



**Kimani v Joseph Kimani Njau t/a Njau Transporter (Cause 1510 of 2016)  
[2022] KEELRC 4860 (KLR) (3 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4860 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1510 OF 2016  
JK GAKERI, J  
OCTOBER 3, 2022**

**BETWEEN**

**JOSEPH GITAU KIMANI ..... CLAIMANT**

**AND**

**JOSEPH KIMANI NJAU T/A NJAU TRANSPORTER ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this suit by a memorandum of claim filed on August 2, 2016 alleging unlawful termination of employment by the respondent.
2. The claimant prays for;
  - i. A declaration that the claimant's dismissal was unlawful
  - ii. The claimant be paid terminal benefits set out in paragraph 14 a – i above.
  - iii. 12 months compensation
  - iv. Reinstatement to employment thereof
  - v. Costs of this claim
  - vi. Interest on the above at court rates

**Claimant's Case**

3. The claimant avers that he was employed by the respondent as a driver in 2009 transporting Bata shoes to various places such as Malindi, Diani, Kilifi and Mombasa.
4. That he served the respondent diligently until 2015 when the respondent terminated his employment. That he had no warning letter for the duration he served.



5. The claimant avers that the respondent failed or refused to provide a breakdown of his terminal benefits.

### **Respondent's Case**

6. The respondent filed a statement of defence dated November 27, 2022.
7. The respondent denies having employed the claimant and admits that he was given not more than three squad rounds to drive the truck belonging to the respondent as a favour since he is a relative and no employment relationship existed between the parties.
8. The respondent prays for dismissal of the suit with costs.

### **Claimant's Evidence**

9. On cross-examination, the claimant confirmed that he was an employee of the respondent from 2009 to 2015 transporting goods from Limuru to Malindi and from Malindi to Limuru and the respondent was a distant relative.
10. The claimant testified that he was paid per month and in cash but had no evidence of any payment. As regards the single delivery note on record, the claimant testified that the document had his ID number and telephone number but had no name.
11. The witness confirmed that he was not an employee of Bata shoe Co Ltd. That the invoice from Vivo energy had a nickname Wangwachi yet the respondent's name is Joseph Kimani Njau. The witness admitted that he had no evidence that Wangwachi was the respondent, Mr Joseph Kimani Njau.
12. It was his testimony that the 2<sup>nd</sup> Bata shoe invoice had no name and he was not sure whether it came from Bata shoe Co Ltd.
13. On re-examination, the witness stated that he was an employee, a driver of motor vehicle KAV 803T. That his salary was Kshs 6,000/= which later rose to Kshs 8,000/= per month.

### **Respondent's Evidence**

14. The respondent, Mr Joseph Kimani Njau adopted the witness statement and was cross-examined. In his evidence in chief, the witness testified that the claimant was his nephew and he was not his employee.
15. On cross-examination, the witness confirmed that under Kikuyu customs, he was the uncle to the claimant or his father.
16. It was his testimony that he owned motor vehicle registration No KAV 803T and was not registered with the Bata shoe Co Ltd, though he was known for transporting shoes throughout Kenya.
17. The witness testified that he gave the claimant squads i.e journey to a particular place and paid him for such squads. That he had introduced the claimant to Bata Shoe Co. Ltd.
18. It was his testimony the delivery note on record did not have the claimant's name. The witness explained that the Bata Shoe Co Ltd would give its goods to the driver for delivery and the delivery note would be returned to the company after delivery of the goods.
19. The witness further confirmed that statements were provided by the company for purposes of payment and that the claimant had filed no document from Bata Shoe Co Ltd.
20. The witness stated that he was not Wangwachi and his nickname was Joseph Kimani Njau.



21. That the operative market charge for a squad at the time was Kshs 6,000/= which he paid for in cash.
22. On re-examination, the witness testified that he was not J.K Ndungu.

### **Claimant's Submissions**

23. By the time the court retired to write this judgement, the claimant had not filed submissions.

### **Respondent's Submission**

24. The respondent identifies four issues for determination, namely; whether the claimant proved that he was an employee of the respondent, entitlement to benefits, compensation for unlawful termination and reinstatement.
25. On the first issue, the respondent submits that there is no sufficient evidence to demonstrate that the claimant was an employee of the respondent as the documents relied upon had different aliases making it difficult to tell whether they referred to the same person.
26. That the claimant did prove the salary he was entitled to.
27. It is urged that the claimant was not an employee as defined in section 2 of the *Employment Act*, 2007.
28. Reliance is made on the decision in *Samuel Wambugu Ndirangu v 2NK Sacco Society Ltd* (2019) eKLR to emphasize the basic elements of an employment relationship.
29. It is the respondent's submission that the claimant did not discharge the burden of prove that he was an employee of the respondent.
30. As to whether the claimant is entitled to the reliefs sought, reliance is made on the decision in *Galgalo Jarso Jillo v Agriculture Finance Corporation* (2021) eKLR to embellish the submission that the employee must adduce prima facie evidence to show that termination of employment has taken place and the same lacked a substantive justification and/or was procedurally flawed for the burden to shift to the respondent.
31. The respondent submits that since the claimant has failed to prove the employment relationship between him and the respondent, he is not entitled to the remedies prayed for and the suit should be dismissed with costs.

### **Determination**

32. The issues for determination are;
  - i. Whether the claimant was an employee of the respondent.
  - ii. Depending on (i) whether termination of the claimant's employment was unfair.
  - iii. Whether the claimant is entitled to the reliefs sought.
33. As to whether the claimant was an employee of the respondent, the starting point is the law on the employment contract as encapsulated by the provisions of the *Employment Act*, 2007.
34. While the claimant alleges that he was an employee of the respondent from 2009 until April 2015, the respondent's case is that the claimant was not his employee.
35. Section 2 of the *Employment Act*, 2007 defines an employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner.



36. An employer on the other hand means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ an individual and includes agent, foreman, manager or factor of such person, public body, firm corporation or company.
37. Finally, 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 or apprenticeship and indentured learnership but does not include a foreign contract of service to which part xi of this Act applies.
38. To buttress his case, the claimant relies on membership card of the National Social Security Fund issued on March 11, 2009, delivery note dated August 24, 2013, invoice from VIVO Energy, Kenya dated December 9, 2013 for Kshs 6,010/=, confirmation receipt from Bata Shoe Co Ltd dated August 24, 2013 for Kshs 10,000/= and a dispatch form to Malindi mall dated May 2014 and the lorry driver is identified as “Joseph”.
39. First, the delivery note and the confirmation receipt have a cell phone number 0xxxxx3 and ID number 1xxxx7 which the claimant alleged to be his. The two documents do not have the claimant’s name.
40. The four documents relied upon by the claimant to demonstrate an employment relationship contain the registration number of the respondent’s motor vehicle KAV 803T.
41. These documents would appear to suggest that claimant drove the respondent’s motor vehicle on December 9, 2013, August 24, 2013 and May 14, 2014.
42. On their own, these documents are insufficient to establish an employer/employee relationship between the claimant and the respondent.
43. Similarly, the NSSF membership card merely shows that the claimant was a member of the fund as opposed to being in an employment relationship with the respondent. A statement would have been more persuasive since it identifies the employer.
44. In the court’s view, taken individually and collectively, the documents on record do not establish an employment relationship between the claimant and the respondent.
45. Second, the memorandum of claim dated July 15, 2016 and the witness statement are explicit that the claimant was employed in 2009.
46. Strangely, none of the documents have an employment date. In his evidence in chief and cross-examination, the claimant was explicit that he was employed in 2009. the court finds this omission curious. The claimant could not remember the date or month when he was in fact employed by the respondent.
47. Third, neither the memorandum of claim nor the witness statement or cross-examination reveal the claimant’s salary not even an allusion that he was paid per month.
48. It was only on re-examination when the claimant indicated that he was paid Kshs 6,000/= which later rose to Kshs 8,000/= and did not indicate it was his monthly salary.
49. Coincidentally, the respondent confirmed that a squad was Kshs 6,000/= and he paid the claimant in cash a fact confirmed by the claimant.
50. The claimant neither pleaded nor proved the fact that he earned any wage or salary as defined by section 2 of the [Employment Act](#). It is settled law that parties are bound by their pleadings (see [Independent](#)



*Electoral and Boundaries Commission and another v Stephen Mutinda Muli and 3 others* (2014) eKLR).

51. Fourth, paragraph 14 of the memorandum of claim, which particularises the specific claims against the respondent, no specific figures are pleaded and none was proved including one months salary in lieu of notice, unpaid leave, house allowance, 12 months compensation, unpaid overtime, travelling allowance and other claims.
52. It is trite law that special damages must be pleaded and proved evidentially as was held in *Coast Bus Ltd v Murunga and others* CA No 192 of 1992, *Mohammed Ali and another v Sagoo Radiators Ltd* (2013) eKLR and *Hahn v Singh* (1985) KLR 16.
53. The memorandum of claim has no prayer for specific damages neither were the damages claimed against the respondent particularised.
54. On the other hand, the respondent was consistent that the claimant was his relative, a fact the claimant reluctantly admitted and gave him squads as a relative and not as an employee and introduced him to Bata Shoe Co Ltd for that purpose.
55. It is trite that he who alleges must prove.
56. Section 107 of the *Evidence Act* provides that:
  - i. 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.
57. Section 109 provides that;

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.
58. Relatedly, section 47 (5) of the *Employment Act*, 2007 provide that;

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving than an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
59. Similarly, there is sufficient judicial authority for the proposition that the claimant is bound to prove not only that he was an employee of the respondent but also that termination of his employment was unfair. See *Monica Kanini Mutua v Al- Arafat Shopping Centre and another* (2018) eKLR, *Samuel Wambugu Ndirangu v 2NK Sacco Co-operative Society Ltd* (2019) eKLR.
60. Finally, the claimant led no evidence on the circumstances that led to his termination and how it took place and when. The written statement states that he was directed to go home and report after 2 days and when he reported, he was told that his services were no longer needed.
61. That the termination was based on malice and discriminative. It is unclear who gave the directions and when as the claimant made no reference to termination of employment in his oral evidence.
62. For the above stated reasons, it is the finding of the court that the claimant has on a balance of probability failed to establish that there was an employment relationship between him and the respondent.
63. Having found that the claimant has failed to establish the existence of an employment relationship with the respondent, the issue of termination and reliefs sought fall by way side.



64. In conclusion, the claim herein is unmerited and is accordingly dismissed.

65. Parties shall bear own costs.

66. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3<sup>RD</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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

