



REPUBLIC OF KENYA



KENYA LAW
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**Njoki v Afric Eco Solutions Ltd (Cause 251 of 2017)
[2022] KEELRC 4108 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4108 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 251 OF 2017
DN NDERITU, J
SEPTEMBER 22, 2022**

BETWEEN

ANN WANGUI NJOKI CLAIMANT

AND

AFRIC ECO SOLUTIONS LTD RESPONDENT

JUDGMENT

I. Introduction

1. In a memorandum of claim dated June 8, 2017 filed through Munene Chege & Co Advocates the claimant prays for the following:-
 - a. A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal
 - b. Payment in lieu of notice
 - c. Compensation for unfair termination
 - d. An order compelling the Respondent to settle the outstanding benefits as enumeration at paragraph 25 of the claim
 - e. General damages
 - f. Cost of the suit and interest thereof at court rates
 - g. Any other relief that this court may deem fit to grant.
2. The memorandum of claim is supported by a verifying affidavit sworn by the claimant on even date and a witness statement by the claimant. The claimant also filed a copy of her national identity card as an exhibit and produced the same during the hearing.



3. Upon service, the respondent entered appearance through Mong'eri & Co Advocates but did not file a defence.
4. This cause came up in court for hearing on March 9, 2022 when the claimant (CW1) testified alone in support of her case and closed the same. The respondent did not attend the hearing and this court ruled that the respondent had no evidence to offer and the case was closed.
5. Counsel for the claimant addressed the court by way of written submissions filed in court on May 18, 2022.

II. Claimant's case

6. The claimant's case as pleaded and supported with the oral testimony by her is that she was engaged by the respondent as a casual employee in July, 2015 at an agreed daily wage of Kshs 250/=. She testified that she used to perform general duties such as making tea. She did not inform the court what type of business the respondent was engaged in.
7. The claimant testified that there was no written contract of service executed between her and the respondent but that the accumulated daily wage was paid weekly.
8. The claimant alleged that she worked from 7 am to 6 pm daily but that she was not paid for overtime as agreed. She alleges that she was not paid for house allowance or provided with accommodation. She also avers that the respondent did not remit NSSF and NHIF dues for her. She also testified that she did not go on leave for the entire period that she worked for the respondent from July 2015 to December 8, 2018.
9. The claimant testified that due to the above issues the employees decided to take industrial action by way of a strike. In her filed statement the claimant avers that she led the strike and that she stopped going to work on December 8, 2016 as the respondent was not yielding to the demands of the employees.
10. It is on the basis of the foregoing that the claimant is seeking for the prayers set out in part I of this judgment.

III. Claimant's counsel submissions

11. In summary, the claimant's counsel argues that the claimant has proved her case based on the oral testimony and that it was upon the respondent to rebut that evidence. Further, counsel argues that the respondent having failed to adduce any evidence to the contrary this court should find in favour of the claimant and award as prayed in the memorandum of claim.
12. Counsel has relied on the decision of the Court of Appeal in *Chengo Kitsao Chengo v Umoja Rubber Products (2017) eKLR* to the effect that under section 10(7) of the *Employment Act* (the Act) it is upon the employer to produce employment records.
13. According to counsel, once the claimant adduced the oral evidence as summarized above it was then upon the respondent to rebut that evidence by way of employment records or other evidence. In other words, counsel is submitting that since the claimant filed this cause and tendered her oral evidence the burden of disproving the allegations made shifted to the respondent and that since the respondent did not defend the cause, the evidence by the claimant, no matter its probative value, should be accepted as factual.
14. Counsel for the claimant then submitted on the prayers sought for asserting that the claimant be awarded as prayed in the memorandum of claim.



IV. Issues for determination

15. This court has carefully gone through the pleadings filed, the oral evidence adduced by the claimant, and the written submissions by the counsel for the claimant, and finds the following issues for determination:-
- a. Was the claimant an employee of the respondent?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought?
 - c. Costs.

V. Employment

16. Sections 107, 108, and 109 of the Evidence Act (Cap 80) provide as follows:-

' 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'
17. It is upon the claimant in this case to prove that there was indeed an employment relationship between her and the respondent. This is because it is upon such relationship that the respondent is expected to keep and avail employment records under sections 10 and 74 of the Employment Act.
18. The purpose and essence of the records to be kept by the employer under sections 10 and 74 inter alia, is to provide and authenticate the terms of the employment relationship in case of a dispute on such term(s), and also for government regulatory purposes.
19. However, even in employment and labour relations matters sections 107, 108, and 109 of the Evidence Act cited above apply. The basic rule of evidence is that he who alleges must prove. This is what is referred to as burden of proof. Unless the law otherwise provides, that burden is always on the party who alleges.
20. In this cause, the claimant alleges that she was an employee of the respondent. The claimant bears the burden of proof to the effect that indeed there existed an employment relationship between her and the respondent. It is only then that sections 10 and 74 of the Act kicks in if the terms of employment are in dispute.
21. To prove the existence of that relationship, the claimant had to avail evidence beyond the oral evidence that she tendered. While she alleges that there was no written contract, and hence the respondent had no written contract to avail, the claimant ought to have called evidence, such as from co-workers, to confirm and corroborate that she indeed worked for the respondent. The claimant testified that she was paid a daily wage of Kshs 250/=on weekly basis. She did not avail evidence of payment of the said wage either by way of Mpesa statement, paylips, or petty cash vouchers. She did not adduce oral evidence on how the said wages were paid.



22. This cause as presented and prosecuted by the claimant leaves this court with no evidence to establishing a nexus between the claimant as an employee and the respondent as the employer. If for example A claims to be an employee of B, A must and should have evidence of such relationship capable of being ascertained and of convincing this court on a balance of probability that A is indeed such an employee. If then a dispute arises as to the terms of that relationship B shall be under an obligation to produce the records as demanded to be kept under sections 10 and 74 of the Act, if such terms are in dispute.
23. It is within the legal rights of the respondent not to defend this cause and indeed the respondent took that option. The fact that the respondent did not defend the cause does not lessen or diminish the obligation, duty, and burden on the claimant to prove her cause on a balance of probabilities.
24. It is in the considered view and opinion of this court that the claimant has failed to escalate her cause beyond mere allegations and this court holds that she has not proved that she was indeed an employee of the respondent, and this court so holds.
25. Whether by design, or through abundance of luck, negligence, and or carelessness, the respondent did not file a defence and hence this court cannot speculate on what position the respondent would have taken in regard to the matters raised in this cause by the claimant.
26. Having found the first issue in the negative this court finds no merit in going into the second issue as that would be merely academic.

VI. Costs

18. As for costs there is no order thereon considering the circumstances of this cause.
19. The upshot of the foregoing is that the claimant's cause herein is dismissed with no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022

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DAVID NDERITU

JUDGE

