



REPUBLIC OF KENYA



KENYA LAW
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**Muraguri v Magnus Limited (Cause 678 of 2015)
[2022] KEELRC 13229 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13229 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 678 OF 2015
MA ONYANGO, J
NOVEMBER 10, 2022**

BETWEEN

GEDION MWANGI MURAGURI CLAIMANT

AND

MAGNUS LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim dated March 23, 2015 and filed in court on even date, the claimant seeks the following reliefs:
 - a. A declaration that the termination was unlawful, untimely and an order that the claimant be paid his terminal dues and benefits of Kshs 1,545,840/- as itemized below: -
 - i. Service/gratuity pay Kshs 210,000.00
 - ii. Compensation for loss of future earnings Kshs 420,000.00
 - iii. Half month's salary whilst on suspension Kshs 17,500.00
 - iv. Unpaid annual leave for 10 years Kshs 245,070.06
 - v. Unpaid wages for public holidays worked for 10 years Kshs 23,340.00
 - vi. House allowance unpaid for 10 years Kshs 630,000.00Total Kshs 1,545,840.00
 - b. Costs of the claim and interest.
2. The respondent is a limited liability company incorporated in Kenya and proprietor of Aquatic Building in Industrial Area, Nairobi.



3. The claimant avers that he was employed by the respondent sometime in January 2004 in the position of a cleaner.
4. That at all times, during the subsistence of his employment, he performed his duties diligently and to the respondent's satisfaction and as a result he rose through the ranks to the position on supervisor, a position he held until September 2014 when he was asked to proceed on compulsory leave on the alleged ground of loss of the respondent's money meant for payment of electricity and water bills.
5. The claimant contended that at the time of separation with the respondent he was earning a monthly basic salary of Kshs 35,000/- that was always paid in cash and that no payslip was issued to him.
6. That his employment contract was verbal and was never reduced into writing by the respondent.
7. The claimant avers that two weeks into his compulsory leave/suspension he learnt that his employment would be terminated after the lapse of the compulsory leave through verbal communication between the claimant and the respondent's agents a result of which the claimant states he was forced to resign.
8. The claimant denied the allegations levelled against him by the respondent and maintained that he was not responsible for payment of electricity and water bills. He averred that he was tasked with collecting rental income on behalf of the respondent which was paid in form of cheques drawn in favour of the respondent. That he did not handle any cash transactions on the respondent's behalf.
9. The claimant averred that the reason advanced for the termination of his employment by the respondent was unfounded and lacked basis. He believed that the deteriorated relationship between him and his employer was as a result of a suit filed against the respondent by one of its tenants.
10. The claimant averred that the termination was unlawful and unfair as he was neither given reasons for the same nor accorded a fair hearing contrary to the provisions of the Employment Act, 2007.
11. The claimant urged this court to find his claim with merit and to allow it as prayed.
12. In response to the claim, the respondent filed a defence and counterclaim dated February 10, 2016 and filed in court on February 16, 2016 in which the respondent denies having employed the claimant as alleged. It however avers that it engaged the claimant's services as an agent for purposes of collecting and banking rent from its tenants and paid him Kshs 800.00/- as commission for days worked.
13. The respondent contends that the claimant, while carrying out his duties as the respondent's agent, misappropriated funds to the tune of Kshs 500,000/- that was intended for payment of electricity and water bills.
14. That following the incident the claimant deserted his duties and has been on the run since the respondent requested for an account of the said sums.
15. The respondent admits that it received a letter dated October 7, 2014 from the claimant purporting to resign from his employment despite the fact that he was never at any point engaged as an employee of the respondent.
16. The respondent has raised a counterclaim for Kshs 500,000/- which it avers the claimant misappropriated and retained for his own use amount remains due and owing to the respondent. The respondent further avers that the said amount continues to accrue interest at commercial rates until settlement in full.



17. The respondent urged this court to find the claim devoid of merit and to accordingly dismiss it in its entirety with costs to the respondent. It further prayed for the court to allow the counterclaim with costs to the respondent.

Evidence

18. At the hearing, the claimant testified on his own behalf and the respondent called one witness, Benson Kinoti Marete, its director who testified on behalf of the respondent.

Claimant's Case

19. The claimant, CW1 adopted his witness statement dated June 9, 2016 as his evidence in chief. He further adopted the documents attached to the memorandum of claim as exhibits in this matter.
20. On cross examination CW1 stated that he was employed by the respondent but was never issued with any documentation as proof of his engagement. He further testified that his salary was paid by the respondent in cash and he did not have any proof of the same in writing.
21. He further testified that his relationship with the respondent became sour when he acquired a motor vehicle. He states that he was asked to proceed on compulsory leave and another person appointed to carry out his functions.
22. CW1 testified that he sent to the respondent a resignation letter but maintained that the letter was done after he was informed that another person had been hired by the respondent to perform his roles.
23. He urged this court to find his claim merited and to allow it as prayed.

Respondent's Case

24. RW1 adopted his witness statement dated December 17, 2019 as his evidence in chief.
25. RW1 testified that the claimant was never employed by the respondent and that he was a free consultant who was being used to pay electricity and water bills.
26. On cross examination RW1 stated that the claimant did not acknowledge receipt of the Kshs 500,000/- anywhere and there is no proof availed to this court to confirm the same.
27. RW1 further stated that the claimant was not a caretaker as described in the letter dated September 17, 2019, insisting that he was a consultant and was not under its employment.
28. On re-examination RW1 stated that the letter sent out to tenants described the claimant as caretaker for lack of a better term and that the purpose of the same was so as to avoid tenants paying their rent through the claimant while he was away.
29. RW1 stated that all rent was paid directly to the respondent's office and the claimant did not collect any rent as alleged in the memorandum of claim.

Claimant's Submissions

30. In his submissions the claimant maintained that he was employed by the respondent as evidenced by the letter dated September 17, 2014 which describes him as the respondent's caretaker. He argues that if he was not an employee then there would be no need for the respondent to prepare the said letter.



31. The claimant relied on the provisions of section 9 and 10 of the *Employment Act*, 2007 which require an employer to reduce the employment contract into writing and argued that the failure to reduce the employment contract into writing is an error on the part of the respondent.
32. The claimant submitted that his employment was tactfully terminated by the respondent when it sent him on compulsory leave and filled his position thus causing him to believe that he was no longer needed. That as a result the claimant tendered his resignation.
33. He maintained that the termination of his employment was unlawful, unfair and wrongful as the respondent failed to comply with the mandatory provisions of sections 43 and 45 of the *Employment Act*, 2007.
34. He further submitted that he had proved his case on a balance of probabilities as required under law and is therefore entitled to the reliefs sought t.

Respondent's Submissions

35. The respondent on its part maintained that there was no employer–employee relationship between the claimant and the respondent. To fortify this argument the respondent relied on the provisions of section 2 of the *Employment Act*, 2007 which defines an employer, employee and employment contract and the decision in the case of *Everret Aviation Limited v Kenya Revenue Authority (Through the Commissioner of Domestic Taxes)* (2013) eKLR and *Samuel Wambugu Ndirangu v 2NK Sacco Society Limited* (2019) eKLR.
36. The respondent submitted that the memo dated September 17, 2014 cannot be used to establish an employer–employee relationship between the claimant and the respondent. The respondent further submitted that the word caretaker was used for lack of a better word and cannot therefore be a basis to prove the claimant's employment.
37. For emphasis the respondent relied on the case of *John Matete Abayo v Digital Imaging Systems Limited* (2018) eKLR where the claimant sought to prove existence of an employment relationship by solely relying on NSSF statement and memo which the court held was not sufficient to establish an employer–employee relationship between the parties.
38. The respondent further cited the case of *Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited* (2016) eKLR where the court held that the claimant bears the burden of proving his case where the employment contract was oral in nature. The court went on to state that a claimant must adduce evidence whether documentary or viva voce to corroborate his word.
39. A similar position was held in the cases of *Transport Workers Union v Euro Petroleum Products & another* (2019) eKLR, *Joseph Munene Murage v Salome Ndung'u* (2019) eKLR, *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* (2013) eKLR and *Mary Mmbone Mbayi v Chandubhai Patel & another* (industrial cause No 761 of 2011) all of which dealt with proof of the existence of an employment relationship.
40. The respondent further submitted that in the absence of an employment relationship between the claimant and the respondent, the claim for unfair termination must fail.
41. The respondent urged this court to find the claim devoid of merit and to dismiss it with costs to the respondent.



Determination

42. Having considered the pleadings, evidence, submissions filed by the parties and authorities relied upon, the following are the issues for determination:
- i. Whether there existed an employer-employee relationship between the claimant and the respondent ;
 - ii. Whether the claimant’s employment was unlawfully terminated;
 - iii. Whether the claimant is entitled to the reliefs sought.
 - iv. Whether there existed an employer-employee relationship between the claimant and the respondent
43. It is the duty of the employer to avail the written contract and in the event of a dispute the burden to prove and/or disapprove the existence of terms of employment lie on the employer.
44. Section 10 (7) of the *Employment Act*, 2007 provides: -
- (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
45. The respondent was shifty about the relationship with the claimant. In the response to the claim, the respondent refers to the claimant as an agent for purposes of collecting and banking rent. in the witness statement of Kinoti Marete states that the respondent took over the claimant’s services as a general labourer upon purchase of the suit premises from Aqua Technologies where the claimant previously worked in the same capacity.
46. The specific words used in the witness statement are: –
- “Sometime in the year 2005 the respondent company bought property located in Industrial Area from Aqua Technologies Limited where the claimant was working as a casual labourer and the respondent company herein took over his services as a general labourer entitled to payment pursuant to the tasks given.”
- [Emphasis added]
47. In his testimony before court, Mr Kinoti abandoned his statement and testified that the claimant was a free consultant. In the memo to the tenants, the claimant is described as the caretaker.
48. From the many different positions taken by the respondent, its credibility is in serious doubt.
49. The memo dated September 17, 2014 reads as follows: -
- “To: All tenants
- Aquatec/Loipi, Lunga Lunga
- Date: September 17, 2014
- Subject: Njoroge Muiruri
- Dear tenant
- This is to inform you that Mwangi the caretaker is on leave.



While he is away, Njoroge (the bearer of this Memo and whom you have already met), will be on hand to help with the day- to-day property management.

Njoroge's Tel. 07xxxx7

Please accord him the necessary cooperation.

Regards,

(Signed)

Susan Marete

For. Magnus Limited”

50. It is clear from this communication that the claimant was employed as a caretaker by the respondent and at the time of writing the circular to the tenants, he was away on leave.
51. I therefore find that the claimant has indeed discharged the burden of proving the existence of an employment relationship between him and the respondent.
52. Having settled the first issue the court will consider the issue of the claimant's termination.

Unfair Termination

53. The claimant contended that his services were wrongfully and unfairly terminated by the respondent. He further contended that he was forced to resign after the respondent employed another person to take up his role while he was on leave.
54. The respondent on the other hand vehemently denied terminating the claimant's employment maintaining that he absconded and/or deserted duties after failing to pay the electricity and water bills despite being given the money to do so.
55. Black's Law Dictionary (Ninth Edition) defines desertion as:

“The wilful and unjustified abandonment of a person's duties or obligations.”

56. The claimant maintains that the respondent suspended him from duty to pave way for investigations following his failure to pay electricity and water bills totalling to Kshs 500,000/- despite being given the money to settle the bills, a fact that is confirmed by the memo dated September 7, 2014. The respondent cannot therefore claim that the claimant is guilty of desertion.
57. Further, even if he had absconded, he is by law entitled to a fair disciplinary process as set out in section 41 of the Employment Act, 2007. No evidence was availed to the court to prove any disciplinary process or notice issued prior to the termination. It is the duty of the respondent to prove to this court that it accorded the claimant a fair hearing prior to the termination. In the case of Felistas Acheba Ikatwa v Charles Peter Orieno (2018) eKLR it was held:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”



58. In the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR the court held that:

“.... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

59. In the present case, I find no evidence of either desertion of duty or fair termination by the respondent. I thus make a finding that the termination of the claimant’s employment was unfair both substantively and procedurally.

Whether the Claimant is entitled to the reliefs sought

60. The claimant is entitled to the following:

i. Service/gratuity totalling to Kshs 210,000/-

61. There being no proof that the claimant was a member of NSSF the claimant is entitled to compensation under this head by dint of section 35 of the *Employment Act*, 2007. In the absence of proof of the amount of salary paid to the claimant the court will accept the amount pleaded by the claimant as his salary being Kshs 35,000/-. I award him Kshs 175,000/- being half salary for 10 years worked.

ii. Compensation for loss of future earnings Kshs 420,000/-

62. The claimant is not entitled to the above as it amounts to unjust enrichment by the claimant which this court ought not to allow. In the case of *Pamela K. Butalanyi v University Council for the Kenya Polytechnic University College* (2015) eKLR it was held that employment remedies must be proportionate to the injury sustained by the employee. They are not aimed at advancing any parties desire for unjust enrichment.

63. Further, in the case of *D. K. Njagi Marete v Teachers Service Commission* (2013) eKLR Rika J. held:

“What remedies are available to the claimant “this court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

iii. Half month’s salary whilst on suspension

64. No proof was availed by the claimant to prove that he was not paid half of his salary during the period that he was on suspension. indeed what the claimant alleged was that he was on compulsory leave, not suspension. In the circumstances the claim stands dismissed.

iv. Unpaid annual leave for 10 years

65. The claimant is entitled to relief under this head as the respondent failed to avail records to ascertain whether or not the claimant is entitled to leave days being the custodian of claimant’s employment records. I award the claimant the sum Kshs 245,070.06/- as payment *in lieu of* leave as prayed since the respondent did not contest the amount claimed in the memorandum of claim.

v. Unpaid wages for public holidays worked for 10 years totalling to Kshs 23,340/-

66. This claim fails as no evidence was adduced by the claimant to prove the same.



- vi. House allowance unpaid for 10 years
- 67. The claimant did not adduce any evidence to prove that the salary he was paid did not include house allowance or to enable the court ascertain that he was not paid house allowance. In the circumstances this claim fails for want of proof.
- 68. The claimant is awarded costs of this suit and interest from the date hereof until settlement in full.
- 69. In summary the claimant is awarded the following:
 - i. Service pay Kshs 175,000
 - ii. Pay *in lieu of* annual leave Kshs 245,070
Total Kshs 420,070
 - iii. Costs
 - iv. Interest
- 70. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

