



Muia v Kiare (Cause 2057 of 2017) [2022] KEELRC 12923 (KLR) (24 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12923 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2057 OF 2017
JK GAKERI, J
OCTOBER 24, 2022

BETWEEN

FREDRICK MWANZIA MUIA CLAIMANT

AND

JOHN MAINA KIARE RESPONDENT

JUDGMENT

1. By a statement of claim dated October 13, 2017 and filed on October 16, 2017, the Claimant sued the Respondent alleging wrongful dismissal from employment.
2. The Claimant avers that he was employed by the Respondent via a verbal contract on June 1, 2004 as a caretaker at a monthly salary of Kshs.4,000/= which rose to Kshs.5,000/= in 2006, to Kshs.9,000/= June in 2010, to Kshs.12,000/= and in June 2015 it was Kshs.13,000/= per month.
3. The Claimant further avers that he served the Respondent diligently and honestly.
4. That he used to serve the tenants of the Respondent by cleaning the compound and opening the gate as the Respondent had no watchman.
5. It is the Claimant's averment that on September 30, 2017, the Respondent terminated his employment by word of mouth without payment of benefits for the 12 years worked. That he worked for 13 hours daily with no overtime and was not paid for public holidays and was underpaid.
6. It is the Claimant's case that the Respondent retains the personal items of the Claimant as he is not allowed to access the compound.
7. The Claimant prays for orders that;
 - i. The dismissal from employment was unfair and unlawful.
 - ii. The Respondent pays Kshs.694,326.48 comprising; One month's salary as notice Kshs.21,213.30 Underpayment for 21 months Kshs.172,



479.30Unpaid leave Kshs.118,794.48Service pay Kshs.127,279.8012 months
compensation Kshs.254,559.60Total Kshs.694,326.48

- iii. Costs of this suit and interest at court rates.

Respondent's case

8. The Respondent filed a Statement of Response on November 9, 2017 stating that he was 75 years old and suffers from hypertension and cardiac complications.
9. The Respondent avers that as a retired Chairman of Ngong Juakali Co-operative Society since 1987, he interacted with many young men and gave them free training in plumbing, painting, masonry, metal fabrication, motor vehicle mechanics etc. and the Claimant was a beneficiary of the free training.
10. That in 2014, the Claimant started abusing the Respondent's generosity by colluding with the Respondent's tenants.
11. That the Claimant was engaged by one, Mr. Gerald Hiuhu to take and collect his child to school using Hiuhu's car. That subsequently, Mr. Hiuhu bought a 7-seater van which the Claimant had been operating.
12. It is the Respondent's averment as a consequence the Claimant failed in his duties to serve the tenants who infact paid him through the Respondent.
13. That on June 26, 2016, the residents agreed to engage a watchman but the Respondent persuaded them to have the Claimant and they agreed conditionally but his conduct did not improve.
14. On September 14, 2017, the Claimant refused to open the gate for the Respondent's daughter.
15. That on June 15, 2017, the Claimant informed the Respondent's 7 years old adopted son that the Respondent and his wife were not his parents and disclosed his biological parents but later apologised and the matter was closed.
16. The Respondent finally avers that in view of the foregoing, he requested the Claimant to vacate his house but allowed him to stay until October when schools close.
17. The Respondent prays for dismissal of the suit with costs.
18. It is unclear to the court why the Respondent filed another statement of defense on June 13, 2018, which does not purport to amend the earlier one. The statement comprises more denials of the Claimant's allegations.

Claimant's evidence

19. The Claimant's written statement replicates the contents of the Memorandum of Claim but makes no reference to the reliefs sought save for the total amount claimed.
20. On cross-examination, the Claimant indicated that on employment, he was given a house by the Respondent and was neither paying for water nor electricity. That his wife lived with him in the compound together with their daughter who the Respondent used to take to school in his car at no cost to the Claimant.
21. The witness confirmed that the compound had 27 tenants and each house had its compound including the Respondent's. He confirmed that he used to work for other tenants in the compound. He admitted that Mr. Gerald Hiuhu, a tenant had a church van. He denied driving the van to take children to school and never visits the compound but may have visited friends such as one Joshua.



22. The witness confirmed that he had no evidence that he was an employee of the Respondent. That the respondent used to pay him in cash. The witness testified that other tenants never paid him for work or services rendered.
23. The witness testified that he came to the Respondent's compound at the age of 17 and knew the Respondent's children and the Respondent treated him as part of his family.
24. He denied having informed the Respondent's son that he was adopted.
25. He denied having been at the Respondent's compound that week.
26. It was his testimony that he used to open the gate in the compound and had neither a record of employment nor payment of salary.
27. In re-examination, the witness denied having had an agreement with Gerald Hiuhu to drive his van.

Respondent's evidence

28. RWI, the Respondent testified that he was aged 80 and had known the Claimant since the age of 17. That he engaged the Claimant and others when he was putting up a house for about 5 years but retained him since he was a minor and gave him residence as he sought employment elsewhere. He denied having employed or paying the Claimant. The witness further testified that the Claimant used to work for his tenants and would be paid, having been introduced to them by the Respondent.
29. RWI testified that the Claimant used to drive Gerald Hiuhu's van.
30. The witness told the court that the Claimant earned his daily bread in the compound having been taught masonry, drilling and painting by the Respondent.
31. That the Claimant married while still in his compound and had a baby girl who the Respondent took to school until the Claimant left the compound.
32. That he used to open the gate for tenants who would pay him until the tenants engaged their own watchman.
33. The Respondent testified that he chased the Claimant from the compound for informing the Respondent's 10 year old adopted son that the Respondent and his wife were not his biological parents.
34. On cross-examination, the witness testified that he adopted the child in 2011. That he used to assist the Claimant financially by lending monies to him which he would repay later.
35. That each tenant was responsible for his compound and the Claimant was paid for the tasks he discharged to the individual tenants.
36. The witness was categorical that the claimant was not a caretaker.
37. RWII, Grace Njeri, testified that she knew both the Claimant and Respondent having been the Respondent's tenant for 12 years. She could not tell the court how much rent the Claimant ought to have been paying to the Respondent for the house provided.
38. The witness testified that the Claimant worked to the tenants who would pay him and she had paid him in the past.
39. That the Claimant used to take children to school using Gerald Huihu's church van. The witness testified that she had seen the claimant do so the day before she gave her testimony.



40. The witness testified that the Claimant never used to open the gate for all tenants but only those who needed him at night and had agreed with him and he was not a caretaker of the Respondent and worked for any other tenant.
41. On cross-examination, the witness confirmed that she was still a tenant of the Respondent and found the Claimant there but unsure of the arrangement the two had. That the Claimant used to work for all the tenants and was paid per task rendered and used to drive the church van. The witness was categorical that “I see him every day”.
42. Finally, the witness confirmed that the Claimant used to open the gate for those who would come at night.
43. On re-examination, the witness confirmed that each tenant had a compound of their own.

Claimant’s submissions

44. The Claimant’s counsel submits that the Claimant was an employee of the Respondent as a gate keeper and caretaker and urges that that is why tenants would complain to the Respondent if his services were poor and no agreement between Mr. Gerald Hiuhu and the Claimant was provided to show that the Claimant used to drive the vehicle in question and Mr Hiuhu did not testify. That RWI was untruthful and the alleged transport business was unsubstantiated. It is urged that since the Respondent has 27 tenants in the compound, he ought to have called some of them to testify in support of his allegations.
45. It is submitted that no evidence was adduced to prove that the Claimant rendered services to other tenants.
46. That the Respondent did not show how the Claimant’s services were terminated by the tenants.
47. Reliance is made on the decisions in *Stephen Ouko Ondiek V Samuel Kuria Kamau* (2021) eKLR, *Joseph Munene Murage V Salome Ndung’u* (2016) eKLR to urge that the Claimant was an employee of the Respondent.
48. On termination, the decision in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR is relied upon to urge that termination of employment must be substantively justifiable and procedurally fair.
49. The decision in *Paul Odhiambo Onyango v Kalu Works Ltd* (2020) eKLR is relied upon to urge that the provisions of section 41 were not complied with.
50. Other decisions are relied upon to urge the court to award the reliefs sought including service gratuity, salary arrears and leave pay.

Respondent’s submission

51. By August 6, 2022 when the court retired to prepare this judgment, the Respondent had not filed submissions.

Determination

52. The issues for determination are;
 - (a) Whether the Claimant was an employee of the Respondent
 - (b) Depending on the findings above



- i. Whether termination of the Claimant's employment was unfair.
- ii. Whether the Claimant is entitled to the reliefs sought.

53. This case turns on whether the Claimant was indeed an employee of the Respondent.
54. On this issue, the parties have adopted contrasting positions. While the Claimant alleges that he was employed on June 1, 2004 on a public holiday, the Respondent states that the Claimant was engaged as a labourer during the construction of a house but retained since he was a minor, a fact he admitted as he sought opportunities elsewhere.
55. The Respondent denies having employed nor paid the Claimant any salary at any point but acknowledges that the Claimant used to do odd jobs for him in exchange for residence and work for his tenants.
56. Regrettably, there is no cogent evidence of an employment relationship between the parties in the form of documents, receipts or Mpesa payments. It is all oral evidence which is susceptible to manipulation. However, as the mantra dictates, he who alleges must prove.
57. It is not in doubt that the Claimant and the Respondent had a very cordial relationship as demonstrated by the fact that the Claimant did not pay for water and electricity, Respondent took his daughter to school at no charge and the Claimant had the freedom to work for all the 27 tenants of the Respondent having been introduced to them by the Respondent and they were paying him for services rendered.
58. In addition, he testified that he used to see the Respondent every day and had contact with the Respondent's adopted son.
59. Finally, the Claimant confirmed on cross-examination that the Respondent treated him as part of his family. The Respondent confirmed that he used to assist him financially.
60. Although the Claimant admitted that Gerald Hiuhi had a church van, he denied driving it to take children to school. He also denied having been to the Respondent's compound unless visiting friends yet RWI testified that he used to do so and had been doing so as confirmed by RWII.
61. As regards the driving of one of the tenants van, both RWI and RWII testified that he used to do so and RWII confirmed that he still does so. This would appear to suggest that if in deed he was an employee of the Respondent, he was also free to work for anyone else and be away from the compound. The evidence of RWII casts serious doubt on the credibility of the Claimant's evidence in this case.
62. The Claimant denied being paid by other tenants for services rendered but RWII testified that she had indeed paid him for services rendered and had lived in the compound for 12 years.
63. Contrary to the Claimant's submissions that RWII was untruthful, the court found her evidence reliable and credible being an uninterested party who knew both parties for at least 12 years. She confessed that she was unaware of the arrangement between the Claimant and the Respondent but reiterated the fact that the Claimant rendered services to all the tenants of the Respondent individually and would be paid.
64. On opening of the gate, RWII testified that the Claimant would only do so for those who had an arrangement with him that they would come late at night.
65. Contrary to the Claimant's submissions that the tenants should not have complained to the Respondent about the Claimant's services, it is common ground that the Claimant was living in the



- Respondent's compound and he personally introduced him to them. They had a reason to complain to him.
66. As regards the gate duties, the Claimant tendered no evidence as a sentry. Neither his written nor oral evidence allude to this fact. However, RWI testified that since the Claimant's house was near the gate, he requested him and the Claimant agreed to be opening the gate but the tenants used to pay him. There is no indication that the Claimant was obligated to open the gate for anyone at anytime and as confirmed by RWII he only opened the gate for those who had made an arrangement with him particularly at night.
67. In his written statement, the Respondent states that "The fact that I never considered him an employee is borne witness by the fact that I allowed him to engage himself in other gainful employment income of menial work, gate keeping, church work and as a driver for a school van."
68. In a similar vein, the Respondent testified that he used to give financial assistance to the Claimant whenever he was in need and the same varied from time to time and regarded the suit herein as an act of betrayal by the Claimant after so many years of assistance.
69. Section 107 (1) of the *Evidence Act* is explicit that –
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.
70. Similarly, section 109 provides:
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.
71. In *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR, Abuodha Judge stated as follows;
" This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings which are not backed by any evidence and expect the court to find in his or her favour."
72. The court is guided by these sentiments.
73. The Claimant must still prove his or her case. In this case, it is the duty of the Claimant to prove that there existed an employer – employee relationship between him and the Respondent.
74. Although the Claimant alleges that he was employed by the Respondent on June 1, 2004, there is no scintilla of evidence to establish that fact. Noteworthy, 1st June is a national public holiday.
75. As adverted to elsewhere, there is no material evidence to establish this fact and disconcertingly, the court found the Claimant's untruthful which weakened the probative value of his oral testimony.
76. Weighing the evidence tendered by the Claimant against the evidence tendered by the Respondent, the Respondent's evidence outweighs that of the Claimant who borne the duty to establish that he was an employee of the Respondent, a burden he has on a balance of probability failed to discharge and the court so finds.
77. The upshot of the foregoing is that the suit herein is dismissed with no orders as to costs.
78. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2022

DR. JACOB GAKERI

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 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 has 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.

DR. JACOB GAKERI

JUDGE

