



**Ahago v Kenapen East Africa Limited & another (Cause E6551 of 2020)
[2022] KEELRC 12977 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12977 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6551 OF 2020
J RIKA, J
OCTOBER 28, 2022**

BETWEEN

MOURINE ATIENO AHAGO CLAIMANT

AND

KENAPEN EAST AFRICA LIMITED 1ST RESPONDENT

**ESSENTIAL MANAGEMENT CONSULTANCY SERVICES LIMITED 2ND
RESPONDENT**

JUDGMENT

1. The claimant filed her statement of claim on December 14, 2020. She states that at all material times, she was employed by the respondents as a cleaner and a cook.
2. She was employed in August 2017, on a monthly salary of Kshs 17,000. This was reviewed to Kshs 19,000 by the time she left employment in 2020.
3. She sustained burns on her hand, on or about July 2019. She could not perform her duties normally. She approached the respondents for leave to seek medical attention. The plea for leave was declined. In or around March 2020, she was placed on compulsory leave. On April 1, 2020, the respondents terminated her contract. There was no warning. She was not heard, or told why her contract was terminated. She was not issued a notice of termination. She states that termination was unfair, in breach of the [Employment Act](#).
4. She prays for: -
 - a. Terminal dues [unspecified]... Kshs 554,661.
 - b. Service pay at Kshs 10,000 for 3 years at Kshs 60,000.
 - c. 12 months' salary in compensation for unfair termination at Kshs 420,000.



- d. Deducted but unremitted NSSF contributions at Kshs 7,200.
 - e. Deducted but unremitted NHIF contributions at Kshs 21,600.
Total...Kshs 853,461.
 - f. Costs.
 - g. Interest.
 - h. Any other suitable relief.
5. The 1st respondent filed its Statement of response dated February 20, 2021. It is explained that following the outbreak of Covid-19 in March 2020, the 1st respondent's business diminished significantly, and the claimant, with other Employees, was required to go on temporary leave, until the business stabilized. Other employees resumed after the situation changed. The claimant never reported back. The 1st respondent made calls to her, to find out her whereabouts, but she was unreachable. The first communication received by the 1st respondent from the claimant was a letter of demand, dated November 6, 2020. The 1st respondent's position is therefore that the claimant deserted, and she owes the 1st respondent notice of 1 month at Kshs 17,412. The 1st respondent prays the court to dismiss the claim.
 6. The 2nd respondent filed its statement of response dated March 24, 2021. Its position is that it has a contract with the 1st respondent, for provision of human resource services. It did not have a contract with the claimant. The claimant was employed by the 1st respondent, and posted to work at the 2nd respondent's. Due to Covid-19, the 2nd respondent temporarily released its staff in March 2020, including those sourced from the 1st respondent. The 2nd respondent resumed normal operations gradually, and recalled its staff from November 2020. If the claimant's contract was terminated, it was by the 1st respondent, who employed her. The 2nd respondent prays that it be struck out from the claim.
 7. The claimant gave evidence and closed her case on February 4, 2022. The 1st respondent's Director Aggrey Andura gave evidence on June 23, 2022, while the 2nd respondent's Accountant, Erastus Wambua, gave evidence on June 23, 2022 when the hearing closed. The claim was last mentioned in Court on July 28, 2022, when the parties confirmed filing and exchange of their respective Submissions.
 8. The claimant restated the contents of her pleadings, and adopted her 6 documents on record as her exhibits. she relied on her witness statement. She fell ill and was granted sick off of 3 days. On return she was told to go home, and would be recalled. She was not recalled.
 9. Cross-examined by counsel for the 1st respondent, she told the court that she was working for the 2nd respondent. The person who told her to go home, and that she would be recalled, was Madam Christabel, from the 2nd respondent. She was not told why she should go home. The letter of employment stated she was employed by the 1st respondent. The 1st respondent sent the claimant to work at the 2nd respondent. Coronavirus was detected in Kenya, in March 2020. The claimant was not aware of measures imposed by the Government in responding to the pandemic. She did not know that the Government advised Employers to keep Employees away from the workplace. Exhibited NSSF records run up to the year 2017. There was none for 2018-2020.
 10. Cross-examined by counsel for the 2nd respondent, the claimant told the court that she was employed in July 2016. Her salary was paid by the 2nd respondent. She was taken ill in March 2020. She was at the 2nd respondent on a contract of 1 year. She was not assigned work by the 1st respondent elsewhere. She



was not issued a letter of termination. Her salary was stopped in March 2020. Redirected, the claimant told the Court that the 1st respondent was under the control of the 2nd respondent. She supplied sick-off sheet to the 2nd respondent. NSSF contribution was inconsistent.

11. Aggrey told the court that the claimant was employed by his company, the 1st respondent herein. She was seconded to the 2nd respondent. The 2nd respondent suspended production for 1 month, due to Covid-19. Seconded Employees were placed on short leave. They were to return immediately production resumed. They, with the exception of the claimant, resumed as instructed. She did not inform the 1st respondent about her unavailability. The 1st respondent then received a demand letter in November 2018 from her advocates, alleging that her contract was unfairly terminated. The claimant did not explore alternative dispute resolution mechanisms. She did not seek redeployment from the 1st respondent. The 1st respondent did not terminate her contract. There was no letter of termination. All statutory contributions were remitted to relevant statutory bodies.
12. Cross-examined by the counsel for the claimant, Aggrey agreed that there was a contract between the claimant, and the 1st respondent. Employees were sent on leave because of Covid-19. There are procedures on sending employee on leave. The issue of leave was addressed by the 2nd respondent. There was no termination letter issued to the claimant. Aggrey did not receive notification of her illness. The 1st respondent grants its employee paid sick leave. She was still an employee after 30 days of Covid-19 leave. The 1st respondent tried to reach her unsuccessfully. The 1st respondent employs over 3,500 employees across Kenya. The 1st respondent remitted all statutory obligations.
13. Upon cross-examination by the counsel for the 2nd respondent, Aggrey confirmed that the claimant was employed by the 1st respondent. Her salary was paid by the 1st respondent.
14. Redirected, he told the court that actual duties were assigned by the 2nd respondent. The claimant did not report back to work as advised. Had she done so, she would have been assigned alternative work.
15. Accountant Erastus Wambua, adopted the pleadings, documents and his witness statement in his evidence-in-chief. He restated that the claimant was employed by the 1st respondent, and seconded to the 2nd respondent. The respondents have a contract for supply of labour. Cross-examined by counsel for the claimant, Erastus told the court that it was the 2nd respondent who sent the claimant on leave. It instructed the employees on their work. Pay slips were issued by the 1st respondent. 1st respondent paid taxes and statutory dues. Leave was administered by the 1st respondent. The claimant did not report to work after 30 days' Covid-19 break. The 2nd respondent was not aware that she went on sick-off. There was no cross-examination from the 1st respondent or redirection from the 2nd respondent's counsel, directed at Erastus Wambua.
16. The issues are whether the claimant was employed by the 1st or 2nd respondent, or both; whether termination was unfair; and whether she merits the remedies pleaded.

The Court Finds:

17. The respondents have in their evidence and pleadings, agreed that the 1st respondent was the claimant's employer. Although legally, both respondents could be found to have employed the claimant, there is no need to grapple with the question on who employed the claimant, once one of the potential employers, has unequivocally assumed employment responsibility. The claimant has no reason to pursue the 2nd respondent, as the 1st respondent has assumed complete employment liability. In a triangular relationship, the question who is the employer becomes an issue, only where there is a dispute between the potential employers, on which one of them, should bear employment responsibility. It is a question that need not engage the minds of the parties and the court once there



is consensus, on who is the employer. There is an agreement between the respondents, whereof the 1st respondent undertook to supply labour to the 2nd respondent, and to assume legal responsibility, over the supplied employees. The court agrees with the respondents that the 1st respondent, was the claimant's employer.

18. Consequently, the 2nd respondent is discharged from this claim, from the outset.
19. The claimant was employed as a cook and cleaner. she was on renewable contracts of 1 year. She was first engaged in August 2017, and deployed at the 2nd respondent. Her first salary was Kshs 16,000 monthly, and lastly earned Kshs 19,000 monthly. She states that she suffered burns on her hand around July 2019, and could not perform her duties properly. She sought sick-leave, which was declined. In March 2020, she was sent on compulsory leave, and told she would be recalled. She was never recalled.
20. The 1st respondent's narrative is different. It does not mention burns suffered by the claimant, and her inability to function normally. It is explained that due to Covid-19, employees were placed on temporary leave, as production could not go on normally at the 2nd respondent's. After 30 days, other employees resumed duty as had been instructed. The claimant did not resume, and proceeded to instruct counsel, who issued demand letter upon the respondents, alleging unfair termination.
21. The court has difficult agreeing with the claimant on her manner of exit from the 1st respondent's employment. The incident she mentions about burns, happened in July 2019. Her exit was some months later, in March of 2020. There was a period of 8 months from the date she claims she suffered burns, and was denied sick-leave. What is the relevance of this incident, to her exit in March 2020? Was she not in employment for the 8 months preceding her exit?
22. There is an explanation by the respondents, that the 1st respondent was compelled to place Employees on 30-day leave, imposed by Covid-19 pandemic. Production at the workplace could not proceed normally. After 30 days, Employees were recalled. The claimant did not return to work. The 1st respondent persuasively told the court that it was open to placing the claimant in an alternative job, but she never got back to any of the respondents. She instead instructed her Trade Union in July 2020, and her counsel in November 2020, to claim that she had been unfairly dismissed. If she was instructed to go home and would be recalled, and was not recalled, should she not have enquired from the 1st respondent why she was not recalled? In both her demand letters, she did not enquire why she was not recalled, but demanded monetary redress.
23. There was no letter of termination issued by either respondent upon the claimant. In a claim for unfair termination, the claimant has the obligation to establish that unfair termination has occurred, under section 47[5] of the *Employment Act*. Without a basic letter of termination, or other evidence showing that the Employer initiated termination, the claimant has not demonstrated that she was unfairly dismissed.
24. The prayer for terminal dues at Kshs 554,661 as suggested at the outset in this Judgment, is not explained. The details have not been supplied. The sum has not been broken down in the Pleadings and Evidence presented by the claimant. What are the various terminal benefits, amounting to Kshs554, 661? This is a prayer which has been pursued in a vacuum.
25. There are NSSF Statements showing that statutory contributions were consistently made by the 1st respondent. The prayer for service pay is declined under section 35 of the *Employment Act*. If any contribution was deducted and not remitted, the claimant should seek enforcement through the NSSF statutory regime, rather than seek to be paid statutory contributions. This applies to NHIF contributions as well.



26. There is no evidence that the claimant's contract was terminated unfairly. The prayer for compensation for unfair termination, has not been established.

It Is Ordered:

- a. The claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 28TH DAY OF OCTOBER 2022.

JAMES RIKA

JUDGE

