



**Kiema v Haut International (K) Co Ltd (Cause 1744 of 2017)
[2022] KEELRC 13512 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13512 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1744 OF 2017
SC RUTTO, J
DECEMBER 9, 2022**

BETWEEN

JACKSON NZOMO KIEMA CLAIMANT

AND

HAUT INTERNATIONAL (K) CO LTD RESPONDENT

JUDGMENT

1. The claimant has stated through his memorandum of claim dated August 30, 2017, that he was employed by the respondent as a general labourer with effect from January 10, 2014. He avers that he worked honestly and diligently and to the respondent's satisfaction. That he was terminated by the respondent when he made persistent enquires on his National Social Security Fund (NSSF) dues. The claimant avers that his dismissal was unfair, unlawful and against the rules of natural justice. Consequently, he prays for the sum of Kshs 200,200.00 being one month's salary *in lieu* of notice, pay in lieu of untaken leave days, service pay for the years served and compensatory damages for unfair termination.
2. Upon being served with the claim, the respondent filed a statement of defence, through which it denied all the averments in the memorandum of claim except the descriptive paragraphs 1 and 2. Specifically, it denies that the claimant was its employee. The respondent further avers that the claim doesn't disclose any cause of action hence should be struck out with costs.
3. The matter proceeded for hearing on March 22, 2022, and while the claimant presented oral evidence in support of his case, the respondent failed to present any witnesses despite being given an opportunity to do so on June 20, 2022.



Claimant's Case

4. The claimant testified in support of his case at the outset, sought to rely on his witness statement together with the documents filed on his behalf, to constitute his evidence in chief. He also produced the said documents as his exhibits before court.
5. It was his testimony that he started working for the respondent in 2014. That trouble began when he started following up for his NSSF dues. That on November 4, 2016, he approached the respondent's director by the name Mr Sun and inquired about remittance of his NSSF dues. That in this regard, he informed Mr Sun that his NSSF statement was not accurate as it was not reflecting the employer's contributions. That it was then that Mr Sun told him that his services were no longer required and that he had been dismissed from employment.
6. The claimant further testified that he reported the matter to the labour office whereupon he was issued with a letter to take to the respondent's offices. That when he took the letter to Mr Sun, he tore it and told him that there were many potential employees. That he was terminated from employment for following up on his terminal dues. That following his termination, he was not paid a single cent by the respondent. The claimant closed his testimony by asking the court to allow his claim as prayed.

Respondent's Case

7. As stated herein, the respondent did not present oral evidence and it sought to rely on its documentation on record.

Submissions

8. The claimant submitted that his evidence was uncontroverted and that the statement of defence remain mere allegations. He further submitted that he was not given any valid reasons as to why his employment was coming to an end. That further, he was not given a chance to be heard or to make a representation. In support of these submissions, the claimant placed reliance on the cases of *Walter Ogal Anuro v Teachers Service Commissions* (2013) eKLR and *Kenya Union of Domestic Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club* (2014) eKLR.
9. On its part, the respondent submitted that the claimant had failed to prove that he was its employee. That the terms of the engagement are unknown and several cases have provided that it is not the duty of the court to create a contract between disputing parties. It was further submitted that the claimant was unable to prove the mode of payment on how he collected his pay check during the alleged period of employment. The respondent further submitted that it did not have any engagement with the claimant in whatsoever form. In support of this argument, the respondent asked the court to consider the determination in the case of *Jospeh Nyaga v United Millers Limited* cause No 267 of 2015 (Nakuru).
10. In further submission, the respondent stated that the claimant did not provide any evidence on the labour office investigating his claim and its conclusion on the existence of an employer and employee. That further, the facts of the case do not prove breach of any contract.

Analysis and determination

11. I have considered the issues raised in the pleadings, the evidence on record as well as the rival submissions and the following issues stand out for determination: -
 - a. Whether there was an employment relationship between the claimant and the respondent.



- b. If the answer to (a) is in the affirmative, was the claimant's termination from employment unfair and unlawful?
- c. Is the claimant entitled to the reliefs sought?

Existence of an employment relationship?

- 12. The respondent's main argument was that the claimant was not its employee. It thus follows that with that express denial by the respondent, the claimant was bound to prove the existence of his employment relationship with the respondent.
- 13. This position resonates with the finding in the case of *Zarika Adoyo Obondo v Tai Shunjun & another* [2020] eKLR where the court held that:

“It has been stated time and again by this court that where the respondent does not participate in the hearing and has not admitted the employment relationship, the claimant must prove the same as a preliminary point as without proof, the whole claim is anchored on quicksand.”
- 14. And further in the case of *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* [2013] eKLR, it was held that:

“...It was thus the burden of the claimant to prove the existence of an employment relationship and the unfair termination thereof. Having failed to prove the existence of an employment relationship the claim has no leg to stand and must thus fail...”
- 15. These decisions augment the provisions of section 47 (5) of the *Employment Act* which places the burden of proving the fact of termination on the employee. It provides thus:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that 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.”
- 16. Therefore, it follows that in order to prove termination, an employee must first prove the existence of an employment relationship. This is what essentially constitutes the backbone of the claimant's case, without which, it is not practical for the court to move forward and determine the fairness or otherwise of the alleged termination.
- 17. That said, the claimant exhibited a statement from the NSSF which identifies the respondent as his employer. In its submissions, the respondent challenged the admission of the said piece of evidence and termed the same as fraudulent for having been filed without leave from court and for being unauthenticated by the issuer. Notwithstanding the respondent's assertions, it is notable that it did not object to the production of the said documents either at the pretrial stage or at the hearing. If anything, it proceeded with the trial and gave the impression that it did not object to any of the documents sought to be relied upon by the claimant. Needless to say, its objection was coming too late in the day to be entertained by the court.



18. On this issue, I will follow the determination by the Court of Appeal in [Daniel Toroitch Arap Moi v Mwangi Stephen Muriithi & another](#) [2014] eKLR where it was held that: -

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.” Underlined for emphasis

19. Having been served with the claimant’s NSSF statement indicating that it was his employer, one wonders why the respondent did not rebut the same at the opportune time.

20. In light of the foregoing, I am satisfied that the claimant has proved on a balance of probability that he was an employee of the respondent.

21. Having found as such, I now move to determine whether the claimant’s termination was unfair and unlawful.

Unfair And Unlawful Termination?

22. The claimant has alleged that he was unfairly and unlawfully terminated from employment. An employer is required under the [Employment Act](#) to prove that an employee’s termination was not only fair substantively but also procedurally. Essentially, this is the standard for determining whether an employee’s termination was fair or not. In this regard, sections 43, 45 and 41 of the [Employment Act](#), are key and I will proceed to consider them hereinunder.

23. Substantive justification entails proof of the reasons which resulted in an employee’s termination. In this regard, section 43(1) of the [Employment Act](#), requires an employer to prove the reason or reasons for the termination, and where it fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

24. Section 45 (2) (a) and (b) of the [Employment Act](#) provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee’s conduct, capacity or compatibility; or based on its operational requirements.

25. As regards the limb of procedural fairness, the same is to be found under section 45(2) (c) of the [Employment Act](#), which provides that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the [Employment Act](#) sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

26. In the instant case, the respondent did not give any reason that led to the claimants’ termination from employment. Its only contention was that the claimant was not its employee.

27. The long and short of it is that the respondent did not present any evidence to prove the validity and fairness of the claimant’s termination in terms of sections 43(1) and 45(2) (a) & (b) of the [Employment Act](#).

28. With regards to fair process, the respondent yet again failed to lead evidence to prove the same. As I have stated herein, the respondent’s sole line of defence was that the claimant was not its employee. In light of the provisions of section 45(2) (c) as read together with section 41 of the [Employment Act](#), the respondent was bound to subject the claimant to a fair process prior to termination. There being



no evidence let alone, the slightest indication that the claimant was subjected to a fair process prior to termination, I can only conclude that no such process was undertaken.

29. In the circumstances, I cannot help but find that the respondent is at fault for want of procedure.
30. The total sum of my findings is that the claimant's termination was both unfair and unlawful in terms of sections 41, 43 and 45 of the Employment Act.

Appropriate Reliefs

31. Having found that the claimant's termination was unfair and unlawful, the court awards him the equivalent of five (5) months of his gross salary as compensatory damages. This award takes into account the length of the employment relationship between the parties.
32. The claimant is further awarded one (1) month's salary in lieu of notice.
33. The claim for service pay is declined as it is evident that the claimant was a member of the NSSF. Therefore, he falls within the exclusions under section 35(6) of the Employment Act.

Orders

34. In the end, I enter judgment in favour of the claimant against the respondent and he is awarded:
 - a. One month's salary *in lieu* of notice being the sum of Kshs 13,000.00.
 - b. Compensatory damages in the sum of Kshs 65,000.00 which sum is equivalent to 5 months of his gross salary.
 - c. The total award is Kshs 78,000.00.
 - d. Interest on the amount in (c) at court rates from the date of judgement until payment in full.
35. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2022

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Alividsa

For the Respondent Mr. Omolo

Court Assistant Abdimalik Hussein

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.

STELLA RUTTO

JUDGE

