



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO.496 OF 2017**  
**JOHN ABWOR RADIALA.....CLAIMANT**  
**VERSUS**  
**SAFARI LUXURY SHUTTLE CO. LIMITED.....RESPONDENT**

**JUDGMENT**

**I .,INTRODUCTION**

1. This cause was initiated vide a memorandum of claim dated 13<sup>th</sup> March, 2017 and upon service the Respondent filed a response to the claim dated 27<sup>th</sup> March, 2017.
2. Subsequently, the Claimant filed an amended memorandum of claim dated 10<sup>th</sup> April, 2017 and the Respondent filed an amended response thereto dated 6<sup>th</sup> July, 2018.
3. Together with the amended memorandum of claim and the amended response to the claim, the parties filed their respective witness statements, list of documents and copies of bundles of those documents.
4. Eventually, the matter was certified ripe for hearing and the hearing proceeded before this court on 3<sup>rd</sup> August, 2021.

**II . ISSUES FOR DETERMINATION**

5. During the hearing, the Claimant testified alone in support of his cause while the Respondent called two witnesses in support of their portion.
6. In his amended memorandum of claim, the Claimant is seeking the sum of Kshs.1,433,143.12 as particularized in paragraph 5 of the claim, costs of this suit, interest on above two, certificate of service, and any other relief as the court may deem fit.
7. In their amended response to the claim, the Respondent prays that cause claim the respondent prays that the cause be dismissed with costs for lack of merit. More fundamentally, the Respondent denied having even employed the Claimant in whatever capacity whatsoever.
8. From the pleadings filed, oral testimonies, the exhibits produced, and rival submissions from counsel on both sides following issues manifest for determination;-
  - (i) At all material times to this cause, was the Claimant employed by the Respondent? What were the terms of that employer/employee relationship if at all it existed?
  - (ii) If the Claimant was an employee of the Respondent, was the termination fair and lawful?
  - (iii) Is the Claimant entitled to the reliefs sought?
  - (iv) Who meets the costs of this Cause?

**II. EMPLOYMENT**

9. The parties are diametrically opposed on the issue of whether the Claimant was an employee of the Respondent at the material time or indeed any other time or at all. While the Claimant alleges that he was an employee of the Respondent as pleaded, the Respondent denied in toto that it employed the claimant as alleged or in any other manner howsoever.
10. This issue becomes so fundamental and core in this cause that the outcome thereof has drastic ramifications on all the other issues and the outcome of the entire cause. This is because, if the court finds that the claimant was an employee as pleaded, the court shall proceed to consider the other issues and determine each issue on merit.
11. However, if the court finds that the Claimant was not an employee of the Respondent, then the cause collapses and it would be an exercise in futility in dealing with the other issues on reliefs awardable and the quantum thereof.
12. In paragraphs 4 and 5 of the amended claim, the Claimant pleads as follows:-
- “(4) On or about 2007 the respondent employed the services of the claimant as a labourer earning a basic monthly salary of Kshs.11,200/= exclusive of House allowance. And was not given appointment letter as required by law.
- (5) The claimant commenced employment in 2007 as aforesaid and served the respondent with loyalty and diligence until 17<sup>th</sup> August, 2016 when the respondent wrongfully and unlawfully terminated the services of the claimant and failed to pay him his terminal dues as tabulated below”.
13. On the other hand in paragraphs 3, 4, and 5 of the amended response, the Respondent denies ever engaging the services of the Claimant as alleged or at any other time or at all and puts the claimant to strict proof thereof.
14. The genesis of this claim may be traced to undated demand letter addressed to the Respondent by Kituo Cha Sheria that was produced as an exhibit during the hearing of this cause. In that letter, the Claimant was demanding a total of Kshs.196,000/= comprising of one month's pay in lieu of notice, compensation for unfair termination, and service pay.
15. In a rejoinder to the letter dated 10<sup>th</sup> October, 2016 the Respondent denied the claim in the aforesaid demand letter and categorically stated that the Claimant and the Respondent were strangers. The said letter was produced as an exhibit during the hearing.
16. The parties to this cause maintained and held the above positions as per the letters described, through the hearing and even in their respective written submissions.
17. In his testimony the Claimant (CW1) stated that he was employed as a labourer to perform office work. He stated that he was not issued with a written contract and that his salary was always paid in cash.
18. The Claimant alleged that he performed various tasks in the office and also outside the office. However, the Claimant did not give any description of what his job entailed.
19. The description given in the aforementioned demand letter and the memorandum of claim is that of “labourer”. But then the question remains a labourer performing what job or tasks?
20. As stated above the Claimant testified alone and called no other witness in support of his claim. On the other hand, the Respondent called two witnesses who corroborated each other in their position that the Claimant was never an employee of the Respondent.
21. While the law does not provide for any number of witnesses that may be required or called to prove any specific allegation, except in certain and specific instances where the law provides so, it is always advisable to call more than one witness to support a specific allegation, especially where an important or core issue is so contested as to determine the direction of the entire cause.
22. As stated earlier on the issue of whether the Claimant was an employee of the Respondent as alleged was and remains a hotly contested issue, right from the first letter of demand, the response thereto, the amended statement of claim and the amended response thereto, the oral testimonies in court, and the filed written submissions.
23. Section 2 of the Employment Act No. 11 of 2007 (the Act) defines an employee as a person employed for wages or a salary, and includes an apprentice and indentured learner. Since there is no allegation that the claimant was an apprentice or an indentured learner, the material part is that of an employee engaged for salary or wages.
24. On the other hand, an employer is a person or public or private body who engages an employee and pays such an employee a wage or a salary for services rendered based on a contract, whether such contract is oral or written.
25. The definition of an employee and the employer gives rise to duties and obligations on both parties to a contract of service of employment and the entire Act is dedicated to providing for those rights and obligations and safeguarding and protecting the same.
26. Courts have dedicated time in laying down the principles or tests to be applied in establishing whether an employer/employee relationship existed between parties to a cause where that issue is contested.
27. In *Christine Adot Lopeyio Vs Wycliffe Mwathi Pere*, a case cited by counsel for the Respondent, Mbaru J. dealt at length with this

issue. The tests set out in that judgment include the control test, integration test, the test of economic or business reality, and mutuality of obligation. Nzioki Wa Makau J. also dealt with the issue in *Samuel Wambugu Ndirangu Vs 2NK Sacco Society Limited*.

28. Applying the same tests to this cause, the court is of the view that the Claimant has not established and proved that he was an employee of the Respondent.

29. This court has scrutinized and examined the pleadings filed, the oral testimonies given, the exhibits produced, and the written submissions filed from both sides. Right from the demand notice by Kituo Cha Sheria, the Respondent denied that the Claimant was their employee. This was again reiterated in the amended response to the claim.

30. Right from the word go, ab initio, the Claimant knew that the issue as to whether he was an employee of the Respondent was a hotly contested issue. It is a cardinal rule of evidence that he who alleges must prove and as such it was all along incumbent upon the Claimant to prove that he was indeed an employee of the respondent, before any other issue such as reliefs available is to be considered.

31. As noted elsewhere in this judgment, the Claimant testified alone in support of his case. He did not produce a written contract and hence he was legally obligated to establish the existence of an oral contract.

32. The Claimant did not produce any evidence of payment of salary and to that effect and only stated that he was paid in cash. More fundamentally, the Claimant was not able to describe and identify with specificity the type of work that he performed and where. He simply stated that he was a labourer. Surely, even as a general labourer he should be able to describe his duties, his supervisors, reporting time to and out of work, and such other issues that the Claimant should be expected to know with certainty

33. The law provides for a legal forum through which a party to a cause can apply for the other party to be compelled to avail specific evidence or information that an applicant may have reasons to believe that the other party has access to and which the applying party feels should aid their case. The Claimant did not make such an application for records on salary payments, work attendance, etc. to be produced by the Respondent.

34. Even more interestingly, the Claimant did not call any witness to corroborate his evidence on employment. Such a witness could have been a workmate, a family member, or even a regular customer who knew and witnessed the Claimant working for the Respondent as claimed.

35. The employment identify cards produced by the Claimant were disowned by the Respondent as forgery and lacking signature of an authorized officer of the Respondent. The Claimant could not inform the court as to who signed the said identity cards.

36. As to the photograph produced by the Claimant allegedly wearing a uniform resembling that worn by the employees of the Respondent and standing next to a vehicle belonging to the Respondent, RW1 offered a reasonable explanation. RW1 stated that while the uniform resembled that of their employees, he could not confirm from the photograph, that it was a genuine one issued by the Respondent. RW1 further stated that it was not unusual for freelance touts to wear such uniform to avoid arrest by council askaris.

37. RW1 further stated that he knew the Claimant as a freelance tout who could bring passengers to the Respondent for a commission that was paid in cash. RW2 produced employment records and deductions paid to NHIF and NSSF by the Respondent on behalf of their employees and stated that the Claimant's name is not therein for the reason that the Claimant was never an employee of the Respondent.

38. The court is inclined to believe the testimonies of RW1 and RW2, which were corroborative on the basic issue of employment. It was all along the burden of the Claimant to prove that he was indeed an employee of the Respondent. The court is of the considered view, based on the analysis of the evidence adduced, that the claimant do not prove his case on a balance of probability, that he was an employee of the Respondent during the material time or indeed at any other time.

39. The Claimant has not established by evidence that there existed a written or oral contract of employment between him and the Respondent. He has not established payment of salary either way and there is no evidence to corroborate his assertion on employment.

40. Prove of a case on a balance of probability does not discharge the claimant from establishing his case. It is not enough to state a case in pleadings, testify in court, file submissions and then assume that the case is proven. Proving a case is not a formalistic process; evidence in support must be adduced to convince the Court that the proposition made by the Claimant is more likely than not to be the truth. That is what is variously referred to as balance of probability.

41. The court is of the unmistakable view and holds the position that the Claimant has failed to discharge his obligation in this case. The probative value of the evidence as adduced by the Claimant falls far below the required standard of balance of probability.

### **III . DISPOSAL**

42. Having found that the Claimant has not proved, on a balance of probability, that he was an employee of the Respondent, it is absolutely unnecessary to go into the other issues identified for determination. The only issue left is that of costs.

### **IV. COSTS**

43. Ordinarily, costs follow event and that is the generally applicable principal on costs.

44. While this court has legal discretion is awarding costs, that discretion cannot be exercised in a manner that departs from the general principles, unless on sound legal grounds. This court has no reason to depart from the general principle on costs in this cause and hence the Respondent shall have costs of this litigation, to be agreed or taxed in accordance with the applicable law.

45. In the circumstances, and in view of all that the court has stated above, this cause is dismissed with costs to the Respondent.

**DATED, DELIVERED, AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER 2021**

**DAVID NDERITU**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by COVID-19 pandemic this Judgment has been delivered via microsoft teams online platform.

A signed copy will be availed to each party upon payment of court fees.

**DAVID NDERITU**

**JUDGE**