



**Omusamia v Upperhill Springs Restaurant (Cause 852 of 2017)  
[2021] KEELRC 3 (KLR) (5 October 2021) (Judgment)**

*Benjamin Joseph Omusamia v Upperhill Springs Restaurant [2021] eKLR*

Neutral citation: [2021] KEELRC 3 (KLR)

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

**CAUSE 852 OF 2017**

**K OCHARO, J**

**OCTOBER 5, 2021**

**BETWEEN**

**BENJAMIN JOSEPH OMUSAMIA ..... CLAIMANT**

**AND**

**UPPERHILL SPRINGS RESTAURANT ..... RESPONDENT**

**Contract of service vis-à-vis contract for service**

Reported by John Ribia

*Labour Law - employment-nature of employment relationship – contract for service vis-à-vis contract of service – independent contractor vis-à-vis employee - what was the difference between a contract for service and a contract of service - what tests would the court use to determine whether one was an independent contractor or an employee - Employment Act, 2007 section 2.*

**Brief facts**

The claimant stated that he was employed by the respondent as a cook. The claimant alleged that he served the respondent continuously, dutifully and diligently, till September 2016, when the respondent terminated his employment without giving any reasons. Aggrieved, the claimant filed the instant suit and claimed unfair termination.

The respondent denied employing the claimant. The respondent alleged that the claimant was engaged as an independent contractor and not an employee.

**Issues**

- i. What was the difference between a contract for service and a contract of service?
- ii. What tests would the court use to determine whether one was an independent contractor or an employee?
- iii. Whether the claimant was unfairly dismissed?



## Held

1. The respondent while admitting that the claimant worked for it, asserted that he did so under contract for service, that relationship being that of contractor-client. The claimant on the other hand contended that their relationship was anchored on that which was termed a contract of service. The relationship was therefore that of employer-employee, him being an employee of the respondent.
2. Those under a contractor-client relationship, play in a different league from those in an employee-employer one. The expansive protection and remedies provided for under the current labour relations system, under various legislations, were only available to employees. Independent contractors were not employees and thus did not enjoy the protection of the statutes. That made it imperative for the court to determine the nature of the relationship from the onset.
3. A contract of employment was one by which a person, the employee undertook for a limited time or indeterminate period of time to do work for remuneration according to the instructions and under the direction or control of another person, the employer. Section 2 of the Employment Act, 2007 defined an employee as a person employed for wages or salary and that included an apprentice and indentured learner. The provision did not offer much that was of use in deciding on the test to apply to determine whether one was an employee or an independent contractor, whenever one was called upon to.
4. Section 2 of the Employment Act, 2007 defined a contract of service, as an agreement whether oral or written and whether express or implied, to employ or to serve as an employee for a period of time and it included a contract of apprenticeship and indentured learner. A contract for service was a contract by which a person, contractor or service provider made a commitment to another person, the client, to carry out material or intellectual work or to provide a service for a price or fee. Its characteristic being that the contractor was free to choose the means of performing the contract and no relationship of subordination existed between the contractor or the provider of the service and the client in respect of such performance.
5. In determining if a worker was an independent contractor or an employee the court had to search for the total relationship of the parties. It was exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service served a useful purpose. The most that could profitably be done was to examine all the possible factors which had been referred to in those cases as bearing on the nature of the relationship between the parties concerned. Not all the factors would be relevant in all cases or had the same weight in all cases. Equally no magic formula could be propounded for determining which factors should, in any given case, be treated as the determining ones.
6. The tests that courts had employed over years, included, the control test – assessing the presence or absence of control; a manager or supervisor might or might not have over their worker, the fourfold test; control, ownership of the tools, chance of profit, risk of loss, and lastly the integration test. The approach looked at whether the service being provided by the worker was an integral part of the business done on behalf of the business but not integrated into the business.
7. The factors to consider in determining whether one was an employee and therefore under a contract of service was where:
  1. the servant agreed to provide his own work and skill by providing services for that matter, in consideration of wages or other remuneration.
  2. The servant agreed that in the performance of that service they would be subject to the master's control. Control included the power of deciding the things to be done, the way in which they had to be done, the means to be employed and in doing them, the time and place where they were to be done.
  3. The contract of service complied with the terms of an employment agreement. That entailed complying with the statutory requirements in the Employment Act including minimum wage, provision for leave and payment of income tax.



8. The respondent took a firm position that the contract between the parties, was a contract for service and therefore the claimant was an independent contractor and the relationship *inter se* was that of contractor-client. That was just a bold assertion. One expected the assertion to be backed up by documents. That did not happen. From the onset, while responding to the claimant's memorandum of claim, the respondent crafted its defence, while knowing that the bedrock of its case was the characterization of the relationship as a contractor-client one. Its witness was to testify to it and indeed did. The respondent had not laid a basis for its allegation.
9. In a situation where one was taking a stand as the respondent did, it would not be strange and or an over expectation, for the court to expect production of an agreement from which the relationship could be discerned, a document(s) in nature demonstrating that for the work, or skills that the claimant rendered, a payment or payments were made that in character were not wages or salary, for instance, payment invoices, local service orders, and a document inviting the claimant for the work. Some form of register too to demonstrate when and how the work was done was needed. Documents that could have been produced including local purchase orders and payment vouchers were documents used in contracts for services.
10. The respondent did not discharge the burden placed upon him under sections 107 and 109 of the Evidence Act. The claimant, on the other hand, testified and tendered documents in evidence to support his claim that he was an employee of the respondent. He placed before the court an appointment letter, a salary increment letter, a termination letter and a summary dismissal letter. All those documents were on the respondent's letterheads, almost all of them were stamped, the stamp appeared to be the respondent's. All that the respondent's witness did was just say that the documents were not theirs. One could only take that assertion seriously if they went further to demonstrate why. For instance, by saying and demonstrating that those letterheads and the rubber stamp belonged not to the respondent, that their letters of, appointment, termination of employment, salary increment appeared to be coached in a style not the respondent's, and that the signature was forged.
11. The claimant stated that his letter of appointment placed before court, had a second page (execution page), but unfortunately, and by oversight, he did not file that page. He was candid on who signed the letter on behalf of the respondent. The respondent's witness admitted that during the period in issue, the signatory was the Human Resource Manager. The letter existed, it originated from the respondent. The claimant expressly stated that at all material times when reporting for duty he would sign a register at the gate. That allegation was not disputed.
12. The claimant's material was in consonance with the elements of a contract of service. The claimant discharged the burden of establishing that he was an employee of the respondent. The relationship between the claimant and the respondent was that of employee-employer.
13. Section 45 of the Employment Act, directed that no employer would terminate the employment of an employee unfairly. Section 45(2)(c) provided the fountain from which the requirement for engagement of a fair procedure flowed. In considering whether the procedure was fair, the test was whether there had been substantial compliance with the overall obligation to allow an employee an opportunity to rebut the allegations of misconduct or offer a representation on any grounds that the employer had indicated to be the basis for his intention to terminate the employment and bring to the attention of the employer any relevant information before a final decision is taken.
14. The respondent having taken the position that the relationship was on basis of a contract for service did not bother to place before the court any material geared towards establishing that the mandatory procedural aspects were honoured. In absence of any such demonstration, and in view of the fact that the claimant produced the two letters which in content were clear that they were in breach of the provisions of section 41 of the Employment Act, the dismissal was procedurally unfair.
15. Section 43 of the Employment Act placed upon the shoulders of an employer an obligation to prove the reason or reasons for the termination, failing of which the termination was to be deemed to have



been unfair within the meaning of section 45 of the Act. The respondent never directed their mind to that, preferring no evidence therefore, on the substantive fairness of the dismissal. The dismissal was unfair in terms of section 45 of the Employment Act.

16. The dismissal was not preceded with any notice. The claimant was entitled to one month's salary in lieu of notice. The claimant pleaded and testified that during his employment with the respondent, for the period 2015 – 2016, he did not proceed for leave and was not paid for the leave not taken. The respondent blurred by the position it took on the nature of the relationship between it and the claimant, did not put forth any specific challenge to that claim. Under that head, the claimant was awarded Kshs. 11,900.

*Claim allowed.*

### **Orders**

- i. *Declaration issued that the relationship between the respondent and the claimant, was that of employer and employee based on a contract of service.*
- ii. *Declaration issued that the dismissal of the claimant from employment was neither substantively nor procedurally fair.*
- iii. *The claimant was awarded the following:*
  1. *One month's salary in lieu of notice – Kshs. 17,000.*
  2. *Unpaid leave - Kshs. 11,900.*
  3. *Compensation pursuant to section 49(1)(c) of the Employment Act - Kshs. 153,000*
- iv. *Costs of the suit were awarded to the claimant.*
- v. *Interest on iii [(a), (b) and (c)] was at the court rates from the date of filing suit.*

### **Citations**

#### **Cases**

1. *Agola, Paul Ochieng v Gateway Marine Services Limited* Cause 602 of 2016; [2018] eKLR — (Explained)
2. *Kenya Hotel and Allied Workers Union v Alfajiri Villas (Magufa Ltd)* Cause 229 of 2013; [2014] eKLR — (Explained)
3. *Kenya plantations & Agricultural Workers Union v Sotik Highlands Tea Estate Limited* Cause 101 of 2015; [2016] eKLR— (Explained)
4. *Misango, Evans Kamadi v Barclays Bank of Kenya Limited* Cause 717 of 2010; [2015] eKLR — (Explained)
5. *Nyaga, Joseph v United Millers Limited* Cause 267 of 2015; [2019] eKLR— (Explained)
6. *Obara, Lydia Moraa v Tusker Mattresses Limited* Cause 1391 of 2016; [2021] eKLR— (Followed)
7. *Odeke, Donald v Fidelity Security Limited* Cause 1998 of 2011; [2012] eKLR — (Mentioned)
8. *Okech Maurice Odour v Chequered Flag Limited* Cause 12 of 2011; [2013] eKLR — (Explained)
9. *Okemwa, John Mogaka v Lavington Security Limited* Cause 1242 of 2010; [2013] eKLR - (Explained)
10. *Otieno, Gilbert Sule v Seventh Day Adventist Church (East Africa) Ltd (Sued on behalf of SDA Church, Kiamunyi East )* Cause 445 of 2014; [2014] eKLR — (Explained)

#### **Canada**

671122 *Ontario v Sagaz Industries Canada Inc* [2001] 2 SCR 983; 2001 SCC 59 — (Followed)

#### **United Kingdom**

1. *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [2010] BTC 49 - (Followed)
2. *Stevenson Jordan and Harrison Limited v McDonald and Evans* [1952] 1 TLR 101- (Followed)

#### **Statutes**

1. Employment Act, 2007 (Act No 11 of 2007) sections 2, 28, 34, 41, 43, 45(2)(c)(5); 49(1)(c) — (Interpreted)



2. Evidence Act (cap 80) sections 107, 109 – (Interpreted)

### **Texts & Journals**

Garner, BA., (Ed) (2004) *Blacks Law Dictionary* Thomson West 8<sup>th</sup> Edn p 564

### **Advocates**

Ms Omamo for the claimant.

Ms Merichi for the respondent

## **JUDGMENT**

### **\*\*Introduction\*\***

1. What is not in dispute in this matter is the fact that there was a work-related relationship between the claimant and respondent. However, the parties have taken a diametrically opposed positions on the character of the relationship and the reliefs if any that should be availed to the claimant. In his pleadings the claimant asserts he is entitled to all those reliefs, whilst the respondent contends that none should be availed to him. The respondent characterizes the relationship as a “contract for service.” While the claimant sees it differently.

### **\*\*The Claimant's Case\*\***

2. When this matter came up for hearing before me, the claimant moved court to have his witness statement adopted as his evidence in chief and the documents that were filed under the list of documents of even date, as his exhibits. The statement was so deemed, and the documents accepted as his exhibits 1 – 5.
3. The claimant stated that he was employed by the respondent on the 10<sup>th</sup> March 2021, as a cook, whereat he served the respondent continuously, dutifully and diligently, till the 28<sup>th</sup> September, 2016, when the respondent terminated his employment.
4. He contended that on the 28<sup>th</sup> September, 2016 the respondent’s Human Resource Manager, one Mrs. Mary Wanjiru issued him with two letters, one being a termination letter and the other being a dismissal letter. The letters were produced as exhibits 3 and 4.
5. The claimant states that upon receipt of these letters, he got prompted to approach the Human Resource Manager, for clarification, only to be told to clear and vacate the respondent’s premises.
6. The claimant testified to the termination. He asserted that it amounted to a summary dismissal, which was unlawful and unfair, taking into account that he had served the respondent diligently and without blemish. There was want of procedural fairness.
7. He contended that the respondent never required him to show cause any time prior to the termination.
8. At the time of the alleged dismissal, he was earning Kshs. 17,000 per month. He testified further that the respondent used to deduct dues for NSSF, and submit the same to the relevant Pension Scheme. He was paid house allowance and allowed to proceed for his leave every year.
9. The claimant in his evidence produced as an exhibit an appointment letter dated 10<sup>th</sup> March 2014 and a salary increment letter dated 6<sup>th</sup> May, 2015.
10. Cross examined by counsel for the respondent, the claimant reiterated that he was appointed on the 10<sup>th</sup> March 2014. He stated that this was through the appointment letter which was given to him by



the Human Resource Manager then , one Shamim. He admits that the name of the Human Resource manager is not on the letter, but maintained that the letter was complete in content.

Referred to the termination letter at page 11 of his bundle of documents, the witness acknowledges that there is a signature thereon of Mary Wanjiru, the Human Resource Manager.

11. Asked on the nature of the relationship, the claimant contended that it was on a permanent basis. He used to work on a daily basis, checking in and out by signing a gate book.
12. Under re-examination, he asserted that he was given a salary increment and that the daily attendance record is a document in the possession of the respondent. He was issued with a dismissal letter, without first being invited to show cause.

### **The Claimant's Submission**

13. In the submissions counsel for the claimant presents the following issues as those that emerge for determination in this matter.
  - a) Whether the agreement between the parties amounted to a contract of service.
  - b) Whether there were valid reasons for the respondent to terminate the claimant's employment.
  - c) Was fair procedure applied before disengaging the claimant from employment?
  - d) Is the claimant entitled to the reliefs sought?
  - e) Who should bear the costs of this suit?
14. It is submitted that an employee is defined under section 2 of the Employment Act, 2007 to mean a person employed for wages or a salary and includes an apprentice and indentured learner.  
  
Similarly, *Blacks Law Dictionary* 8<sup>th</sup> Ed at page 564 defines an employee as a person who comes in the service of another (the employer) under an express or implied contract of hire, under which the employer has a right to control the details of work performance.
15. Section 2 of the Employment Act, 2007, defines a contract of service as an agreement whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learner.
16. Citing the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* counsel stated that therein the court did put forth conditions required to establish a contract of service, thus;
  - (i) The servant agrees to provide his own work and skill by providing services for their master, in consideration of a wage or other remunerations.
  - (ii) The servant agrees that in the performance of that service they will be subject to the master's control. Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time, and the place where it shall be done.
  - (iii) The contract of service complies with the terms of an employment agreement. This entails complying with the statutory requirements in the *Employment act* including minimum wage, provision for leave and payment of income tax.





17. In *Kenya Hotel and Allied Workers Union v Alfajiri Villas* . The court analyzed the difference between an employee under the Employment Act and an independent consultant thus;

“..... a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own businesses, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his services and will be paid accordingly and will not be subject to usual ‘employment’ matters such as the deduction of PAYE, will not get annual leave, sick leave.”

18. It was further submitted the material placed before this court by the claimant, and pieces of evidence by the respondent’s witness are all indicative that the claimant was an employee under the Employment Act, and not a contractor.

19. Despite the respondent alleging that the claimant was a contractor for service, they did not put before this court any documentary evidence, such as a contract agreement, invoices or payment vouchers as proof of the existence of a contract for service. It was further submitted that the respondents have not substantiated their allegations and are merely trying to cover up for their unlawful and unfair termination. Reliance is put on the decisions in *Paul Ochieng Agola v Gateway Marine Services Limited* and *Maurice Odour Okech v The Chequered Flag Limited* .

20. The respondents in their pleadings and testimony disputed the authenticity of the documents availed in court by the claimant but they did not avail to court any of their alleged true copies of documents for comparison so that it can be concluded that indeed the documents presented by the claimant were forged.

21. On whether the respondent had valid reasons to terminate the claimant’s employment, counsel submits that section 43 of the Employment Act, 2007 provides that in any claim arising out of termination of an employment contract, the employer is required to prove the reason or reasons for the termination and where the employer defaults to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act.

22. That section 41 of the [employment Act](#) provides for a mandatory procedure before termination.

23. There were no valid reasons. The procedure was not followed.

24. In determining fairness or otherwise of the dismissal, counsel submits that this court should give it an approach as was put forth in *Evans Kamadi Misango v Barclays Bank of Kenya Limited* where the court stated: -

“To my mind the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee. The *Halsbury’s Laws of England* (4<sup>th</sup> Edition Volume 16) at page 481 expounds this principle as follows: -

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those fact; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on the same facts. The basis of this approach (the range of reasonable test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take another; the function of a tribunal as an industry jury is to determine whether in particular circumstances of each case the decision to dismiss the employee fell within the band of



reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; but if it falls outside the band, it is unfair”.

25. On the reliefs, counsel submitted that having not been given notice or paid, the claimant is entitled to one month’s salary in *lieu* of notice under section 34 of the Employment Act.
26. It was further submitted that for the period of his service with the respondent, the claimant did not go on leave. He was not paid for untaken leave. According to counsel, payment in *lieu* of untaken leave is payable pursuant to section 28 of the Employment Act.
27. In the circumstances of the matter considered an injustice to the claimant in the submissions, and the extent of want of adherence to procedure by the respondent, it is submitted that this court should be impressed to grant a compensatory award, equivalent to 12 months’ gross salary of the claimant. The case of *Donald Odeke v Fidelity Security Limited*, is cited.

**\*\*The Respondent's Case\*\***

28. The respondent in reaction to the claimant’s case filed a memorandum of response, and the ‘take home’ from the response is: -
  - (i) That the claimant was indeed working for the respondent but on “a contract for services” basis as a cook and not on a contract of services” basis.
  - (ii) That the relationship between the claimant and the respondent was that of contractor – client.
  - (iii) That by reason of the nature of this relationship the reliefs sought by the claimant cannot be availed.
29. The respondent presented Mr Anthony Wambugu, to testify in support of its case. He adopted the contents of his witness statement as his evidence in chief. He stated that he is an accountant by profession.
30. The witness maintained that the relationship between the claimant and the respondent was that of contractor-client. That the claimant whenever he rendered services for the respondent, he was required to leave the service.
31. The witness denied the authenticity of the documents that the claimant had placed before court asserting that they did not emanate from the respondent. He testified that whenever an employee is given a document by the respondent a file copy remains in their records.
32. Cross examined by Ms Omamo, the witness stated that the claimant was working on basis of a contractor for services. He was being paid timely upon completion of the service. He admitted that he did not have a document to prove his assertion.
33. The witness contended that the appointment letter did not originate from the respondents Human Resource Department. It did not have a signature.
34. Shown and asked about the salary increment letter, the witness said that he was yet to confirm that the document was from them. And on the termination letter he stated that he is not in a position to say that the letter was theirs. He did not see a copy in the file.

**\*\*The Respondent's Submissions\*\***

35. It is submitted that two issues present themselves for determination in this matter namely: -
  - (i) Whether the respondent’s decision was lawful.





- (ii) Whether the orders sought by the claimant ought to be granted.
36. It was contended that the claimant did not demonstrate that indeed he was an employee of the respondent. That he did not prove that he was earning Kshs 17,000 per a month at the time of termination, and that the respondent was remitting NSSF dues for him. The allegation that the respondent was paying him house allowance and that he used to be accorded leave every year were matters that were not proved by the claimant.
37. On the reliefs sought by the claimant, the respondent testified that the same cannot be available to the claimant as they cannot be accommodated in the relationship that were between it and the claimant. The decision in *Kenya plantations & Agricultural Workers Union v Sotik Highlands Tea Estate Limited* was cited to buttress these submissions.
38. Without an employment relationship, the claimant being well defined as an independent contractor and having been paid for work done upon presentation of a debit note, the suit herein cannot be sustained. It was submitted, and reliance put on the decision in *Joseph Nyaga v United Millers Limited Cause No 267 of 2015 [Nakuru]*.
39. Lastly it was submitted that an independent contractor offers a given service while running his own business and free to carry out his work for more than one employer at the same time. At the end of the service an invoice is drawn and payment is done accordingly or as agreed. Such a contractor is not subject to the usual employment matters such as statutory deductions or off days, annual leave or overtime day. In the case of *Gilbert Sule Otieno v Seventh Day Adventist Church (East Africa) Limited*, the court held; -

“The contract provided for the obligations, duties and responsibilities of each party. None of the obligations, duties and responsibilities accruing to the claimant are of the genre which constitute the fundamental rights or basic conditions and terms of employment of an employee such as entitlement to a wage/salary, which is an essential of a contract of service, hours of work, entitlement to annual leave, public holidays, accommodation or in lieu housing allowance, pensions and protection against unfair or wrongful dismissal.”

#### DETERMINATION

40. Parties herein did not agree on the issues for determination. This being so it falls upon this court to bring out issues that it considers emerge from the material presented by the parties. I consider the following issues as the ones that present themselves for determination: -
- (i) What was the relationship between the claimant and the respondent?
- (ii) Was there a dismissal of the claimant from employment by the respondent?
- (iii) If the answer to (ii) above is in the affirmative, was it substantively and procedurally fair?
- (iv) Can the reliefs sought by the claimant be available to him?
- (v) Who should bear the costs of this suit?
- (i) What was the relationship between the claimant and the respondent?
41. Contract of service or contract for service? This is what this court must answer if the captioned issue has to be determined. As stated hereinabove, the respondent while admitting that the claimant worked for it, asserted that he did so under contract for service, that relationship being that of contractor-client. The claimant on the other hand contended that their relationship was anchored on that which



is termed a contract of service. The relationship was therefore that of employer-employee, him being an employee of the respondent.

42. Those under a contractor-client relationship, play in a different league from those in an employee-employer one. The expansive protection and remedies provided for under the current labour relations system, under various legislations, are only available to employees. Independent contractors are not employees and thus do not enjoy the protection of the statutes. This makes it imperative for me to determine the relationship from the onset.
43. A contract of employment is one by which a person, the employee undertakes for a limited time or indeterminate period of time to do work for remuneration according to the instructions and under the direction or control of another person, the employer.
44. Section 2 of the Employment Act, 2007 defines an employee as a person employed for wages or salary and include an apprentice and indentured learner. In provision this section offers very little in matters, the test to apply to determine whether one is an employee or an independent contractor, whenever one is called upon to.
45. Section 2 of the Employment Act, 2007 defines a contract of service, as an agreement whether oral or in written and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learner.
46. Contract for service can be said to be a contract by which a person, contractor or service provider makes a commitment to another person, the client, to carry out material or intellectual work or to provide a service for a price or fee. Its characteristic being that the contractor is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of service and the client in respect of such performance.
47. In determining if a worker is an independent contractor or an employee the court must search for the total relationship of the parties. I say this alive of the fact that over years courts have developed various tests to aid in the determination. What test applies in what case would depend in the peculiar circumstance of each case. On this, the Supreme Court of Canada, in *Ontario v Sagaz Industries Canada Inc.* stated: -

“it is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves useful purpose ..... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all the factors will be relevant in all cases or have the same wight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated the determining one.”
48. The tests that courts have employed over years, include, the control test – assessing the presence or absence of control a manager or supervisor might or might not have over their worker, the fourfold test – control, ownership of the tools, chance of profit, risk of loss, lastly the integration test, developed in *Stevenson Jordon and Harrison Limited v MCDonald and Evans* (1952), the approach looks at whether the service being provided by the worker is an integral part of business done on behalf of the business but not integrated into the business.
49. In *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* clarified the factors to consider in determining whether one was an employee and therefore under a contract of service as where: -



- (i) The servant agrees to provide his own work and skill by providing services for this matter, in consideration of wages or other remuneration.
  - (ii) The servant agrees that in the performance of that service they will be subject to the master's control. Control includes the power of deciding the things to be done, the way in which it shall be done, the means to be employed and in doing it, the time and place where it shall be done.
  - (iii) The contract of service complies with the terms of an employment agreement. This entails complying with the statutory requirements in the Employment Act including minimum wage, provision for leave and payment of income tax.
50. The respondent took a firm position that the contract that were, was a contract for service and therefore the claimant was an independent contractor and the relationship inter se was that of contractor-client. In my view this was just a bold assertion. One expected the assertion to be backed up by documents. This did not happen. From the onset, while responding to the claimant's memorandum of claim, the respondent crafted its defence, it knew that the bedrock of its case was the characterization of the relationship as a contractor-client one. Its witness was to testify to it and indeed did. But on what basis was this allegation. None was placed before court.
51. In a situation where one is taking a stand as the respondent did, it would not be strange and or an over expectation, for the court to expect production of an agreement from which the relationship can be discerned, a document(s) in nature demonstrating that for the work, or skills that the claimant rendered, a payment or payments were made that in character are not wages or salary, for instance payment invoices, local service orders, and a document inviting the claimant for the work. Some form of register too to demonstrate when and how the work was done.
52. In the case of *Maurice Oduour Okech v The Chequered Flag Limited* the court held *inter alia* that the documents produced, local purchase orders and payment vouchers were documents used in contract for services.
53. The provisions of sections 107 and 109 of the Evidence Act, cap 80 Laws of Kenya, and that they applied to the circumstance of the respondent, are well within my minds. The respondent did not discharge the burden this provision of the law of evidence placed upon him.
54. The claimant on the other hand, testified and tendered documents in evidence to support his claim that he was an employee of the respondent. He placed before court an appointment letter, a salary increment letter, a termination letter and a summary dismissal letter. All these documents are on the respondent's letter heads, almost all of them are stamped, the stamp appears the respondent's. All that the respondent's witness did was to just say that the documents are not theirs. One could only take this assertion seriously if he went further to demonstrate why. For instance, by saying and demonstrating that those letter heads and the rubber stamp belonged not to the respondent, that their letters of, appointment, termination of employment, salary increment appear to be coached in a style not the respondent's, and that the signature of Mary Wanjiru was forged.
55. The claimant stated that his letter of appointment placed before court, had a second page (execution page), but unfortunately, and by oversight, he did not file that page. He was candid on who signed the letter on behalf of the respondent. The respondent's witness admitted that during the period in issue, Miss Shamim whom the claimant mentioned as the person, was the Human resource manager. By reason of this, coupled with the foregoing premises, I have no difficulty in taking the view that the letter existed and that it originated from the respondent.



56. The claimant expressly stated that at all material times when reporting for duty he would sign a register at the gate. This allegation was not disputed.
57. Two things emerge from the claimant's material, first, that they are in consonance with the elements of a contract of service, and second that the claimant discharged the burden of establishing that he was an employee of the respondent.
58. In sum, I am convinced that the relationship that were between the claimant and the respondent was that of employee-employer.

(ii) Whether there was dismissal

59. Having found, as I have, regarding the relationship, and that therefore the provisions of the Employment Act, 2007 are applicable, I now turn to the issue as to whether there was termination/dismissal of the claimant from his employment. The claimant testified to two letters that were received dated 29<sup>th</sup> September 2016, one captioned termination and another summary dismissal. As I have indicated hereinabove, these letters were not successfully challenged by the respondent's witness. I hereby find that there was a dismissal.
60. In matters dismissal of an employee or termination of his work section 45(5) of the *employment Act*, places an obligation on the employee to prove the fact of dismissal or termination see ELRC Cause No 94 of 2016, *Aristide Maraga Nyangace v Lavington Security Limited*. The claimant has discharged this burden.

(iii) Whether the dismissal was substantively and procedurally fair?

61. Section 45 of the Employment Act, directs that no employer shall terminate the employment of an employee unfairly. Section 45(2)(c) thereof, provides the fountain from which the requirement for engagement of a fair procedure flows.
62. As to what fair procedure is, the provision of section 41 of the Employment Act, 2007 provides an answer thus;

“(1) subject to section 42(1) an employer shall, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapability explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provisions of this part an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representation which the employee may on grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

63. On fair procedure, this court *Lydia Moraa Obara v Tusker Mattresses Limited* , stated;

“In sum, in considering whether the procedure was fair, the test is whether there has been substantial compliance with the overall obligation to allow an employee an opportunity to rebut the allegations of misconduct, or offer a representation on any grounds that the employer has indicated to be basis for his intention to terminate the employment and bring to the attention of the employer any relevant information before a final decision is taken.”



64. The respondent having taken the position that the relationship was on basis a contract for service did not bother to place before court any material geared towards establishing, and establishing that the mandatory procedural aspects were honoured. In absence of any such demonstration, and in view of the fact that the claimant produced the two letters, all dated 28<sup>th</sup> September, 2016, which in content are clear that they were in breach of the provisions of section 41 of the Act, I find that the dismissal was procedurally unfair.
65. Section 43 of the Employment Act, places upon the shoulders of an employer an obligation to prove the reason or reasons for the termination, failing of which the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. The respondent never directed their mind to this, preferring no evidence therefore, on the substantive fairness of the dismissal.
66. In the upshot, I hereby invoke the default implication against the respondent, find that the dismissal was unfair in terms of section 45 of the Act. The dismissal was not substantively fair.
- (iv) Can the reliefs sought be availed to the claimant?
67. The claimant has sought for a payment in lieu of notice Kshs 17,000. The dismissal having occurred in the manner it did, I have no doubt that it was not preceded with any notice. The claimant is entitled to one month's salary in lieu of notice. The claimant pleaded and testified that during his employment with the respondent, for the period 2015 – 2016, he did not proceed for leave and was not paid for the leave not taken. The respondent blurred by position it took on the nature of the relationship between it and the claimant, did not put forth any specific challenge to this claim. Under this head the claimant is awarded Ksh 11,900.
68. The claimant has further sought for compensation pursuant to the provisions of section 49(1)(c) of the Act. He seeks for Kshs 232,900 representing 12 months' gross salary. This court is convinced that in the circumstances of the matter, compensation in the nature contemplated in the Act is awardable to the claimant. I have considered that the respondent, tried to run away from the relationship, and that is not equity, and did not comply at all with the provisions of the law relating to procedural and substantive fairness. I award the claimant, nine (9) months' gross salary as compensation pursuant to the provisions. Therefore, Kshs 153,000.
69. Therefore, Judgment is entered against the respondent in the following terms: -
- a) A declaration that the relationship between the respondent and the claimant, was that of employer and employee based on a contract of service.
  - b) A declaration that the dismissal of the claimant from employment was neither substantively nor procedurally fair.
  - c) One month's salary in lieu of notice – Kshs 17,000.
  - d) Unpaid leave - Kshs 11,900.
  - e) Compensation pursuant to section 49(1)(c) of the Employment Act, Kshs 153,000
  - f) Costs of this suit.
  - g) Interest on (c), (d) and (e) at court rates from the date of filing suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF OCTOBER, 2021

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OCHARO KEBIRA



\*\*\*\*

JUDGE

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Delivered in presence of

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Ms Omamo for the claimant.

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Ms Merichi for the respondent.

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