



**Qhala Limited v Commissioner of Domestic Taxes (Tax Appeal  
E112 of 2024) [2025] KETAT 41 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KETAT 41 (KLR)

**REPUBLIC OF KENYA  
IN THE TAX APPEAL TRIBUNAL  
TAX APPEAL E112 OF 2024  
RO OLUOCH, CHAIR, G OGAGA & AK KIPROTICH, MEMBERS  
JANUARY 24, 2025**

**BETWEEN**

**QHALA LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant is a private limited company registered in Kenya, which offers businesses with business solutions.
2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, CAP 469 of Kenya's Laws. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Parts 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. The Respondent conducted an audit of the Appellant's affairs and noted that there were PAYE arrears from 43 employees leading to issuance of a tax demand notice dated 18<sup>th</sup> October 2023 for Kshs 25,280,079.00. The Appellant objected to the said notice via a notice of objection dated 17<sup>th</sup> November 2023.
4. The Respondent rejected the Appellant's application and confirmed the additional assessments vide its Objection decision dated 18<sup>th</sup> December 2023.



5. The Appellant being dissatisfied with the Respondent's Objection decision, lodged a Notice of Appeal dated and filed on 17<sup>th</sup> January 2024.

### **The Appeal**

6. The Appellant filed a Memorandum of Appeal dated 30<sup>th</sup> March 2024 and filed on 31<sup>st</sup> March 2024 setting out its grounds of Appeal as follows:
  - a. That the Respondent erred in law and fact in confirming its assessment of PAYE on the basis that the persons engaged by the Appellant were employees engaged under contracts of service contrary to the interpretation provided in Section 2 of the *Income Tax Act* as read together with Section 2 of the *Employment Act*, 2007;
  - b. That the Respondent erred in law and fact in concluding that the persons engaged by the Appellant were employees despite not meeting the common law test for an employer – employee relationship.
  - c. That the Respondent erred in law and fact in its consideration of extraneous factors and in failing to consider relevant factors leading to its determination that the persons engaged by the Appellant were employees and therefore misdirected itself in confirming its assessment of PAYE; and
  - d. That in view of the foregoing, the Appellant is apprehensive that the actions of the Respondent lack in merit, are unlawful and manifestly unjust and that unless the orders sought are granted, the Appellant risks being unjustly compelled to pay for the alleged taxes to the prejudice of the Appellant.

### **The Appellant's Case**

7. The Appellant relied on its Statement of Facts dated 30<sup>th</sup> March 2024 and filed on 31<sup>st</sup> March 2024 together with the Written Submissions dated 27<sup>th</sup> August 2024 and filed on 28<sup>th</sup> August 2024.
8. The Appellant's case is that on 18<sup>th</sup> October 2023, the Respondent issued a demand notice in respect of PAYE for the period January 2020 to July 2023. In the said notice, the Respondent notified the Appellant that it had incorrectly classified employees as consultants and assessed PAYE in the amount of Kshs. 20,494,705.00 on grounds that these 43 employees were not consultants.
9. In its defence the Appellant stated that it is a digital solutions provider that offers various products such as product design, data science and analytics, research services, providing digital platforms among others. It alleged that it engages various consultants on a need basis for instance, where an active project is ongoing which period of engagement is limited to the duration of the project.
10. The Appellant cited the definition of contract of service under Section 2 of the *Income Tax Act* (ITA) to argue that the relationship between the consultants and the Appellant can only be adequately discerned from their conduct. It argued that the consultants exercise control over their own work, utilize their own tools to work, choose their place of work and bear the risks for providing consultancy services. It was its view that the contracts of engagement between it and its service providers cannot be said to be of that of employee and employer.
11. The Appellant noted that the ITA brings to charge under Section 3(2) (2)(ii) any gains or profits from employment or services rendered. It argued that in the Respondent's decision that the persons it had engaged were not consultants whose remuneration was subject to withholding tax under Section 35(3) (ii) of the ITA was erroneous.



12. The Appellant stated that the remuneration paid to the consultants was duly taxed under Section 35 (3)(f) of the ITA which provides:

“Deduction of tax from certain income

(3) Subject to subsection (3A), a person shall, upon payment of an amount to a person resident or having a permanent establishment in Kenya in respect of-

(f) Management or professional fee or training fee, the aggregate value of which is twenty-four thousand shillings or more in month.”

13. The Appellant stated that it duly deducted and remitted Withholding tax on applicable payments to the consultants in line with the law. It asserted that the consultancy agreements set out in varying clauses that, ‘the Consultancy Fees shall be subject to a 5% withholding tax.’

14. The Appellant maintained that the persons engaged were consultants whose remuneration falls within the meaning of Section 3(2) (a) (ii) of the ITA. That the Respondent misdirected itself in determining that the earnings of the consultants were subject to PAYE and not Withholding tax.

15. In support of the second ground of appeal, the Appellant stated that the consultants were engaged on terms set out in the consultancy agreements which expressly provide that the nature of engagement is that of consultancy. It added that the terms of engagement between it and the consultants connote a consultancy agreement as the agreements delineate the rights and obligations of the consultants which terms of engagement do not include the rights of employees provided in the *Employment Act* such as annual leave, housing benefit, sick leave or maternity leave.

16. The Appellant placed reliance on ILO Recommendation 198 which sets out the parameters for determining whether a relationship constitutes an employment relationship as follows:

“Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the employment relationship. Those indicators might include –

a. the fact that the work; is carried out according to the instructions and under the control of another party, involves the integration of the worker in the organization of the enterprise, is performed solely or mainly for the benefit of another person, must be carried out personally by the worker, is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work, is of a particular duration and has a certain continuity, requires the worker’s availability, or involves the provision of tools, materials and machinery by the party requesting the work;

b. Periodic payment of remuneration to the worker, the fact that such remuneration constitutes the worker’s sole or principal source of income, provision of payment in kind, such as food, lodging or transport, recognition of entitlements such as weekly rest and annual holidays, payment by the party requesting the work for travel undertaken by the worker in order to carry out the work, or absence of financial risk for the worker.”

17. The Appellant further stated that the Respondent failed to consider whether the engagement of the 43 persons met the common law criteria of a consultant.



18. The Appellant noted that mutuality of obligation is one of the qualifiers used to determine whether a worker should be classified as a consultant or as an employee. It stated that the consultants engaged by the Appellant are only engaged when a project arises and not on a constant or regular basis. That the consultants are not obligated to accept the work nor are they assured of receiving work from the Appellant.
19. The Appellant asserted that in the absence of such mutual promise for either future work or future performance of work, the worker ceases to qualify to be an employee. It supported this position with the case of *Charles Juma Oleng v M/S Auto Garage Ltd & another* (2014] eKLR.
20. The Appellant stated that the consultants did not work under the condition that the Appellant will provide work or guarantee the workers future performance. That as such, the consultants cannot be classified as employees in the absence of such mutual obligations.
21. The Appellant stated that the integration test is used to determine whether the worker is integrated to the business. It submitted that the consultants are not integrated into the business of Qhala as the consultants are only engaged by the Appellant in respect of specific projects in line with their areas of expertise.
22. The Appellant averred that the consultants utilize their own tools of trade and workstations to perform the work. It asserted that the agreements with service providers states that,

“Tools, Instruments and Equipment, the consultant shall provide consultants' own tools, instruments and equipment, and place of performing services unless otherwise agreed between the parties.”
23. The Appellant stated that if the consultants were actually employees engaged by the Appellant as alleged by the Respondent, then they would be integrated to the company where the workers would be required to work during specific hours, provided specific workstations and company tools and equipment as well as work within the company's guidelines which is not the case.
24. The Appellant averred that the test of integration was explained in the case of *Evveret Aviation Ltd Vs Kenya Revenue Authority* (through the Commissioner of Domestic Taxes) (2013) eKLR where the High Court stated that,

“The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual.”
25. The Appellant stated that in line with this High Court decision the consultants were correctly classified and charged to withholding tax by the Appellant as they were not integrated into the business as ordinary employees.
26. It was the Appellant's case that the Respondent also incorrectly concluded that since the nature of work done by the consultants is integral to the business and the consultants are not "mere accessories" to the business, they qualify as employees.
27. The Appellant maintained that the integration test is not considered in isolation as the criteria set out must be satisfied in totality to conclude whether the consultants are correctly classified as such.



28. The Appellant noted that the control test is used by courts in addition to the other tests set out herein to determine whether a worker qualifies to be an employee or consultant. That the control test generally requires the employer to exercise a great deal of control over the work of the employee on a day-to-day basis for the relationship to be classified as an employer-employee relationship. It supported this position with the case of *Newport Africa Kenya Limited VS, the Commissioner of Domestic Taxes, TAT No, 171 of 2015*.
29. The Appellant opined that consultants are not subject to its control because they were contracted by Qhala to accomplish a specified objective in various projects that arise. That these consultants work at their own time, with their own tools to attain these objectives and they are then remunerated for the days worked.
30. The Appellant stated that the Respondent failed to consider that the relationship between the Appellant and the consultants does not meet the economic reality test. It added that the test considers whether the worker is in business in their own account (Consultant) or if they work for another person (Employee).
31. The Appellant submitted that a consultant is likely to provide for themselves their own equipment and bear the risks involved in the consultancy services that they provide. That on the other hand, an employer provides an employee with the tools of work and bears the risks arising in the business.
32. It added that the consultants in question utilized their own tools and bore the risk of their consultancy engagement by providing indemnity to the Appellant and/or procuring their own liability insurance policy at their own expense. The Appellant referred to clauses in the consultancy agreements with provisions on insurance to argue that it had retained consultants not employees. It cited the case of *Charles Juma Olong v M/S Auto Garage Ltd & another [2014] eKLR* to support its argument.
33. The Appellant averred that the common law demonstrates that the actual relationship in question is actually a contract for services and not a contract of service in respect of an employer-employee relationship as claimed by the Respondent. In this regard, the Appellant asserted that the relationship between it and the engaged workers is that of a contract for service.
34. Whereas the Respondent alleged that the workers are employees as the payments made to them are consistent and on a monthly basis upon submission of invoices for services performed in the preceding month, the Appellant asserted that the consultants are paid based on the services provided when they are requested to take up consultancy work that relates to specific projects that they accept. The consultants then invoice the company on the payments due. It relied on the case of *George Kamau Ndiritu & another v Intercontinental Hotel (2015] eKLR* to support its position.
35. The Appellant argued that the consultants are paid upon submission of the invoices in respect of the consultancy services provided in the course of the project they are engaged in. That given the nature of the work and their engagement for provision of consultancy services in the course of projects that arise, the consultants cannot be deemed to be employees on the basis of payments made to them upon issuing of invoices for the consultancy services they provide to the company.
36. It was the Appellant's case that the Respondent deemed that an employer-employee relationship exists on the basis of the contracts providing a termination clause for either party. The Appellant noted that parties have freedom of contract which allows parties to decide on the terms and obligations that will guide their relationship. It added that the contracts between it and the consultants expressly set out that the nature of engagement is that of an independent contractor. That the termination clause provides ground for termination by both parties in various key circumstances such as material breach of contract, death/incapacitation and project termination.



37. The Appellant asserted that the termination clause intends to guide the relationship between the two parties and avoid contractual disputes and is available to either party. It averred that the Respondent disregarded the general intention of this clause by considering it in isolation of the reasons and claiming that the company would terminate the consultant in the same manner as an employer-employee relationship.
38. It asserted that the provision for termination is only intended to guide the relationship of the parties and does not in any way construe an employer-employee relationship as alleged by the Respondent.
39. In support of the third ground of Appeal, the Appellant stated that the Respondent erred in its re-classification of the consultants as employees on the basis of extraneous factors such as the confidentiality clause which requires the consultants to maintain confidentiality over work done. The Appellant maintained that this is not an indication of an employer-employee relationship as the nature of the Appellant's business requires protection of confidential or proprietary information.
40. The Appellant noted that whereas the Respondent stated that there cannot be a contract of service in the absence of an irreducible minimum of mutuality of obligation and contracts providing for when, how and with what frequency work would take place. The Appellant concurred with this position as the facts of engagement of the consultants do not disclose any mutuality of obligation between the parties thus an employment relationship does not arise.
41. The Appellant supported its arguments with the following additional case laws;
  - i. Charles Tuma Oleng v M/S Auto Garage Ltd & another [2014] eKLR;
  - ii. Evveret Aviation Ltd v Kenya Revenue Authority (through the Commissioner of Domestic Taxes) (2013) eKLR;
  - iii. Newport Africa Kenya Limited v the Commissioner of Domestic Taxes, TAT No, 171 of 2015;
  - iv. Kenya Hospital Association v Commissioner of Domestic Taxes (Tax Appeal No. 1146 of 2022) (2024) eKLR; and
  - v. George Kamau Ndiritu & another v Intercontinental Hotel (2015) eKLR.

### **Appellant's Prayers**

42. Consequently, the Appellant urged the Tribunal to find in its favour by vacating the tax demand issued by the Respondent with costs.

### **The Respondent's Case**

43. In response to the Appeal, the Respondent lodged a Statement of Facts dated and filed on 1<sup>st</sup> March 2024 together with the Written Submissions dated and filed on 11<sup>th</sup> September 2024.
44. The Respondent stated that it has not in any way misinterpreted the provisions of Section 2 of ITA and Section 2 of the *Employment Act*. The Respondent alleged that in interpreting the said provisions, it looked at the Appellant's various contracts with said consultants and information available to it under Section 31 of the TPA.
45. The Respondent stated that it noted the following in regard to the relationship between the said consultants and the Appellant:-
  - i. That the Appellant provides the said consultants with support staff and reimburses them for any expenses incurred in the performance of their duties;



- ii. That the said consultants can neither assign nor sub-contract any portion of the work without the Appellant's express permission;
  - iii. That the Appellant provides information, property and personnel to the said consultants;
  - iv. That, after scrutiny of the contracts, the Respondent noted the said consultants always issued monthly invoices; and
  - v. That, after scrutiny of the Appellant's iTax returns, the Respondent noted that consultants were mainly engaged by the Appellant, showing a continuing relationship.
46. The Respondent alleged that it considered the above findings and concluded that the said consultants were not consultants but employees with the title of consultants.
47. In response to the second ground of Appeal, the Respondent stated that from the review of the contracts and iTax returns, an employer-employee relationship could be clearly identified. It added that the contracts clearly demonstrate the control that the Appellant had on the said consultants. The Respondent averred that the contracts delineate:-
- i. How services were to be performed;
  - ii. The Reporting lines for the said consultants;
  - iii. Fixed remuneration;
  - iv. Ownership rights of the work done; among other factors.
48. According to the Respondent, the contracts clearly illuminated the integral nature of the services provided by the consultants.
49. In response to ground three of the Appeal, the Respondent averred that it did not consider extraneous factors, though it could, but relied on the contracts and the Appellant's tax returns. It asserted that it reviewed these documents and the information contained therein in reaching its conclusion.
50. The Respondent also stated that the contracts reveal that the Appellant and the consultants had irreducible minimum of mutuality of obligations. The Respondent stated that its actions were justified, lawful and reasonable, hence this Appeal is unmerited. It cited the case of *Omusamia v Upperrhill Springs Restaurant (Cause 852 of 2017) [2021] KEELRC 3 (KLR)* to support its position.
51. The Respondent also cited the case of *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* where it stated that the Court clarified the factors to consider in determining whether one was an employee and therefore under a contract of service. That those factors included the following:-
- i. 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 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.



52. The Respondent submitted that from the review of the contracts and iTax returns, an employer-employee relationship could be clearly identified as the contracts clearly demonstrate the control that the Appellant had on the said consultants.
53. The Respondent submitted that the service providers were that of employees and not independent contractors

### **Respondent's prayers**

54. Respondent prayed for the following orders:
  - a. The Appeal be dismissed;
  - b. The Respondent's Objection decision dated 18th December 2023 be upheld; and
  - c. The costs be awarded to the Respondent.

### **Issues for Determination**

55. Having examined the parties pleadings, documents and Written Submissions filed by both parties the Tribunal is of the view that the issue for determination is:

Whether the Respondent erred in treating Appellant's service providers as employees instead of independent contractors and issuing additional assessment thereof for PAYE.

### **Analysis and Findings**

56. Whereas the Appellant asserted that its service providers are not employees who could be liable to remit PAYE to the Respondent, the Respondent maintained that the Appellant's service providers are employees who must be subject to PAYE. Moreover, whereas the Appellant maintained that its service providers are subject to Withholding tax at the rate of 5%, the Respondent argued that the service providers are employees and therefore liable PAYE.
57. The law makes a distinction between an employee and an independent contractor. This distinction is key because it affects the type of tax that each category is liable to pay.
58. Whereas the ITA does not define a contract for service, Section 2 of the said Act defines "contract of service" as follows:-

"An agreement, whether oral or in writing, whether expressed or implied, to employ or to serve as an employee for any period of time, and includes a contract of apprenticeship or indentured learnership, under which the employer has the power of selection and dismissal of the employee, pays his wages or salary and exercises general or specific control over the work done by him; and for the purpose of this definition an officer in the public service shall be deemed to be employed under a contract of service."
59. The *Employment Act* defines "contract of service" as thus:-

"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 learnership but does not include a foreign contract of service to which Part XI of this Act applies."



60. Section 5(b) of the ITA defines an "employee" in the following words:-

“any person who is not a beneficial owner of or able either directly or indirectly or through the medium of other companies or by any other means to control more than five per cent of the share capital or voting power of that company.”

61. Section 2 of the *Employment Act* defines “employee” to mean:

“a person employed for wages or a salary and includes an apprentice and indentured learner.”

62. Persons serving under contract for service are liable to management or professional fee. In this regard, Section 2 of the ITA defines "management or professional fee" as:

“any payment made to any person, other than a payment made to an employee by his employer, as consideration for any managerial, technical, agency, contractual, professional or consultancy services however calculated” (Emphasis added).

63. It is vital to note that whereas contracts of service are governed by *Employment Act*, contract for service are beyond the scope of the *Employment Act*. In other words, a contract of service must comply with the provisions of the *Employment Act*. In particular, the contract must comply with the provisions of Section 10 of the *Employment Act* which provides as follows:

“Employment particulars

- (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.
- (2) A written contract of service shall state—
  - a. The name, age, permanent address and sex of the employee;
  - b. The name of the employer;
  - c. The job description of the employment;
  - d. The date of commencement of the employment;
  - e. The form and duration of the contract;
  - f. The place of work;
  - g. The hours of work;
  - h. The remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
  - i. The intervals at which remuneration is paid; and
  - j. the date on which the employee’s period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and
  - k. Any other prescribed matter.”



64. Additional requirements concerning a contract of service are also provided for under Section 10(3) of the *Employment Act*. The additional requirements under the said subsection include but are not limited to provision as to annual leave, incapacity to work due to sickness or injury, provision for sick pay, pensions and pension schemes, length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment, any collective agreements just to mention but a few.
65. Another aspect that differentiates contract of service from contract for service is that the law protects wages of employees under Section 17 of the *Employment Act*. In addition, and perhaps an important aspect of contract of service provided for under Section 20 of the *Employment Act* is that the employer must issue to an employee itemised pay statement popularly known as ‘payslip.’ In this regard, Section 20 provides that:-
- “(1) an employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.
- (2) The statement specified in subsection (1) shall contain particulars of—
- (a) The gross amount of the wages or salary of the employee;
- (b) The amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and
- (c) Where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.”
66. The relevant factors to further consider in determining whether one was an employee and therefore under a contract of service was discussed in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968) 2QB 497* where the court clarified the factors to consider in determining whether one was an employee and therefore under a contract of service:-
- 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 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.
67. This means that a person under contract of service is under the control of the employer and a person under a contract for service is an independent consultant who is not under direct control of the the principal as was explained in *Fredrick Byakika v Mutiso Menezes International Limited (2016) eKLR*, where the court held as follows;
- “Such I find to be just some of the defining characteristics of a consultant/independent contractor. The Claimant was under such a contract. His hours of work were not fixed and were subject to the work to be undertaken; was required to invoice his dues to the Respondent so as to be paid each month which he did so in July and August 2014; he was subject to withholding tax at 15%; when he got sick he did not apply for sick leave/time off



and does not claim for a refund of costs for treatment he underwent while he suffered malaria and diabetes; and the contract between the parties recognise the Claimant as a Consultant.”

68. In the case of *Geoffrey Makana Asenyo vs Nakuru Water & Sanitation Services Company* (2014) eKLR, the court reiterated the tests to determine an employee and an independent contractor as follows;
- a. The control test; where an employee 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;
  - b. The integration test; in which the employee is subjected to the rules and procedures of the employer rather than personal command;
  - c. The test of economic or business reality; which takes into account whether the employee is in the business of his or her own account or works for another person, the employer who takes the ultimate risk of loss or chance of profit;
  - d. Mutuality of obligation; in which the parties make commitments to maintain the employment relationship over time. Under this test, a contract of service is for essentially services in return for wages, and secondly mutual promises for future performance.
69. The Tribunal has examined the contracts in evidence and is of the view that the said contracts do not contain salient features of contracts of service within the meaning of *Employment Act*. For instance:
- a. The agreements do not comply with the provisions of Section 10 (2) of the *Employment Act*.
  - b. The agreements do not define aspects such as age and sex of the employee; and the hours of work; and scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits; the intervals at which remuneration is paid; annual leave; incapacity to work due to sickness or injury; provision for sick pay; pensions and pension scheme; length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment; any collective agreements among other factors.
  - c. The agreement also provide for invoicing of services which is a key feature of contract for services as was affirmed in the case *Fredrick Byakika v Mutiso Menezes International Limited* (2016) eKLR. Meaning that the costs for the services offered are not fixed or predictable like it would be in case of employees.
70. The agreements in issue also expressly stated that consultants are supposed to rely on their own tools, instruments and equipment. This is an important feature of contracts for service which indicate that the service provider is not subject to control from the principal.
71. The agreements also have clauses on consultancy fee, clauses on the need to tender invoices to facilitate payment, and provide that the consultancy fee is subject to 5% Withholding tax. Apart from that, the agreements indicates that the consultants were required to take out insurance policies at their expense covering their performance. All these do point that this was a contract for service.
72. Further from the agreements, it is clear that the parties did not intend to create employee-employer relationship. The Agreements expressly state that:
- “nothing contained in this agreement shall be construed to place the consultant and the company in a relationship as partners, joint ventures, employee/employer or principal/agent...”



73. This provision in the agreement confirms that this was intended to be a contract for service.
74. The Tribunal is also of the view that the reimbursement arguments is not sustainable to support the Respondent's position because the purpose of reimbursement is to restore a person to original position for using his or her own resources. It is a charge on the principal's finance. It cannot be used as a ground to argue that such reimbursement is a sufficient to hold that a contract is one of service.
75. The Respondent's assertion that the consultants can neither assign nor sub-contract any portion of the work without the Appellant's express permission does not demonstrate that agreements are contracts of service neither does it indicate that the Appellant retained control over the consultant. It is the view of the Tribunal that this is a boilerplate clause present in typical contracts and cannot be used to determine the nature of the contract.
76. Regarding the issue of invoices, the Tribunal affirms that the use of invoices in a contract for service was affirmed in *Kenya Hotels and Allied Workers Union v Alfajiri Villas (Magufa) Ltd (2014) eKLR* where the court held as follows:
- “ An independent contractor's contract, in my view is a contract of work (contract for service) and not a contract of service, or to use the ordinary language a contract of employment. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual “employment” matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave, 13<sup>th</sup> cheque and so on.” (Emphasis added).
77. The Tribunal aligns itself with this case in holding that the issuance of invoices for services offered on a monthly basis cannot be a ground for determining that a contract was one of service.
78. Under the circumstance, the Tribunal finds and holds that the Appellant discharged its burden of proof by providing a set of agreements which showed that it was an independent contractor, providing invoice evidence to show that it was paid regularly as an independent entity and not as an employee as envisaged in the Act and providing agreement to show that it was not an employee of the principal who was entitled to rights envisaged in the *Employment Act*. The Respondent's assessment based on a contract of service was thus erroneous.

### **Final Decision**

79. The upshot to the foregoing analysis is that the Tribunal finds and holds that the Appeal is partially meritorious and makes the following Orders: -
- a. The Appeal be and is hereby allowed;
  - b. The Respondent's Objection decision dated 17<sup>th</sup> January 2024 be and is hereby set aside.
  - c. Each party to bear its own costs.
80. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2025**

**DR. RODNEY O. OLUOCH - CHAIRPERSON**

**GLORIA A. OGAGA - MEMBER**



