



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1287 OF 2015**

**FRANCIS KINYUA MWANGI.....CLAIMANT**

**V**

**HOME SCOPE PROPERTIES LTD.....RESPONDENT**

**JUDGMENT**

1. Francis Kinyua Mwangi (Claimant) instituted legal proceedings against Home Scope Properties Ltd (Respondent) on 27 July 2015 and he stated the Issue in Dispute as Wrongful and unfair termination of the Claimant's services and failure by the Respondent to pay terminal benefits to the Claimant.

2. The Claimant filed an *Amended Memorandum of Claim* on 12 October 2017 and the Respondent filed a *Memorandum of Response* on 25 January 2019.

3. The Cause was heard on 19 December 2019. The Claimant and a Messenger with the Respondent testified.

4. The Claimant's submissions should have been filed/served on or before 24 January 2020 but were not on file by this morning while the Respondent filed its submissions on 18 February 2020.

5. The Court has considered the pleadings, evidence and the submissions and will adopt the Issues as identified by the Respondent in its submissions.

**Employment relationship**

6. The Claimant asserted that he was employed by the Respondent as a machine operator on 15 June 2013 until dismissal on 28 August 2014 and that he used to be paid through voucher by one Wambua on the instructions of a Manager called Mbugua. He stated that the Respondent's offices were in Karen and that he was deployed to a site near Yaya Centre.

7. The Respondent denied that it employed the Claimant and contended that he was an employee of an independent contractor called Mbugua whom it had contracted on some projects.

8. The Respondent called its Messenger as the witness to support the assertion. The witness testified that he used to deliver payment cheques to the said Mbugua, and at other times he would deposit the cheques into Mbugua's account. The witness produced copies of payment slips.

9. The Court has two inconsistent versions as to the nature of the employment relationship between the Claimant and the Respondent. The credibility of both the Claimant and the Respondent's witness were not impeached.

10. The Court can in the circumstances turn to probabilities to determine the nature of the relationship.

11. It was incumbent upon the Claimant to provide some modicum of evidential foundation to demonstrate an employment relationship with the Respondent. He had filed a witness statement of a person who contended that he worked under the supervision of the Claimant.

12. The Claimant did not explain why he failed to call this prospective witness or any other person he may have worked with to show the nature of the contractual relationship in place.

13. In a letter dated 11 March 2015 from the Respondent to the Claimant's advocate, the Respondent had denied any employer/employee

relationship with the Claimant.

14. From that early, the Claimant was aware that he needed to go a little further to prove the contractual relationship and he could even have amended his pleadings to include the alleged independent contractor who the Respondent claimed was his employer.

15. The Claimant failed to go that little further, and without such evidential foundation, the Court is unable to utilise the provisions of sections 9(2) and 10(7) of the Employment Act, 2007, to draw an inference of employer/employee relationship.

16. The Claimant having failed to establish an employment relationship with the Respondent means the Court has to down its pen and dismiss the Cause without considering any other Issues identified and arising.

17. It is also telling that the Claimant did not/file submissions within the agreed timelines. Perhaps, he realised that there was not much to submit on in respect to the foundational question of whether he was an employee of the Respondent.

18. The Cause is dismissed with costs to the Respondent.

**Delivered, dated and signed in Nairobi on this 13<sup>th</sup> day of March 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Gichigo instructed by Ndegwa & Ndegwa Advocates

For Respondent Ms. Njagi instructed by Garane & Somane Advocates

Court Assistant Judy Maina