



REPUBLIC OF KENYA



KENYA LAW
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Theobald v Osani Community Health and Development Centre (Cause E005 of 2023) [2024] KEELRC 1871 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1871 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E005 OF 2023
CN BAARI, J
JULY 18, 2024

BETWEEN

DR AKILI BANGA THEOBALD CLAIMANT

AND

OSANI COMMUNITY HEALTH AND DEVELOPMENT CENTRE RESPONDENT

JUDGMENT

Introduction

1. In a Memorandum of Claim dated 23rd January, 2023 and filed on similar date against the Respondent, the Claimant seeks the following reliefs: -
 - a. A declaration that he was unlawfully and illegally terminated from employment.
 - b. Salary arrears as at 27.05.2022 @ Kshs 238,000.
 - c. Two month's salary in lieu of notice @ Kshs 222,000.
 - d. 12 Month's salary as damages for unfair termination Kshs 111,000 x 12 Months. Kshs 1,332,000
 - e. 8 months house allowance (July 2021-February 2022) @15% of the monthly salary 8x15/100x90,000=Kshs 108,000.
 - f. 3 months house allowance (March, April and May 2022) @15% of the monthly salary 3x 15/100x111,000=Kshs 49,950/=.
 - g. Costs of the suit.
 - h. An order for issuance of Certificate of Service by the Respondent.



2. In a Response to the Statement of Claim dated 15th August, 2023, the Respondent refuted the claim and averred that the Claimant absconded duty.
3. The matter proceeded for hearing on 11th October, 2023 and 13th February, 2024, with both the Claimant and the Respondent's Managing Director testifying in support of their respective positions.
4. Thereafter, both parties filed written submissions.

The Claimant's Case

5. It is the Claimant's case that he was employed by the Respondent as a medical superintendent at a salary of Kshs 90,000/=. He asserts that due to his exemplary performance, his salary was revised to Kshs 111,000/= under a new contract that was to run for one year from 1st March, 2022
6. The Claimant's case is that save for the first three months in the Respondent's employment, the Respondent never paid him his full salary, which subjected him to financial distress. He avers that despite raising the issue with the Respondent they never addressed the same.
7. It is his case that he approached the Respondent on several occasions on the payment of his salary arrears, but which discussions only result in false promises that the Respondent never met.
8. It is the Claimant's case that on or about 27th May, 2022, the Respondent summoned him for a meeting in which his outstanding salary was computed at Kshs 238,000/=. He states that after this computation, he was verbally notified that he should forthwith stop working for the Respondent on the basis that the Respondent's facility could no longer pay him.
9. It is his case that the verbal termination was in gross violation of his rights under the [Employment Act](#) and his employment contract for not having been issued any notice, disregard of due process and that he was not heard prior to the termination of service. He avers further that his termination from employment was unreasonable, unfair and based on unsubstantiated grounds.
10. It is his prayer that his claim be allowed.

The Respondent's Case

11. The Respondent on its part acknowledged that it engaged the Claimant as a Medical Superintendent at a monthly salary of Kshs 111,000/=.
12. It is the Respondent's case that prior to the Claimant's engagement he was supposed to avail his immigration documents, residency permit and KRA pin to enable remittance of taxes, which he failed to do.
13. The Respondent asserts that when it requested for this documentation the Claimant disappeared from the work place.
14. It is the Respondent's further case that the Claimant was engaged as a consultant and not an employee, hence his consultancy contract came to an end during the period of his absenteeism.
15. RW1 Justus Brian Omondi testifying for the Respondent, told court that the contract between the parties herein provided that breach of its policies would result in disciplinary action.
16. It is his evidence that notice period under the contract was for one month. It is his testimony that the Claimant was entitled to leave.



17. It is RW1's further testimony that either party could have procured a work permit and not just the Claimant. It is his evidence that the Respondent did not reach out to the Claimant after he deserted duty.
18. He states that the Respondent did not terminate the Claimant from service, but that he left to collect his documents and never returned. It is his evidence that no disciplinary action was taken against the Respondent.

The Claimant's Submissions

19. In support of his case, the Claimant submits that he is an employee and not a consultant as alleged by the Respondent. He cites the letter to Equity Bank produced as CEX 5 and the employment contract which refers to him as an employee.
20. In further buttressing his employment status, the Claimant submits that he was an integral part of the Respondent's business. He cites the case of *Kenneth Kimani Mburu & another v Kibe Mungai Holdings* [2014] eKLR where the court held that consultancies/independent contracts are based on the periphery of an employer's business.
21. In further urging the employment relationship, the Claimant submits that it is important to distinguish between a contract of service and a contract for service. He sought to rely on the holding of Denning L.J in *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 at 110: where he stated as follows:

“The distinction between a contract for services and a contract of service can be summarized in this way: In the one case the master can order or require what is to be done, while in the other case he cannot only order or require what is to be done but how it shall be done.”

22. In further refuting the consultancy tag, the Claimant highlighted his entitlement to leave which he asserted was the preserve of an employment contract.
23. On the issue of a work permit and KRA pin certificate, the Claimant submits that they were not prerequisites for employment. He asserts that his entry was authorised as he holds an East African Community Passport and for reason that there exists a reciprocal recognition between East African Community doctors allowing him to practise in Kenya.
24. It is the Claimant's submission that it was the Respondent's duty to procure a work permit on his behalf based on Section 45 (2) of the *Kenya Citizenship and immigration Act*. For the foregoing reason it is the Claimant's contention that the lack of a work permit did not invalidate his contract with the Respondent. He cites the Court of Appeal case of *Five Forty Aviation v Erwan Lance* (2019) eKLR, where the court stated that the contract executed by the Respondent was not pre-conditioned on the production of a valid work permit.
25. The Claimant equally cites the case of *Nicola Romano v Master Mind Tobacco (K) Limited* eKLR for the holding that: -

“While making that finding, the Court has considered that the need for a work permit was a statutory provision whose satisfaction was necessary towards legitimate implementation of the contract of service but in absence of express contractual provision making lack of the permit as frustrating the contract, the absence of the permit by itself, did not bar the parties



from pursuing their respective rights and obligations under the contract of employment one way or the other.”

26. On the strength of the foregoing, the Claimant strongly submits that the issue of KRA PIN and a work permit were only being used by the Respondent as an avenue to avoid its contractual obligations.
27. In respect of the alleged abscondment of duty, the Claimant submits that the Respondent had failed to prove that fact to the required standard. He had reliance in the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR, where the court held that the employer must demonstrate the steps taken at ascertaining the whereabouts of the employee. The rationale for this, the Claimant submits is that the absence could be justifiable due to sickness or natural calamities.
28. It is the Claimant’s submission that even if he absconded, he still had to be subjected to the dismissal procedure prescribed under Section 41 of the *Employment Act*.
29. On whether the Claimant is entitled to the remedies sought, it is submitted that he is entitled to salary arrears of Kshs 238,000/= as evinced in the computation produced as CEX8 and which evidence he affirms has not been controverted.
30. The Claimant submits that notice or pay in lieu thereof, is a statutory requirement under Sections 35 and 36 of the *Employment Act*. The Claimant affirms that he is entitled to 2 months’ salary based on the Employment contract he had with the Respondent.
31. In respect of compensation for unlawful termination, the Claimant’s submission is that he is entitled to 7 months’ salary being the remainder of his contract period for the year 2022.
32. It is the Claimant’s submission that he is entitled to house allowance as the same was not provided for in the contract. Additionally, he avers that there was no indication that the house allowance was consolidated in his salary. He relies on the Court of Appeal case of *Grain Pro Kenya Inc v Andrew Waitbaka Kiragu* [2019] eKLR to buttress this position.
33. The Claimant urges the court to allow the claim as prayed.

The Respondent’s Submissions

34. On its part, the Respondent submits that the onus of proving an employer-employee relationship was on the Claimant. It avows that the Claimant had failed to discharge that burden by adducing evidence of a monthly salary, statutory deductions and medical insurance. He cites the case of *Martin Juma Kundu v KEMU Salt Packers Production Ltd* [2016] eKLR for the holding that the onus of proving employment was on the Claimant.
35. It is the Respondent’s further submission that despite Section 45 of the *Kenya Citizenship and Immigration Act* laying the obligation on the employer to procure a work permit, the fact still remained that the Claimant was a foreigner and could not work without a permit.
36. It is submitted for the Respondent that the question of the Claimant being licensed to practice medicine in Kenya was distinguishable from his immigration status.
37. The Respondent avows that taking into consideration the foregoing, the engagement letter was vitiated by illegality rendering it null and void *ab initio*. He cites *Hon. B.O. Manani in Maso v Leopard Point Luxury Beach Management Ltd* [2022] eKLR where the court held that an employment contract in the absence of a work permit was vitiated by illegality and was thus incapable of enforcement.



38. Regarding the reliefs sought, the Respondent submits that the same cannot be granted given the illegality of the employment contract.

Analysis and Determination

39. I have considered the pleadings, the witnesses' oral testimonies and the rival submissions. The issues that present for my determination are:
- i. Whether the Claimant was an employee or an independent contractor.
 - ii. Whether the Claimant was lawfully terminated from employment
 - iii. Whether the Claimant is entitled to the remedies sought

Whether the Claimant was an employee or an independent contractor.

40. The Claimant's assertion is that he was employed by the Respondent under a contract of service and not one for services. It is his case that his contract of employment dated 15th July 2021 and the subsequent renewal dated 1st March 2022, are concrete proof of his employment status. On its part, the Respondent contends that the Claimant was hired as a consultant to conduct trainings for the Respondent. It states therefore, that the Claimant was an independent contractor and not an employee, and could therefore not have been terminated from the service of the Respondent.
41. The distinction between an employee and an independent contractor mainly lies in nature of the contractual relationship between the parties. While an employee has a contract of service, an independent contractor has a contract for service. Section 2 of the [Employment Act](#) defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner;
42. In offering guidance to courts on the nature of the contractual relationship, the Supreme Court of Nigeria in [Shena Security Co. Ltd v Afropak \(Nig.\) Ltd & 2 others](#) [2008] 18 NWLR held thus:-
- “If payments are made by way of “wages” or “salaries” this is indicative that the contract is one of service. If it is a contract for service, the independent contractor gets his payment by way of “fees”. In like manner, where payment is by way of commission only or on the completion of the job, that indicates that the contract is for service.”
43. Further in [Christine Adot Lopeyio v Wycliffe Mwathi Pere](#) [2013] eKLR the Industrial Court (as it then was) sought to differentiate an employee from an independent contractor as follows: -
- “In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprises ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:
1. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.
 2. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
 3. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works



for another person, the employer, who takes the ultimate risk of loss or chance of profit.

4. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.”

44. The Claimant herein was evidently paid a monthly salary, he was subject to the Respondent’s disciplinary measures which depicts control, and it is also true that the Claimant was not in business on his own account but that the Respondent took the ultimate risk of loss or chance of profit.

45. In the *Christine Adot Lopeyio* (*supra*) case the court held that a pattern of payment of wages points to a degree of control which indicates an employer-employee relationship. The court stated as follows: -

“The appellant retained a fairly large degree of control over the 2 nd respondent. Further, the nature of the relationship between the appellant and the 2nd respondent reveals a pattern of payment of wages after performance of contractual duties, which in turn highlights mutuality of obligations. The foregoing analysis of the control test, the economic test and the mutuality of obligations test, reveals a relationship between the appellant and the 2 nd respondent that is inextricably linked to that of an employer-employee or master-servant relationship.”

46. Guided by the foregoing decisions of superior courts vis-à-vis the nature of the relationship between the parties herein, I reach the conclusion that the Claimant herein was for all intents and purposes an employee of the Respondent. He was under a contract of service and not a contract for services.

47. Another prominent issue raised by the Respondent was that of the employment contract being vitiated by lack of a work permit. The Respondent cited the case of *Maso v Leopard Point Luxury Beach Management Ltd* [2022] eKLR.

48. An analysis of the Maso case (*supra*) shows that the Claimant therein was engaged on probationary terms and was yet to be confirmed. Further, the wording of Section 45 of the *Kenya Citizenship and Immigration Act* places obligations on the Employer not to employ a foreigner who has entered Kenya illegally among other conditions. It also obligates the Employer to procure a work permit before employing a foreigner.

49. The Claimant has produced a permit showing that he was in the country legally. He has also produced a temporary practise license issued by the Kenya Medical Practitioners and Dentists Council. This evidence has not in any way been controverted. The license is a clear indication that the Claimant was licensed to carry out clinical practise in Kenya and which he still does to date.

50. In the circumstances of this case, it is evident that the Claimant was lawfully employed by the Respondent.

51. For this reason, the Respondent’s assertion that the Claimant’s contract was vitiated by his lack of a work permit has no legal basis.



Whether the Claimant was lawfully terminated from employment

52. Section 41 of the *Employment Act*, 2007 demands that before terminating an employment contract on the grounds of misconduct, performance or physical incapacity, the employer should grant the employee an opportunity to make representations, either in the presence of a colleague or representative of a trade union if he is a member of one.
53. In the circumstances of this case, there was no pretending that the Respondent made an attempt at adhering to the provisions of Section 41 of the *Employment Act*. The Claimant testified that on the 27th May, 2022 he was summoned and verbally informed to stop working. On its part through RW1, the Respondent contended that the Claimant absconded duty after being pressed to provide some documents.
54. It is settled that even in cases of abscondment of duty, the procedure in Section 41 still has to be followed.
55. In this case it is evident that the Claimant was neither issued with a notice delineating reasons for contemplated disciplinary action nor was he invited to make representations at a formal hearing.
56. The termination of the Claimant's employment contract thus failed the procedural fairness test.
57. In claims of unfair termination or wrongful dismissal, Section 43 of the *Employment Act* requires the employer to prove the reasons for termination/dismissal, Section 45 requires that the employer proves that the reasons are valid and fair and Section 47(5) expect the employer to justify the grounds for termination/dismissal.
58. In this suit no grounds for dismissal were advanced. The court therefore finds that the termination of service was devoid of any legal basis. It thus failed the substantive fairness test, and so I hold.

Whether the Claimant is entitled to the remedies sought

Salary Arrears

59. The Claimant sought Kshs 238,000/= on account of salary arrears. He placed reliance on the hand-written computation produced in evidence and which evidence was not controverted by the Respondent.
60. In view of the fact that the claim was not controverted, I find it merited and is awarded as prayed.

Salary in lieu of notice

61. Under this head, the Claimant sought two months' salary based on Sections 35 and 36 of the *Employment Act*, and the Employment contract between the Respondent and himself. Indeed, the contract produced in evidence carries a provision for two months' notice for either party desirous to exit the contract.
62. The claim is equally merited and is awarded as prayed.

Compensation for unfair termination

63. The Claimant sought 12 months' salary as compensation for the unfair termination. The Court notes that he changed this position and sought instead to be paid salary equivalent to the remainder of his contract. The contract commenced on 1st March 2022 for one year. The Claimant was dismissed on 27th May 2022. This means the Claimant still had 7 months left on his contract.



64. Considering that the Claimant had only 7 months to the end of his contract, together with his admission that he has since secured comparable employment and finally the Respondent's admission of financial constraints, I deem an award of three months' salary sufficient compensation for the unfair termination and which is hereby awarded.

House Allowance

65. The Claimant sought a total of Kshs 157,950/= as house allowance. He based his Claim on Section 31 of the *Employment Act*, and the fact that the Respondent did not lead evidence of having paid house allowance.

66. Section 20 of the *Employment Act* obligates an employer to issue an itemised pay statement. The Respondent has not provided any evidence that the house allowance was consolidated with the monthly salary which makes me find merit in the claim.

67. The Claimant is awarded the house allowance as prayed.

Certificate of service

68. This is a statutory requirement under Section 51 of the *Employment Act*. Accordingly, the Respondent is directed to issue a certificate of service to the Claimant.

69. In the final analysis, the claim succeeds in terms of the following orders: -

- a. A declaration that the Claimant was unfairly terminated.
- b. An award of salary arrears in the sum of Kshs 238,000/=
- c. Salary in lieu of notice Kshs 222,000/=
- d. Two months' (2) salary as compensation for the unfair termination Kshs 222,000/=
- e. House Allowance Kshs 157,950/=
- f. Costs of the suit shall equally be borne by the Respondent.

70. Judgment accordingly

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 18TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Okoth Odera present for the Claimant

Mr. Oduol present for the Respondent

Ms. Anjeline & Debra-C/As

