



**Kimani v Amanda Security Services Ltd (Cause 294 of 2017)
[2022] KEELRC 13059 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13059 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 294 OF 2017
AN MWAURE, J
OCTOBER 27, 2022**

BETWEEN

JAMES KAMAU KIMANI CLAIMANT

AND

AMANDA SECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim dated the November 28, 2016 on the February 14, 2017. He is alleging wrongful, unfair termination and non-payment of dues. He says that the respondent employed him on or about the month of February 2008 at an initial salary of ksh 6,000 per month. He says that on the January 3, 2016 without any colour of right the respondent herein unfairly, wrongfully and unlawfully terminated his employment.
2. The claimant says that he did not receive notice of termination of his employment, payment in lieu of notice, outstanding wages, vacation or severance pay. The claimant avers that as a result of the unexpected termination of his employment he found himself unemployed with outstanding wages, vacation pay, pay in lieu of notice, severance pay and aggravated damages resulting from the emotional distress associated with having his employment terminated without notice.
3. The claimant claims that the respondent breached the actual and implied employment contract in that it failed to provide the claimant with reasonable notice before termination, it failed to provide adequate compensation in lieu of notice, failed to compensate for outstanding wages and vacation pay and failed to compensate for severance, withheld compensation owed to the claimant in lieu of benefits and bonuses to them by reason of the termination.
4. The claimant also states that he sustained aggravated damages consisting of mental distress, inconvenience and psychological injury as a result of having his employment terminated without any notice whatsoever.



5. The claimant prays for the following remedies;
 - a. A declaration that he was wrongfully and unfairly dismissed from his employment.
 - b. Unpaid dues totalling Ksh 1,057,605.98
 - c. Notice period of one month- Ksh 12,221.00
 - d. 12 months' salary as compensation for wrongful and unfair termination $12,221 \times 12 = \text{Ksh } 146,652/=$
 - e. Punitive and aggravated damages for breach of the claimant's constitutional rights.
 - f. Costs of the claim.
6. The respondent did not file the memorandum of appearance or response. The claim thus proceeded as an undefended suit. The claimant relied on the statements and the submissions filed.
7. In the submissions, the claimant argues that the claimant was an employee of the respondent and that section 9(1) of the *Employment Act*, 2007 requires that a contract of service for a period of 3 months and beyond be in writing. That further section (2) places the burden of drawing such contract on the employer. It is the claimant's argument that his employment lasted for 8 years and it was incumbent upon the respondent to have it reduced to writing. He says that from the evidence on record it is clear this was not done.
8. The claimant relies on the case of *Naomi Okoth v Creative Consolidated Systems Limited 2021 eKLR* where it is argued the court held that:

“There are no documents to establish if claimant was employed by the respondent or not since the respondent did not provide any records of employment. Section 9(2) of the *Employment Act* 2007 provide that an employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating the particulars of employment and that the contract is consented to by the employee in accordance with subsection 3 of the said section. In the instant case there are no records from the employer having not put a defence.”
9. The claimant relying on the above authority contends that it is the respondent who should assist the court in determining this issue by availing the employment records as mandated by the statute. The claimant argues that the respondent failed in this and as such should shoulder the consequences arising therefrom. The claimant also relied on the case of *Abigael Jepkosgei Yator and Another v China Hanan International Co Ltd 2018 eKLR* for the proposition that where work records are not produced, any claim made by employee with regards to the terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not necessary; the submission of work records is a legal requirement.
10. The claimant contends that he was dismissed from the service verbally by the respondent without any justifiable cause and without being subjected to due process as required by the law. Sections 43 (1) of the *Employment Act* requires that an employer proves the reasons for termination and in the event of failure to do so, such termination is deemed to be unfair. The claimant submissions are that the respondent had the burden of proving that there was reason for terminating the claimant. The claimant submits that since the matter is undefended, there was no statement by the respondent nor proof to counter the claimant's assertions and there was therefore no proof that the termination of



the claimant was justified. The claimant argues that there was similarly no proof that the claimant was taken through due process.

Determination

11. Having considered the pleadings, evidence, submissions and authorities cited by the claimant, the following are the issues for determination
 - a. Whether there existed an employer employee relationship between the claimant and the respondent herein
 - b. Whether the termination of the claimant's employment was both procedurally and substantively fair.
 - c. Whether the claimant is entitled to the reliefs sought.

Whether there existed an employer-employee relationship between the claimant and the respondent

12. In a claim where there is no response to the memorandum there is need for evidence to demonstrate the existence of an employment relationship as a basis of consideration of all other prayers. Failure to show the relationship would mean that the claim does not stand as all other prayers are dependent on the existence of the employment relationship.
13. This was the holding of the Court in [*Monica Kimani Mutua v Al-Arafat Shopping \(2018\) eKLR*](#) where the court held that in an undefended claim, it is trite law that the claimant establishes all the facts of the existence of employment relationship as a preliminary issue before establishing the alleged unfair termination of employment.
14. In [*Herman Ilangarwa Shidakwa v Armati Security Solutions Ltd 2019 eKLR*](#), the court observed that the respondent had failed to enter appearance or file a defence despite being served with the summons. The court held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent.
15. There is no letter of termination, bank statements or payment vouchers provided in the present case. The court is struggling to establish an employee and employer relationship in order to justify the jurisdiction of this court under sections 12 of the [*Labour Relations Court Act 2011*](#).
16. It is unbelievable that a person who worked in an organization from 2008 to 2016 had absolutely no document to show relationship with the respondent. It would be difficult for a Court to assume an employer/employee relationship where there is absolutely no document or evidence whatsoever to connect the two.
17. The court is not even looking for elaborate documents like letter of appointment but a bank statement, mpesa statement, or a NSSF documents. You know at least something. The court is really struggling to assume a relationship of so many years and there is absolutely no tangible proof.
18. The respondent did not respond to any of the letters addressed to him by the various agencies who were reaching to him to attempt out of court settlement. He did not file a response and did not appear in court at any point. That is curious. Could it be because the client was a stranger to him. It is hard to tell. In the case of [*Monica Kanini Mutua v Al Arafat Shipping Center & Another \(2018\) eKLR*](#) the court held that in an undefended claim, it is trite that the claimant establishes the facts of the claim and must establish an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of employment. In the case of [*Herman Illangarwa Shadakwa v Aramati Security Solutions Limited \(2019\) eKLR*](#) the court noted the respondent had failed to enter appearance



or file a defence despite served with summons and held that the claimant proved his employment relationship with the respondent through bank statements and the same was not contested.

19. In this present case there is no evidence to demonstrate such employment relationship with the respondent. In the premise there is no basis to even find if the claimant was unfairly terminated and if he is entitled to the reliefs sought. The court finds claimant failed to prove employer/employee relationship and so his claim is dismissed accordingly.
20. The court orders each party to bear their own costs considering the respondent did not even file a response.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 27TH OCTOBER, 2022.

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 March 15, 2020 and subsequent directions of April 21, 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 a just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE

