



**Mae v Barot t/a Bajrang Pan & Cold Drinks (Cause 1112 of 2017)
[2022] KEELRC 13064 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13064 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1112 OF 2017
AN MWAURE, J
NOVEMBER 1, 2022**

BETWEEN

HARRISON MSINDA MAE CLAIMANT

AND

BAVESH BAROT T/A BAJRANG PAN & COLD DRINKS RESPONDENT

JUDGMENT

1. The claimant by the statement of claim dated the 15th day of June 2017 alleges unfair dismissal against the respondent Company. He claims that on or about February, 2013 the Respondent offered him employment to cut his spices known as supari at his enterprise on a daily pay of Kshs 800/= . It is stated that this contract was never reduced to writing contrary to section 9 of the [Employment Act, 2007](#).

Claimant's Case

2. The Claimant avers that he was not housed nor was he given house allowance and he never went for leave, off duty and public holidays were never compensated. The Claimant states that he sought advice from his advocates on record who wrote a demand letter to the Respondent to seek for his arrears. The Claimant says that the Respondent upon receipt of the Claimant's demand letter on the January 23, 2017, called the Claimant from his place of work and issued him with a form requiring him to sign that he was a piecemeal employee.
3. The Claimant says that he declined to sign and sought time to interrogate the contents of the form he was being asked to sign, a request which infuriated the Respondent who immediately dismissed the Claimant and asked him to go to his lawyers. The Respondent thereafter replied through its own advocates and denied ever employing the Claimant and instead alleged to have engaged the Claimant at various times as an independent contractor. The Claimant says he had worked for a continuous period exceeding 3 months and was therefore a permanent employee in terms of section 37 of the [Employment Act, 2007](#).



4. The Claimant is of the impression that the act of dismissing him for having sought arrears was unlawful and unfair since the Claimant was not issued with any notice or a valid notice as contemplated by the provisions of section 41 of the [Employment Act 2007](#).
5. The Claimant seeks the following remedies;
 - a. A declaration that the dismissal of the Claimant from his workplace is unlawful and unmerited
 - b. That the Claimant be paid his arrears and terminal benefits as set out in paragraph 11 of the claim amounting to ksh 1,439,600/=
 - c. The Respondents be ordered to issue the Claimant with certificate of service in accordance with the provisions of section 51 of the [Employment Act, 2007](#).
 - d. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - e. The Respondent to pay costs of the claim

Respondent's Case

6. The Respondent filed a memorandum of appearance dated the June 27, 2017 on the June 30, 2017. The Respondent then filed the response to the claim and said that it used to employ the Claimant intermittently to perform tasks of chopping supari, a Tanzanian spice, in amounts of 5 to 6 kilogrammes and pay the Claimant the sum of Kshs 80 per kilo.
7. The Respondent avers that in the course of performing the engaged tasks, the Claimant used to work independently, without the Respondent's control and did not draw any wages/salary for his services rather the contractual sum agreed upon per task. The Respondent says that the Claimant was not employed permanently nor did he have a fixed employment with the Respondent at all. The Respondent says that the Claimant is not entitled to the benefits he claims in paragraph 4 of the claim.
8. The Respondent denies ever terminating the Claimant and says that the Claimant's engagement ended when no further tasks were given to him. The Respondent further denies owing the Claimant any arrears or being obliged to give the reasons as required by section 41 of the [Employment Act](#) which it says is not applicable to their nature of engagement.

Claimant's Case

9. Harrison Msinda Mae the Claimant gave sworn testimony and stated he was working with the Respondent after being employed in January 2013 but there was no appointment letter. He said he used to be paid ksh 800/= per day twice a month for every spice he cut. He stated that he used to sign when he received the money. He adopted the witness statement dated the June 15, 2017 which he adopted as his evidence in chief. He also adopted the documents contained in the list as exhibits in the case. He said that he was terminated on the January 19, 2017. He says there is a letter which was given to him to sign but he refused to do so and went to take a photocopy. He testified that he was expected to sign that he was a casual worker and was told there would be no work if at all he declined to sign.
10. He says he was not given any notice or explanation of any misconduct and was paid no money. He further states that he never went on leave when he was working for the Respondent and also never went for public holidays. He further says he was not given any allowance and do not know if the Respondent remitted NSSF and NHIF dues. The Claimant stated that sometimes they would work until 9 or 10 pm and was not paid any overtime. The witness said that it is not true that he used to be paid as a casual.



11. On cross-examination, the Claimant said that he has no appointment letter but only had the letter he got from the Respondent before being asked to sign that he was a casual employee. It is stated that he has no other evidence aside from the book showing how much he was paid. He further answered that he had no witness in court. He said that the Respondent used to make food like pans and Asian foods which he mentioned were spices from Kenya and East Africa. He told court one of the spices is supari from Tanzania and India and would cut the supari which used to come in tons and there would be many bags and he would cut them all. He said that he never used to be paid daily but mid-month and end month.

Respondent's Evidence

12. Bavesh Barot is the Respondent witness. He adopted the witness statement dated the July 3, 2017 as his evidence in chief. He said that they do food from Tanga which they package and sell. He testified that the Claimant used to cut a spice called Supari which he would get from Tanga. He said they would bring in 500kgs as one consignment which would be every two months or so. He further said that when the consignment came, he had approximately six or seven men to cut the consignment. He said he would only call them to cut it and then they would leave. He said he would pay them between 400/ to 500 per day per person. He further said the Claimant would come and cut them at his time and the work would not be everyday but may be 20 days in a month. The Respondent further said that he would not pay him every day but may be 20 days in a month and never used to take the Claimant for outside catering as he was not part of the catering business. He added that the Claimant demanded some 50,000/= to 60,000/= to go home but the Respondent refused to give him. He also confirmed that he did not chase the Claimant away because he refused to sign documents. He admitted that he did not remit NSSF and NHIF dues as the Claimant was not his employee but was a casual.
13. On cross-examination, he stated that he started working with the Claimant around January 2013. He said he gave him no document to confirm his terms of engagement. The witness said the Claimant left in 2017 and in the 4 years he worked he would cut Supari. He told court that he used to pay workers cash everyday but would not sign anywhere and there was no attendance book as he was not an employee.
14. Respondent said he had no record to show Claimant was his employee and the Claimant was not given house allowance or housing. It is the Respondent's testimony that the Claimant never went on annual leave and there was no document to show that the Claimant's work was piecemeal work. He said the Claimant left work in January 2017 after he demanded ksh 50,000 to 60, 000 ksh to go home but he refused to give him.
15. The witness was adamant that he never wrote the letter dated the January 23, 2017 to the Claimant and it does not have his stamp. He further stated that he did not give the Claimant letter and did not take him through disciplinary hearing. The Respondent reiterated that he did not have any records of the Claimant's employment and never forced the Claimant to sign any document. He also admitted he did not give Claimant certificate of service.

Claimant's Submissions

16. The Claimant submits that it is not contested that the Claimant started working for the Respondent in the year 2013 and was terminated in the year 2017 which is a period of 5 years of the Claimant being in the employ of the Respondent. The Claimant submitted that the terms of engagement of the Claimant automatically converted to regular term contracts upon completion of one month's continuous service by operation of the law under section 37 of the *Employment Act*.



17. The Claimant submitted that the Respondent herein did not have valid reason to terminate the Claimant's services. He submits that he was issued with a form dated the January 23, 2017 to sign but did not sign because he did not understand it but instead asked for a copy for him to read and seek hearing. The Claimant argued that whilst the Respondent testified that he has permanent employees and the Claimant is not one of them, he did not file in court any document like a register which the Respondent witness said it had. The Claimant argued that the allegation that he had asked for money to go home and Respondent refused to give money was also not proven by the Respondent.
18. The Claimant also argued that the Respondent at cross-examination by the Claimant's counsel had told court that he did not give the Claimant any reasons for ending the Claimant's services but later on contradicted this position and stated that he did not fire the Claimant. The Claimant says that it is clear the Respondent terminated the Claimant's services after he refused to sign the form issued to him to say that he worked on piecemeal basis and no other reason existed for the Respondent to terminate the Claimant. The Claimant also argued that the Respondent never observed procedural fairness required under section 41 of the [Employment Act 2007](#) as he was never given any notice to show cause why his services could not be terminated as they were. The Claimant further submitted that he was not called to any disciplinary hearing to explain any action done by himself or to give an explanation as to why he could not be terminated.

Respondent's Submissions

19. The Respondent submits that the Claimant was his employee but was independent contractor. It relied on the case of [Christine Adot Lopeyio v Wycliffe Mwathi Pene](#) 2013 eKLR where was held that:

“The differentiation relates to the very fundamental issues noting that under a contract of service, it customarily relates to an employee who is subordinate or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his own terms for purposes of a task in autonomous manner”.

In most cited authorities in this regard from various jurisdictions several tests have been applied to distinguish what comprises 'employment' in case of contracts of service as contrasted with contract for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner he or she will do the work.
 - b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than his personal....
 - c. The test of economic or business reality
 - d. Mutuality of obligations in which the parties make commitments to maintain the employment relationship over a period of time.
20. The Respondent submitted that as apparent from the cross-examination, the Respondent explained that it runs a specialized restaurant and has employees who sign an attendance book and who he remits their NSSF and NHIF dues. The Respondent submits the Claimant was not integrated into the Respondent's business and was not subject to the rules and procedures of the Respondent and that the Claimant confirmed repeatedly that he would be hired whenever work would arise.



Issues for Determination

- a. Whether the Claimant was employed by the Respondent and was he a regular or a casual employee.
- b. If the answer to (a) above is in the affirmative, whether the Claimant was unlawfully terminated
- c. What remedies, if any, is he entitled to.

Determination

21. In the present case the Claimant alleges that there is employment relationship between him and the Respondent. The Respondent denies the existence of employment relationship arguing the Claimant was an independent contractor. In Cause No 298 of 2018, *Ibrahim Ulalo v Nation Media Group*, Lady Justice Maureen Onyango held that

“The contract between two parties where the nature of the relationship is contested is for the court to interpret. In the interpretation the court requires evidence of the nature of the relationship between the parties. An employment relationship can be a matter of presumption based or be based on the facts”

22. In Cause No 12 of 2011, *Maurice Oduor Okech versus the Chequered Flag Limited* Ndolo J quoted Kimondo J in the case of *Everette Aviation Limited v Kenya Revenue Authority* [2013] eKLR, where it was held that

“In determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical”

23. In the case before court the relationship between the parties is not evidenced by documents such as payslips or job card or anything whatever in writing. The Respondent is of the view that the Claimant was not on the register as he was not an employee. The Respondent testified that the Claimant alongside other men would cut the Supari (a type of a spice) then leave after being given money in cash and which would vary depending on the work available and the work would not be done every day.
24. The question here to answer in order to get to the cranks of the matter is whether the Claimants was a regular employee or a contractor or a casual employee who was employed to cut Supari spice and would be paid as per the work done.
25. The court in the case of *Christine Adot Lopevia v Wycliffe Mwathi Pene* [2013] eKLR citing section 2 of the *Employment Act* defined a contract of service as an agreement whether oral or in writing and whether expressed or implied to employ or to serve an employee for a period of a time.
26. The judge further held that the issue of whether there is a contract for service is one that can be established in law or in fact. The judge further noted” the differentiation relates to very fundamental issues noting that under a contract of service, it customarily relates to an employee who is subordinate or under guidance and dependant on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner. In most cited authorities in this regard from various



jurisdictions several tests have been applied to distinguish what comprises employment as against series in case of contracts of series as contrasted with contract for service.

27. The Respondent was firm that the Claimant was cutting the supari spices for him together with other workers whenever the spices were available and would be paid as per the amount he would cut. There are no records to prove the Claimant had any other form of an engagement with the Respondent to justify contract of service. From the evidence adduced by the Respondent and the pleading it would be more like the Claimant was engaged to perform piece work and would be paid as per the amount he would cut.
28. There is lack of any document whatsoever or any support of oral evidence that the Claimant was indeed employed by the Respondent on regular basis to support conversion to regular employment under Section 37 of the *Employment Act* from casual employment. The court returns therefore that there is no evidence that the Claimant was a regular employee and there is no indication that the respondent controlled how the Claimant did his work or any other evidence showing integration into the Respondent's organisation.
29. The court finds the Claimant has failed to establish an employer and employee relationship with the respondent. The only document produced by the Claimant being a letter purported to be written by the Respondent asking Claimant to accept he was performing piecemeal work dated January 23, 2017 but the same is denied by the Respondent vehemently. Furthermore it does not assist to establish the working relationship of the two ie the Claimant and the Respondent. It is not signed by any of the parties and so its source cannot be verified. The court finds the same does not help in the case.
30. In conclusion the claimant having failed to establish employment relationship with the respondent calls for dismissal of his case accordantly.

Taking all matters into consideration court orders each party to bear their own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 1ST NOVEMBER, 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 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 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 just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE

