



**Nairobi University v Opar (Civil Appeal E043 of 2023)  
[2024] KEHC 15428 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15428 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E043 OF 2023  
PN GICHOHI, J  
DECEMBER 4, 2024**

**BETWEEN**

**NAIROBI UNIVERSITY ..... APPELLANT**

**AND**

**HEZRON NJONG OPAR ..... RESPONDENT**

*(An Appeal against the judgement of Orengo K.I. Principal Magistrate Nakuru delivered on 10/2/2023 in CMCC No. 28 of 2008; Hezron Njong Opar Vs Nairobi University)*

**RULING**

1. This matter was coming for judgment but will now be a ruling for reasons here below. The background of this appeal is that the Respondent herein sued the Appellant before the Nakuru Chief Magistrates Court vide a plaint dated 11<sup>th</sup> January, 2008, seeking judgment against the Appellant for: -
  - a. Payment of Kshs. 143,400.
  - b. Costs of the suit.
  - c. Interest on (a) and (b).
2. The Respondent's claim was that he entered into a contract of employment with the Appellant as a part time lecturer from the year 2002 till the year 2005 and posted to Nairobi University, Nakuru branch Campus. He pleaded in the said contract, parties agreed that the Respondent would be paid Kshs.1000 per hour for services rendered.
3. It was his contention that despite teaching the Appellant's Students, the Respondent paid him some wages leaving a balance of Kshs. 143,000 that being: -Kshs. 23,100/= for hours taught in certificate of public Relations between April and June 2003.Kshs. 19,800/= for hours taught in international marketing between April and September, 2003.Kshs. 20,850/= for hours taught in marketing planning



and Control between April and September, 2003.Kshs. 34,650/= for hours taught in certificate in Public Relations between the month of June and August, 2005.Kshs. 45,000/= for hours taught in Certificate of Public Relations between June and August 2005.

4. The Appellant entered appearance on 22<sup>nd</sup> February, 2008 and filed a defence of even date denying the entire claim. More particularly, the Appellant denied having any contractual relationship with the Respondent as alleged or their being any privity of contract between the Appellant and the Respondent. In the circumstances, the Appellant stated that it had no obligation to comply. The Appellant urged the court to dismiss the Respondent's claim.
5. The Respondent's case was heard on 4<sup>th</sup> August 2008 and closed. The defence case was adjourned for various reasons on record prompting the trial court to ultimately close it 30<sup>th</sup> October, 2009 without any defence witness testifying. Judgment was delivered on 5<sup>th</sup> February, 2009 in favour of the Respondent.
6. On application by the Appellant, the trial court set aside the judgment and re-opened the case for defence hearing. The defence did not avail witnesses prompting the trial court on 25<sup>th</sup> July 2018 to slate the matter for hearing on 8<sup>th</sup> August, 2018. However, the Appellant did not have witnesses and therefore closed the defence case. Both parties filed their respective submissions and the trial court delivered its judgment on 10<sup>th</sup> February, 2023 in favour of the Respondent as against the Appellant for Kshs. 143,000/= together with costs and interest at court rates.
7. Aggrieved by that judgement, the Appellant filed a Memorandum of Appeal dated 6<sup>th</sup> March, 2023 on the grounds that: -
  1. The learned magistrate erred in law in refusing to allow the Defendant's witnesses to testify even after filing witness statements and bundle of documents in support of the Defendant's defence and consequently the Defendants right to a fair trial was violated and the entire proceedings are a travesty of justice.
  2. The learned Magistrate erred in law and fact in holding that at all material time there existed a contract of employment between the plaintiff and the Defendant under whose terms the Plaintiff was entitled to wages for alleged services rendered.
  3. The learned Magistrates erred in law and fact in holding that the Plaintiff has discharged his burden of proof on a balance of probability and as required by the provisions of Section 107 of the Evidence Act Cap 80, Laws of Kenya.
  4. The learned Magistrate erred in law and fact in holding that the Plaintiff's claim was unchallenged even when the Defendant had filed a statement of Defence, Witness Statement, cross-examined the Plaintiff during the trial and had marked for identification several documents countering the Plaintiff's evidence.
  5. The learned Magistrate therefore erred in law in shifting the burden of proof to the Defendant contrary to principles of law.
  6. The learned magistrate erred in law and fact in failing to distinguish the cases relied upon by the Plaintiff and consequently misapplied the principal of law expounded in the said authorities to the detriment of the Appellant as the court was not faced with any two opposing probabilities.
  7. The learned Magistrate erred in law and fact in mitting ante evidence and relying on unsubstantiated documents and accounts manufactured by the Plaintiff himself and therefore arrived at an erroneous decision in awarding the Plaintiff the principal amount as pleaded.



8. The learned Magistrate erred in law and fact in awarding the plaintiff costs and interest in the suit against clear evidence that the Plaintiff had delayed the prosecution of the suit for several years necessitating an Application to dismiss the suit for want of prosecution, which application was denied in the court allegedly in the “interest of justice”, even though the same court went on to deny the Appellant an adjournment in order to call its key witness.
  9. The learned Magistrate erred in law in considering extraneous matters and making hypothesis not based on fact or law and thus arrived at a grossly flawed decision.
  10. The learned Magistrate’s decision is therefore full of contradictions and in variance with the evidence tendered before court, his analysis of evidence is selective and his application of the law flawed, leading to gross miscarriage of justice.
8. The Appellant therefore prayed that:
- a. The Appeal herein be allowed and the judgement and decree of the Hon. Orege K. I(PM) issued on 10<sup>th</sup> February 2023 be set aside and substituted with an order dismissing the Plaintiff’s suit before the lower court with costs to the Appellant.
  - b. Without prejudice to the foregoing and in the alternative, this Honourable Court be pleased to remit the suit before the Lower Court for trial before another court of competent jurisdiction.
  - c. Costs of the Appeal herein be borne by the Respondent.
9. Upon considering the entire trial court record and this Appeal together with submissions herein, this court noted that despite the matter appearing like a normal civil case for for determination by High Court, it is evident that the dispute between the parties herein is about an alleged contract of employment between the Respondent and the Appellant herein. That therefore raises the issue as to whether this Court has jurisdiction to determine it even though no party raised it.
10. In such scenario, the Court of Appeal in *Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib* [2015] eKLR, held: -
- “Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.”
11. Having noted the nature of the dispute between the parties herein, this Court is of considered view that the power to determine this Appeal lies with the Employment and Labour Relations Court pursuant to Article 162(2) of *the Constitution* of Kenya 2010.
12. Further, Section 12(1) (a) of the *Employment and Labour Relations Court Act* provides that: -
- “The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—



- (a) disputes relating to or arising out of employment between an employer and an employee; ...”

13. Accordingly, and in light of the analysis above, this Court lacks jurisdiction to hear and determine the Appeal. However, and considering the period the dispute has been pending before the courts, this Court is guided by Court of Appeal decision in Prof. [Daniel Mugendi Vs Kenyatta University & Others, Civil Appeals No. 6 of 2012](#) where the stated: -

“And in order to do justice in the event where the High Court, the Industrial Court or the Environmental Land Court Division comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar and equal status should in the spirit of harmonization effect the necessary transfers among themselves....”

14. In the circumstances this Court makes the following orders: -

1. The Civil Appeal No E043 of 2023 Nairobi University vs Hezron Njong Opar be and is hereby transferred to the Employment and Labour Relations Court Nakuru for determination.
2. The file be urgently placed before the Judge in the said Court for further directions on hearing and determination of the appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Kitulu for Appellant

Mr. Wachira for Respondent

Ruto - Court Assistant

