Flowing from the above the court is convinced the respondent unlawfully and without a valid reason terminated the claimant’s employment and so enters judgment in his favour.
38. Having held so the claimant is entitled to certain reliefs as hereunder:
- i. Consultancy compensation as said in the judgment will not be tackled here and so is declined.
  - ii. Salary arrears are not proved as claimed and prayer is also declined.
  - iii. Two months’ salary in lieu of notice is justified and is granted as is provided in his letter of employment at kshs 300,000/-
  - iv. Payment of untaken leave is justified as is provided in the contract at Kshs 150,000/-.
  - v. Unpaid leave allowance is not proved and is declined.
  - vi. Service pay is also not proved and is declined as no documents to show there were no remittances from NSSF.
  - vii. Unpaid house allowance is also not proved and is not granted. Claimant never raised issue of house allowance during his employment.
  - viii. Unfair termination compensation will be granted for one month considering claimant worked for the respondent for only about one year so is awarded equivalent of one month. kshs 150,000
  - ix. Total award is kshs 600,000.
  - x. He is awarded interest at court rates from date of judgment till full payment.
  - xi. He is awarded costs of the suit.



xii. He is to be given his certificate of service within 30 days.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

