



**Makasi v Manji (Cause 1132 of 2017)  
[2022] KEELRC 12862 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12862 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1132 OF 2017  
JK GAKERI, J  
OCTOBER 12, 2022**

**BETWEEN**

**ANTHONY WAMALWA MAKASI ..... CLAIMANT**

**AND**

**ASHVIN RAMJI MANJI ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this suit by a statement of claim dated May 4, 2017 and filed on June 19, 2017 claiming wrongful dismissal from employment and non-payment of terminal dues and salary.
2. The claimant avers that he was employed by the respondent on October 20, 2006 as a guard and farmhand at a monthly salary of Kshs.10,000/= per month and was not given a written employment contract.
3. It is his case that he worked from 6.00 am to 6.00 pm everyday including public holidays with no payment for overtime.
4. That he was not housed or paid housing allowance and served the Respondent diligently and honestly for 94 months and in the last 24 months he was paid Kshs.5,000/= per month.
5. That the respondent did not make NHIF and NSSF contributions.
6. The claimant also avers that he was underpaid.
7. The claimant prays for;
  - a. A declaration that the claimant's dismissal was wrongful and unfair.
  - b. Payment of Kshs.586,634/= as terminal benefits set out in paragraph 12 as follows;
    - i. One month salary in lieu of notice Kshs.10,000/=



- ii. 50% unpaid salary for 24 months Kshs.120,000/=
- iii. Leave for 7 years Kshs. 7,000/=
- iv. House allowance Kshs.141,000/=
- v. 12 months compensation Kshs.120,000/=
- vi. Service pay for 7 years Kshs. 40,000/=
- vii. Underpayment for 94 months Kshs. 85,634/=
- c. Costs of this suit.

### **Respondent's case**

- 8. The respondent filed the statement of defence on July 21, 2017.
- 9. The respondent denies having employed the claimant as alleged and avers that the claimant is a stranger to him.
- 10. The respondent denies owing the claimant anything and prays for dismissal of the suit with costs.

### **Claimant's evidence**

- 11. On cross-examination, the claimant stated that he was employed as a guard at Loresho Estate, Loresho Ridge on October 2, 2006. That the duty station had a guard house but no other building. That he was guarding the shamba and cutting grass and had taken photos of the land but did not file them in court.
- 12. The witness confirmed that he had no evidence who his employer was and had no picture of the employer.
- 13. The witness confirmed that the recipient of his demand letter dated July 29, 2015 was Barad Kingsway, Nairobi.
- 14. That it was the workplace of the respondent but did not find him there when he delivered the letter. He found other people.
- 15. The witness confirmed that he had no evidence of the salary he used to earn but was paid monthly through mpesa.
- 16. On re-examination, the witness testified that his employment was terminated on January 7, 2014 and was an employee of one Barad and had no employment letter. That he sued one Barad whose name appeared in my mpesa messages.

### **Respondent's evidence**

- 17. RW1, Mr. Ashvin Ramji Manji testified that he worked at Kingsways Ltd as a director of the company and had seen the letter from the Legal Aid Centre dated July 29, 2015 addressed to one Barad Kingsway and the letter was not served upon him and was unaware as to who Barad Kingsway was. That he knew of one Bharat at Kings Wear.
- 18. The witness testified that he did not own property in Loresho and did not employ the claimant and had not seen him before.



19. On cross-examination, the witness confirmed his name as Ashvin Ramji Manji. That he did not know the claimant and had never seen him. He gave his telephone number as 0706380630 and was unaware of any money sent to the claimant.
20. That he was given the letter from Kituo Cha Sheria and gave it to his lawyer and the claim was served at his place of work.
21. He testified that he resided in Parklands and had no property in Loresho or workers there.
22. On re-examination, RW1 testified that he saw the letter from Kituo Cha Sheria as part of the claimant documents.

### **Submissions**

23. By August 18, 2022 when the court retired to prepare this judgement, none of the parties had filed submissions.

### **Analysis and determination**

24. From the pleadings and evidence on record, the issues for determination are;
  - i. Whether the claimant was an employee of the respondent.
  - ii. Depending on the answer to (i) whether termination of the Claimant's employment was unfair.
  - iii. Whether the claimant is entitled to the reliefs sought.
25. As to whether the claimant was an employee of the respondent, the parties have adopted contrasting positions. While the claimant asserts that he was an employee of the respondent, the respondent states that he did not employ him and did not even know him.
26. Section 2 of the *Employment Act*, 2007 provides;

Employee means a person employed for wages or a salary and includes an apprentice and indentured learner.
27. Similarly, a contract of service means an agreement whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies.
28. These definitions are clear that a contract of service or employment need not be in writing or express. It can be discerned or deciphered from the conduct of the parties and the circumstances of the case.
29. In this case, the claimant's evidence that he was employed by the respondent on 20<sup>th</sup> October 2006 is not supported by any evidence. It is his testimony that no written document was issued.
30. The respondent on the other hand denies having employed the claimant, known him or owning the land the claimant was allegedly guarding in Loresho.
31. The claimant's evidence of the fact of employment by the respondent is exclusively oral. Notably, the demand letter written by Kituo Cha Sheria at the claimant's instigation was directed at one Barad Kingsway and alleges that the claimant was dismissed in July 2014, no date is given.



32. The statement of claim makes no reference of the date, month or year of termination, though when prodded by the court, the claimant cited the date of January 7, 2014.
33. Intriguingly, the respondent's name is not Barad Kingsway as confirmed by the person sued by the claimant.
34. The respondent gave his phone number as 0706380630 and denied knowledge of having sent any monies to the claimant.
35. This case turns on whether the claimant has adduced sufficient evidence to demonstrate that he was an employee of the respondent.
36. It is trite that it is the obligation of the claimant to establish that he or she was an employee of the respondent. The claimant is obligated to lead evidence which demonstrates on a balance of probability that there was an employment relationship between the parties. Such evidence could take various forms and need not necessarily be a written contract.
37. The duty of the claimant to prove its case against the respondent is spelt out by the provisions of the Evidence Act, cap 80, Laws of Kenya.
38. Section 107 of the Act provides;

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
39. Section 109 of the Act embellishes as follows;

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.
40. This proposition finds support in the decision in Nicholas Kipkemoi Korir v Hatari Security Guards Ltd (2016) eKLR, where Abuodha J. expressed himself as follows;

“The burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The claimant must still prove his or her case. 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.”
41. The court is guided by these sentiments.
42. In this case, other than oral testimony that the claimant was an employee of the respondent, which the alleged employer denies, the claimant tendered no other evidence to establish some linkage with the respondent.
43. The claimant adduced no evidence of who employed him in October 2006, where and what they agreed.
44. Puzzlingly, the claimant testified that he did not find the employer when he took the demand letter and did not know his name.
45. More significantly, the claimant adduced no evidence of the cell phone number from which he received the alleged salary of Kshs.10,000/=.



46. The respondent's evidence on the other hand is cogent that he was not Barad Kingsway, did not know the claimant, had not seen him before, had no land in Loresho, did not employ the claimant, his phone number is 0706380630 and was not served with any demand letter by the claimant.
47. From the foregoing reasons, it is the finding of the court that the claimant has on a balance of probability failed to demonstrate that there was an employment relationship between himself and the respondent.
48. As regards termination of the claimant's employment, it is puzzlingly that neither the written statement nor the statement of claim makes reference to the date of termination of employment or the circumstances that led to the alleged termination or by who.
49. Paragraph 9 of the statement of claim state that "The claimant was dismissed verbally without any payment or notice at all." Paragraph 8 states "The claimant was not ready for such abrupt termination and he suffered tremendous embarrassment as he could not meet his basic needs."
50. Intriguingly neither the written statement nor the oral evidence adduced in court advert to the issue of termination of employment.
51. The claimant adduced no scintilla of evidence of when and how his alleged employment by the respondent came to an end.
52. It is well settled law that the claimant is duty bound to establish not only that his or her employment was terminated by the employer but also that the termination of employment was unfair or wrongful.
53. In this case, the claimant led no evidence of the termination or unlawfulness of the alleged termination of employment by the respondent.
54. Finally, is the claimant entitled to the reliefs sought? The answer to this question is in the negative.
55. Having failed to demonstrate that he was an employee of the respondent, the claimant is not entitled to the remedies available to employees in cases of unfair termination of employment.
56. The upshot of the foregoing is that the suit herein is unmerited and is accordingly dismissed.
57. Parties to bear own costs.
58. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> 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 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 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**

