



**Wachira v Mbote & another (Cause 821 of 2018)
[2022] KEELRC 12992 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12992 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 821 OF 2018
SC RUTTO, J
OCTOBER 28, 2022**

BETWEEN

BEATRICE NJOKI WACHIRA CLAIMANT

AND

HENRY NJENGA MBOTE 1ST RESPONDENT

SHAPPERS INTERNATIONAL LIMITED 2ND RESPONDENT

JUDGMENT

1. The claimant avers that on or about 15th February, 2012, she was offered employment as a secretary/receptionist at the 2nd respondent company. That the contract was oral and was not reduced into writing. That the 2nd respondent never paid her house allowance and underpaid her salary. That on or about 1st October, 2017, the 2nd respondent unlawfully and unfairly terminated her services without any reason and she was not invited for a hearing. It is on this account that the claimant seeks against the respondents the sum of Kshs 759,684.92 being salary for September, 2017, one month’s salary in lieu of notice, annual leave for five years, unpaid house allowance, compensatory damages and underpayments with effect from 2012 to 2017.
2. The respondents entered appearance and filed a Statement of Defence. The 1st respondent averred that he was a Director of the 2nd respondent. That the 2nd respondent which was in the business of real estate management, ceased operations owing to lack of clients and resignation of its directors.
3. That the claimant was engaged to source for clients for the 2nd respondent after which she was to earn a commission. That she only introduced one client who could not sustain the operations of the 2nd respondent. That the claimant was never employed by the 2nd respondent hence her employment was never terminated as there was none to begin with. To this end, the respondents have asked the Court to reject the claim.



4. The matter proceeded on 31st May, 2022 and each side presented oral evidence.

Claimant's case

5. The claimant testified in support of her case and at the start of the hearing, sought to adopt her witness statement dated 28th May, 2018, as well as the documents filed in support of her claim, to constitute her evidence in chief. The claimant further produced the said documents as her exhibits before Court.
6. The claimant testified that she was an employee of the 2nd respondent. That on 1st October, 2017, she received a letter informing her not to report to work. That further, the 2nd respondent notified its clients that the claimant was no longer its employee. That the 2nd respondent did not notify her of the reasons for her dismissal and did not issue her with a notice to show cause. That further, she was not given a hearing prior to her termination.
7. It was the claimant's further testimony that throughout her employment, she was not paid house allowance and never proceeded on leave. That following her termination, she was not paid her terminal dues and salary arrears.

Respondents' case

8. The respondents presented oral evidence through the 1st respondent who testified as RW1. He proceeded to adopt his witness statement to constitute his evidence in chief. RW1 told Court that he was one of the three directors of the 2nd respondent. That the claimant was introduced to him by a land broker by the name Mr. Wairegi. That the claimant offered to source for clients for the 2nd respondent in exchange of a commission. That as such, the claimant would deduct her commission from the rent collections and bank the balance. That therefore, the claimant was never paid salary as she made her money from deductions from the clients' rent collections. RW1 denied the existence of an employment relationship between the claimant and the 2nd respondent.
9. It was RW1's further testimony that the claimant only introduced one client who could not sustain the operations of the 2nd respondent. That the 2nd respondent's business failed to pick up and was not able to break even. That therefore, the 2nd respondent was unable to continue with its operations. RW1 further told Court that subsequent to the foregoing, he got into employment while one of the other directors left for china.
10. That on her part, the claimant indicated her wish to start her own company. That it was therefore necessary to notify the 2nd respondent's clients who used to pay rent through the claimant that she was no longer authorized to collect rent on its behalf. That the same was meant to safeguard the 2nd respondent's clients.

Submissions

11. It was submitted on behalf of the claimant that she was working under the control of the 2nd respondent hence was its employee. It was further submitted that the claimant had met the test to establish an employment relationship. To this end, the claimant placed reliance on the case of *Christine Adot Lopeiyo vs Wycliffe Mwatbi Pere* [2013] eKLR.
12. The claimant further submitted that no reason was given for terminating her employment. That the reason for her termination was not proved and the respondent did not state the procedure it followed in terminating her employment.



13. On the other hand, the respondents submitted that the claimant had failed to prove that she was the 2nd respondent's employee. That she was trying to fish for a cause of action. That the letter presented by the claimant did not constitute an employment contract and neither did it set out terms and conditions of employment.
14. The respondents further urged that the claimant had failed to satiate the burden of proof of unlawful termination under section 47(5) of the *Employment Act*. In support of their submissions, the respondents cited the case of *Ongori Gwako vs Styroplast Ltd* cause 949 of 2017 and *Protus Wanjala Mutike vs Anglo African Properties* Cause No. 30 of 2019.

Analysis and determination

15. Upon considering the pleadings before me, the evidence and submissions on record, the following questions stand out for resolution by the Court:
 - a. Was there an employment relationship between the parties?
 - b. If the answer to (a) is in the affirmative, was the claimant's termination unfair and unlawful?
 - c. Is the claimant entitled to the reliefs sought?
 - d. Is there existence of an employment relationship?
16. Before I proceed to determine whether there was an employment relationship between the parties, I find it imperative to mention that the respondents filed a bundle of documents alongside their submissions. As it is, these documents were filed after the trial had closed and was without leave of the court. This was in clear violation of the Employment and Labour Relations Court (Procedure) Rules, 2016. Subsequently, the same are inadmissible and are hereby expunged from the Court record.
17. That said, I move to consider the first issue for determination. It is the claimant's case that she was employed by the 2nd respondent as a receptionist. This assertion has been disputed by the respondents who aver that the claimant was not engaged as an employee and thus, had no employment contract with her. With this denial by the respondents, the burden was on the claimant to prove the existence of an employment relationship.
18. On this issue, I gather support from the determination in the case of *Casmir Nyankuru Nyaberi vs Mwakikar Agencies Limited* (2016) eKLR, where the Court held as follows: -

“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word.”
19. The claimant has sought to prove the employment relationship vide a notice that was ostensibly issued by the 2nd respondent to its customers. The notice reads in part:

“Dear our esteemed customers,
Re: Introduction of new employee



This is to notify you that Beatrice Njoki Wachira has ceased to be an employee of Shappers International w.e.f 1/10/2017. You are therefore advised not to deal with her or remit any payment through her...”

20. The question thus is whether this notice can be construed to imply that there was an employment relationship between the claimant and the 2nd respondent. To answer this question, it is imperative to consider the definition of the term employee and employer, as well as the essential elements that satisfy the existence of employer employee relationship.
21. Section 2 of the *Employment Act* defines an employee to mean “a person employed for wages or a salary and includes an apprentice and indentured learner.” Underlined for emphasis
22. On the other hand, an employer is defined to mean “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.” Underlined for emphasis
23. In the case of *Samuel Wambugu Ndirangu vs 2NK Sacco Society Limited* [2019] eKLR, the Court had this to say in regards to the ingredients that are necessary to determine the existence of an employer employee relationship:

“A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee’s conduct (this is what gives the test the nom de guerre – control test).” Underlined for emphasis
24. Further, the Court in the case of *Christine Adot Lopeyio vs Wycliffe Mwachhi Pere* [2013] eKLR, spelt out various tests to determine the nature of an employer-employee relationship in a contract of service, thus:

“In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:

 - a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.
 - b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
 - c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
 - d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises



for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

25. It is evident from the statutory definition of the term employee and the foregoing authorities, that the determination of the existence of an employer employee relationship is primarily guided by the manner in which the work is performed and the remuneration of the employee.
26. In the instant case, it was not clear from the evidence presented by the claimant whether she was under the exclusive control of the respondents in the performance of her duties and whether she had been integrated into the 2nd respondent's business.
27. What stood out from the evidence presented by both sides was in regards to the remuneration of the claimant. On one hand, the claimant averred that she was paid salary through signing of petty cash or MPesa. On the other hand, the respondents maintain that the claimant was never paid salary and that she would earn her commission based on the total commissions due to the 2nd respondent. That in this regard, the claimant would deduct her commission which was subsumed in the total commission payable to the 2nd respondent. That upon deducting her commission, the claimant would bank the rest of the money.
28. It is instructive to note that despite the claimant stating that her salary was partly paid through MPesa, she did not attach evidence to confirm as much. This is the kind of evidence that would have proved the claimant's assertion that she was indeed a salaried employee who was earning a regular salary from the 2nd respondent, as opposed to an agent who was earning a commission from the rent collections. This was not an uphill task noting that the evidence in the form of MPesa transaction was within her reach and the period of engagement was considerably long.
29. To this end, the claimant failed to prove on a balance of probability that there was indeed an employment relationship between her and the 2nd respondent. By all means, the notice by the 2nd respondent to its clients was not and could not constitute sufficient evidence to prove the existence of an employment relationship between the parties. The claimant was required to adduce more evidence, which she failed to do.
30. In view of the foregoing, I am led to conclude that the claimant was not engaged under a contract of service, to entitle her to a regular salary.
31. Having found that there was no employer employee relationship, it is not logical to determine the next issue as the same was only dependent on the existence of an employment relationship.

Conclusion

32. In the final analysis, the claim is dismissed in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Wavinya

For the Respondents In person



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 15th March 2020 and subsequent directions of 21st 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

