



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1964 OF 2016**

**WAGO ROBA MOLU.....CLAIMANT**

**VERSUS**

**PERSONAL SYSTEMS COMPUTER LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The suit herein was commenced vide a statement of claim filed before this Court on 23<sup>rd</sup> September, 2016 through which the claimant seeks various reliefs on account of unlawful termination. The claimant averred that he was an employee of the respondent with effect from 19<sup>th</sup> February, 2000 or thereabout, and that his services were terminated verbally, on or about 28<sup>th</sup> February, 2016.

2. The respondent disputed the employment relationship and averred that the claimant has never been its employee at all, more so given that it was incorporated in 2007, whereas the claimant alleges that he was employed in the year 2000.

3. The matter proceeded for hearing on 22<sup>nd</sup> September, 2021 and each side called one witness.

**Claimant's case**

4. The claimant took the stand and testified in support of his case. At the outset, he sought to rely on his witness statement which he adopted as part of his evidence in chief. He also produced the bundle of documents filed together with his claim, as exhibits before Court.

5. The claimant reiterated the averments contained in his witness statement. He told court that he was employed as a security guard by the respondent between the years 2000 and 2016. That sometimes in the morning of 19<sup>th</sup> February, 2016, upon finishing his night shift, he went home to rest, only to be called back at 1:00 pm by one Mr. Mahmood Khambiye (Mr. Mahmood), who informed him of some alleged theft at his residence. That it was then, that the said Mr. Mahmood verbally terminated his services. He also informed court that at the time of his termination, he was earning a monthly salary of Kshs 10,000/= . He prayed that the court allows his claim as prayed.

6. In cross examination, the claimant stated that he was employed by the said Mr. Mahmood and that he was stationed to guard his house, which is in Parklands, near Wambugu Hotel. He admitted that the said Mr. Mahmood or his uncle would pay his salary, which would normally be in cash.

7. In re-exam, the claimant told court that the respondent was going by the name Apple Systems in the year 2000 and added that the said Mr. Mahmood was the owner of the said company.

**Respondent's case**

8. The respondent's Administrator, Mr. Khamati Amwayi testified as RW1. He also sought to rely on his witness statement, which he adopted as part of his evidence in chief. He also relied on the bundle of documents filed on behalf of the respondent and which he produced as exhibits before court.

9. RW1 told court that the claimant was not an employee of the respondent. That the respondent was established in the year 2007 and that he has been its employee since then. He averred that the respondent is situated in Regal Plaza along Limuru road and that it has never operated in Parklands near Wambugu Hotel. He further told court that the respondent has never employed any security guard and that such services are normally contracted for under the tenancy agreement it has entered into with its landlord.

10. He further told court that Mr. Mahmood is a director of the respondent and lives in Parklands near Wamabugu Hotel. He further stated that he is in charge of paying the staff of the respondent and that the claimant has never appeared in its payroll. He summed up his testimony by stating that he does not know the claimant and has never seen him at the respondent's office premises.

11. In cross examination, RW1 stated that the staff identity card produced by the claimant does not belong to the respondent since its staff have never been issued with any identification cards. He stated that the respondent maintains an employee register but the same was not before court.

### Submissions

12. Upon close of the hearing, both parties filed written submissions. On his part, the claimant submitted that he was an employee of the respondent and that the incorporation certificate it produced cannot serve as conclusive proof to discount his employment status. On this issue, he invited the court to consider the holding in the case **Christine Adot Lopeyio vs Wycliffe Mwathi Pere (2013) eKLR** and **Everret Aviation Limited vs Kenya Revenue Authority (through the Commissioner of Domestic Taxes) (2013) eKLR**.

13. He also submitted that the respondent had failed to discharge its burden of proof to the extent that the staff identity card he had produced was a forgery.

14. On its part, the respondent reiterated that the claimant has never been its employee. It also invited the court to consider the case of **Christine Adot Lopeyio vs Wycliffe Mwathi Pere (2013) eKLR**. It was the respondent's submission that the claimant was never subject to its commands, rules and procedures. That despite the said Mr. Mahmood being a director of the respondent, it can never be held liable herein as it is a separate legal entity from its directors/shareholders. On this issue it placed reliance on the case of **Salomonn vs Salomon (1897) AC**.

### Analysis and Determination

15. In view of the pleadings before court, the evidence on record and the rival submissions, it is apparent that this court is being called upon to determine the following issues;

**i. Whether the claimant was an employee of the respondent?**

**ii. If the answer to (i) is in the affirmative, was his termination unfair and unlawful?**

**iii. What reliefs if any, avail to the claimant?**

### Whether the claimant was an employee of the respondent?

16. The claimant has averred that he was employed as a security guard by the respondent, and that he was stationed at the residence of Mr. Mahmood who is its director. To support his assertion, the claimant produced a staff identity card purportedly issued by the respondent. The said staff identity card was disputed by the respondent who averred that its employees were issued with name tags for identification purposes.

17. To counter the claimant's assertions, the respondent produced a certificate of incorporation issued on 18<sup>th</sup> June, 2007, to prove that it came into existence way after he was allegedly employed.

18. The claimant has submitted that a certificate of incorporation is not conclusive evidence to discount an employment relationship. While that may be the case, it is also true that the staff identity card produced by the claimant and bearing the names of the respondent, is not conclusive evidence to prove the existence of an employment relationship. There is more that needs to be established through oral and documentary evidence. It is therefore necessary to interrogate all the evidence presented before court in order to arrive at a reasoned determination as regards the relationship of the two parties.

19. It is notable that the certificate of incorporation issued to the respondent granted it a juristic character, effective that date.

20. Section 2 of the Employment Act (Act) defines an employer to mean **any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.**

21. In this regard, upon incorporation, a corporate entity, as the respondent herein, is capable of entering into all manner of contracts including, employment. Upon entering into an employment contract, such an entity is bound by the provisions of the Employment Act particularly in regards to the rights and responsibilities flowing therefrom. Where the employment period exceeds 3 months, such rights and responsibilities are to be reduced into writing. It is that written document that would constitute the employment contract between the parties. The details of such an employment contract include, particulars of the parties, the job description, commencement date, place of work and remuneration.

22. Further, and more significantly, the employee would ordinarily be subject to the employer's directions, commands and/or rules.

23. In his testimony, the claimant admitted that the said Mr. Mahmood or his uncle would pay his salary. In addition, he stated that his place of work was Mr. Mahmood's residence in parklands area. It is notable that the claimant never at any one time stated or even remotely suggested that he rendered his services from the respondent's office premises. If anything, his entire testimony revolved around Mr. Mahmood. As a matter of fact, it was his testimony that it was the said Mr. Mahmood who verbally terminated his services.

24. On the other hand, the respondent asserted that it manages its daily operations from Regal Plaza and to this end, produced a lease

agreement to confirm the same. The claimant was very clear in his testimony that he rendered his services from the residence of Mr. Mahmood and that the said house was situated in Parklands near Wambugu Hotel. Further, he never indicated whether or not he had ever interacted with RW1, an employee of the respondent.

25. The claimant in this case had the onus to prove his case on a balance of probability and in particular, that he was actually an employee of the respondent. This he failed to do.

26. It is therefore apparent that from the testimony of the claimant and evidence on record, it was the said Mr. Mahmood who was his employer and not the respondent.

27. It is common ground that Mr. Mahmood is a director of the respondent. In view of the fact that the evidence presented points to the fact that the claimant was employed by Mr. Mahmood, does that then make the respondent liable in this regard? The answer to this question lies in the principles of corporate personality as espoused in the celebrated case of **Salomon v Salomon & Co. Ltd. [1897] AC**.

28. It is trite law that a company is a separate legal entity and thus a juristic “person” in the eyes of the law. This was well elaborated in the Salomon case (supra).

29. In the case of **Victor Mabachi & Anor v Nurturn Bates Ltd NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR**, the Court of Appeal reiterated the principles set out in the **Salomon case** as follows, “**A company as a body corporate, is a persona juridica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.**”

30. In view of the finding in the above precedent which I wholly adopt, I find that the respondent is not liable at all to the claimant for the acts or omissions of Mr. Mahmood who from all indication appear to have been his employer.

31. Having found that the evidence before court clearly indicates that Mr. Mahmood was the claimant’s employer, it is not clear why he did not deem it fit to enjoin him in the instant case. Indeed, nothing stopped him from enjoining Mr. Mahmood as a party to the suit. At least he would have partially salvaged his case.

32. In view of the foregoing, the court finds that the claimant has failed to prove his case on a balance of probability to the effect that he was an employee of the respondent. As such, there was no employment relationship between the claimant and the respondent, hence no rights or responsibilities accrued between them.

33. Having found as such, it is not necessary to consider whether the termination was unfair and unlawful or the reliefs payable.

34. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Waiganjo

For the Respondent Ms. Mwangi

Court assistant Barille Sora

**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 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**