



**Gakuya v Double X Enterprises Ltd & 3 others (Cause E001 of 2020)
[2022] KEELRC 13107 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E001 OF 2020
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

ROBERT MURIITHI GAKUYA CLAIMANT

AND

DOUBLE X ENTERPRISES LTD 1ST RESPONDENT

NGUI MUTISYA 2ND RESPONDENT

PETERSON GITHINJI MWANGI 3RD RESPONDENT

KENNETH WANDERI MURAGE 4TH RESPONDENT

JUDGMENT

1. This matter was originated by way of a statement of claim dated September 8, 2020. It does not disclose an issue in dispute on its face.
2. The respondent in a response to memorandum of claim dated May 3, 2021 denies the claim and prays that it be dismissed with costs.
3. The claimant's case is that at all material times to this claim, he was an employee of the 1st respondent under the supervision of 2nd, 3rd and 4th respondent. This was at Mikinduri.
4. The claimant's further case is that sometimes in November/December 2018 the 2nd, 3rd and 4th respondents went to his office in Zipros Business Centre, Buruburu in Nairobi and asked the claimant to be the 1st respondent's site agent in the construction of D484 Liutu Bridge –Mikinduri (Lot 2) and they negotiated about the salary and terms where they agreed on a salary of Kshs 250,000 per month till completion of the contract.
5. The claimant's other case is that he was to be provided with a site office, a vehicle and fuel, and driver as they agreed on their terms of office and reference which ultimately were to be reduced to writing.



6. The claimant avers that he took office and ran it on behalf of the respondents. These also called for his academic papers which he provided and the matter was settled.
7. The claimant further avers that he started working for the respondent even before approval on the part of the respondents but they did not pay his salary as agreed even after working for them for twenty (20) months. They did not fuel the car or even pay the driver as agreed.
8. It is his other case that despite various demand for salary and extingent expenses were met with calls for calm and patience on the part of the respondent. These were Kshs 5,000,000.00 as salary and Kshs balance of Kshs 4,150.00 after a payment of Kshs 850,000.00 only.
9. The claimant further avers that he spent his money totalling to Kshs 196,415 on fuel oil/lubricants, repairs of motor vehicle and office expenses which amount he has only been reimbursed Kshs 44,000 leaving a balance of Kshs 152,415.00.
10. It is the claimant's case that the claimant has written a number of letters to the respondents requesting for his salary and monies owed which letters the respondent did not make good.
11. The claimant avers that the respondents started frustrating him with an intention of unlawfully terminating his employment because he was asking for his money as owed.
12. His further case is as follows;

"15. The respondents withdrew the claimants motor vehicle and even at that the claimant continued working for the respondents and the 2nd respondent on May 7, 2020 signed the interim payment certificate no 4 which was only a reserve for the site agent forcing the claimant to write to the respondents for clarification (attached and marked as RMG10 and RMG 11 are copies of the certificate no 4 and the claimants letter to respondents respectively.)

16. That sometime in the month of June 2020 the respondents without informing the claimant started delegating the claimant's duties to one Simon Gikonyo Wanjohiand when asked by the claimant why his duties were being delegated to someone else he was informed that they no longer needed his services. The claimant continued to work despite the frustrations.

17. That on the 27th day of July 2020 the respondents maliciously land unlawfully terminated the claimants employment by informing the claimant that they will not be needing him on the site and that his employment was over as they had contracted the services of one Simon Gitonyo Wanjohias their new site agent and even forwarded his CV to the respondents employer for approval as the new site agent (attached and marked as RMG 11 is a copy of the CV forwarded to the respondents proposed site agent)

Particulars of malice and unlawful termination

- i. Unlawfully terminating the claimant employment without any notice.
- ii. Failing to discuss with the claimant over his employment before terminating the employment.
- iii. Failing to warn the claimant of the termination before terminating the employment.



- iv. Unlawfully and illegally terminating the claimant's employment without a reason or without giving the claimant reasons.
- v. Contracting a site agent to take over claimants' position even without informing the claimant."

13. He prays thus;

- "i. Declaration that there was a contract of employment and the termination of the same was unlawful and illegal.
- ii. 12 months salary for the unlawful termination
(12 x 250,000.....Kshs 3,000,000.00
- iii. One month notice salary.....Kshs 250,000.00
- iv. Unpaid salary owed by the respondents.....Kshs 4,150,000.00
- v. 17 months' salary for the periods between August 2020 to December 2021 contractual remaining period(17 x 250,000.....Kshs 4,250,000.00
- vi. Money spent by claimant on fuel, oil and
Lubricants..... Kshs 152,415.00
- vii. General damages
- viii. Costs of the suits.
- ix. Interests on prayers i,ii, iii,iv,v, vii,vii,viii above."

14. The respondents case is *in toto*, a denial of the claim. She denies the employment and supervision claim of the claimant as pleaded.

15. The 2nd, 3rd and 4th respondents personalised case is that the claimant is non-suited against them and shall at an appropriate time apply that the claim against them be struck out with costs.

16. The respondents' further deny any agreements on a salary of Kshs 250,000.00 or any other provisions as claimed. It is their case that the claimant was engaged by the 1st respondent on a temporary basis on representation by the claimant that he could perform the duties of a supervisor and the claimant was fully remunerated for the work that he performed.

17. Their further case is expressed as follows;

- "7. That the respondents aver that the claimant was entrusted with cash in the sum of Kshs 900,000/- which cash the claimant failed to employ for the required purposes and instead diverted for individual use.
- 8. That the respondents aver that the claimant was unable to perform his duties leading to the 1st respondent being issued with termination notice by the employer.
- 9. That the respondents aver that the claimant absconded duties owing to his non-performance and formally wrote to the 1st respondent indicating that he was stepping aside from his duties."



18. They *in toto* deny unlawful termination of employment.

"12. In particular, the respondents aver that after the claimant absconded duty and declined to honour and obey lawful instructions from the 1st respondent, the 1st respondent paid the claimant all his respective dues and the respondent are not indebted to the claimant in any manner whatsoever and the claimant is not entitled to any payment from the respondents for the sums allegedly claimed.

13. The respondents deny the contents of paragraph 23 of the claim in its entirety and the respondents aver that the claimant is not entitled to the claimed amount or any amount whatsoever and shall put the claimant to strict proof thereof at the hearing of this claim."

19. The issues for determination therefore are;

1. Whether there was an employment contract between the claimant and the respondents.
2. Whether there was a termination of employment of the claimant by the respondent.
3. Whether the termination of the employment of the claimant by the respondent, if at all, was wrongful, unfair and unlawful.
4. Whether the claimant is entitled to the relief sought.
5. Who bears the costs of this cause.

20. The 1st issue for determination is whether there was an employment contract between the claimant and the respondents. The claimant in his written submissions dated August 26, 2021 submits in reiteration of his case as pleaded.

21. It is his case and submission that at all material times, he was the respondents employee as site agent in the construction of D484 Liutu Bridge-Mikinduri (Lot 2). All terms and conditions of employment were negotiated and set at the inception of the contract in November- December 2018.

22. The claimant has not annexed or produced any letter of contract but does minutes of various meetings involving the parties and other actors of the project for January 24, 2019, March 7, 2019, April 11, 2019 and June 2, 2019. He also adduces evidence of his approval letter from KERA and a breakdown of his payment particulars and schedules by the respondent.

23. The claimant also annexes his breakdown of money spent on the project and a bundle of letters on the contract. This is concluded by a documentation of his qualifications for the assignments he was engaged to do as engineer.

24. The respondents' case is a reversal of the claim. It is their case that the claimant was employed on a temporary basis on a misrepresentation that he would skilfully discharge the duties of a supervisor for the works he was to be engaged in. Subsequently, he was entrusted with monies to the tune of Kshs 900,000.00 which he misappropriated.

25. The respondents further deny engaging or negotiating a salary of Kshs 250,000.00 with the claimant. Again, the claimant absconded duties, declined, ignored and or neglected to obey instructions from the 1st respondent and continued to dishonour his obligations by non-performance leading to the untimely termination of the contract between the 1st respondent and the Kenya Rural Roads Authority, Meru Region on March 25, 2019. His contention of being engaged and termination of contract is false and misleading.



26. It is their case and submission that the claimant willingly communicated his intention of stepping aside from his engagement by a letter dated April 17, 2020. Efforts to engage him were thereafter futile and hence termination of the relationship *inter partes*. No illegality therefore arose on the termination in the circumstances.
27. The claimant has not adduced evidence to controvert or in any way rebut the case of lawful termination of employment as set out by the respondent. He has not met the requirements of section 47 (5) of the *Employment Act*, 2007 which provides as follows;
- “For any complaint of unfair 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.”
28. In the foregoing, the respondents’ submit a case of lawful termination of contract and burdens the claimant to prove otherwise. This is not met.
29. This answers the 1st, 2nd and 3rd issues for determination. There was indeed a contract of employment between the parties but this was terminated for good cause. The termination was lawful in the circumstances.
30. The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost his case for unlawful termination of employment he becomes disentitled to the relief sought.
31. I am therefore inclined to dismiss the claim with orders that each party bears the costs of their claim.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Miss. Aketch instructed by Vivian Aketch & Co. Advocates for the Claimant.

2. Mr. Githinji holding brief for Chebii instructed by M.K Chebii & Co. Advocates for the Respondents.

