Rabdiya Construction Ltd v Abukuse (Appeal E196 of 2023)
[2025] KEELRC 2509 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2509 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E196 OF 2023

JW KELI, J

SEPTEMBER 18, 2025

BETWEEN

RABDIYA CONSTRUCTION LTD ..... APPELLANT

AND

SHADRACK ENANE ABUKUSE ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. S.N. Muchungi (SRM) delivered on 8th September, 2023 in MCELRC E1105/2021)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. S.N. Muchungi (SRM) delivered on 8th September, 2023 in MCELRC E1105/2021 between the parties filed a memorandum of appeal dated the 9th of October 2023 seeking the following orders:-

    a. This appeal be allowed.

    b. The Judgment and Orders of the subordinate court dated 8th September, 2023 be set aside and the suit therein be dismissed with costs to the Appellant.

    c. The costs of this appeal be borne by the Respondent.

Grounds Of The Appeal

2. That the Honourable Trial Magistrate erred in law and in fact in making a finding that the Respondent was an employee of the Appellant.

3. That the Honourable Trial Magistrate erred in law and in fact in believing and relying on the Respondent's submissions without any evidential value attached to them.

4. That the Honourable Trial Magistrate erred in law and in fact by delivering a judgment in total disregard of provisions of the law relating to proof of an employer-employee relationship.

5. That the Honourable Trial Magistrate erred in law and in fact by failing to make a finding that the Claimant was an employee of the sub-contractor who was enjoined as a third party to the suit and not the Appellant herein.

6. That the Honourable Trial Magistrate erred in law and in fact and misdirected herself by failing to consider at all the submissions made before her by the Appellant and reached an erroneous conclusion thereby occasioning a miscarriage of justice.

7. That the Honourable Trial Magistrate erred in law and in fact by failing to appreciate and consider the evidence before her and finding that the Claimant had not proved unlawful termination against the Respondent.

8. That the Honourable Trial Magistrate erred in both law and in fact in deciding the case against the weight of evidence and in further allowing the Claimant's suit in the court below whereas there was want of sufficient evidence.

Background To The Appeal

9. The Respondent filed claim against the Appellant vide a statement of claim dated the 5th of May 2021 seeking the following orders:-

    a. A declaration that the Claimant suffered unfair, wrongful and unlawful dismissal from employment.

    b. The Respondent be ordered to pay the Claimant the following sums:

        i. One month pay in lieu of notice Kshs. 20,800.00

        ii. Compensation for leave days not taken Kshs. 151,200.00

        iii. Housing allowance Kshs. 303,509.70

        iv. Damages for wrongful dismissal Kshs. 249,600.00

        v. Service Gratuity Kshs. 93,600.00

        vi. Costs of the suit

        vii. Interest on (i) to (iv) above from the date of filing the suit until payment in full at court rates.

    c. An order that the Respondent do issue the Claimant with a Certificate of Service and references befitting his status.

    (pages 15-18 of Appellant's Complete ROA dated 21st May 2025).

10. The Respondent filed her verifying affidavit, list of witnesses, witness statement, and list of documents together with the bundle of documents attached, all dated 5th May 2021 (see pages 19-31 of ROA). The Respondent also filed the witness statement of Stephen Omondi Ojuang' dated 4th March 2022, and supplementary list of documents of even date (pages 32-34 of ROA).

11. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 22nd July 2021 (pages 43-45 of ROA). They also filed a list of witnesses and list of

documents dated 5th April 2022; and witness statement of Wilson Odhiambo (pages 46-74 of ROA). The Respondent also took out a Third Party Notice dated 27th July 2022 (page 75 of ROA).

12. The Respondent's case was heard on the 3rd of April 2023 where the claimant/respondent testified in the case, relied on his witness statement as her evidence in chief, produced his documents attached to his list of documents and supplementary list of documents, and was cross-examined by counsel for the Appellant Mr. Kiwinga. PW2, Stephen Omondi Ojuang' also testified on behalf of the claimant/respondent, relied on his witness statement as his evidence in chief and was cross-examined by counsel for the Appellant Mr. Kiwinga (pages 127-130 of ROA)

13. The Appellant's case was heard on the same day with the respondent/appellant calling one (1) witness, Wilson Odhiambo, to testify on his behalf. He relied on his filed witness statement, and produced the appellant's documents. He was cross-examined by counsel for the claimant/respondent Ms. Atema (pages 130- 135ROA)

14. The parties took directions on filing of written submissions after the hearing. The parties complied.

15. The Trial Magistrate Court delivered its judgment on the 8th of September, 2023, partly allowing the claimant/respondent's claim to the tune of Kshs. 179,200/- comprised of one month's pay in lieu of notice; leave pay for the years 2018 and 2019; and compensation for unfair termination equivalent to 6 months' salary (complete judgment at pages 106-115 of Appellant's ROA dated 16th May 2025).

Determination

15. The appeal was canvassed by way of written submissions. Both parties filed.

This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. Further in on principles for appeal decisions in Mbogo v Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

17. In their submissions dated the 12th of June 2025, the Appellant submitted generally on the grounds of appeal.

18. On his part, the Respondent identified the following issues for determination in his undated submissions:

i. Whether the court erred in law and in fact by finding that the Respondent was an employee of the Appellant.

ii. Whether the court erred in law and in fact when it found that the Respondent had been unfairly and unlawfully terminated.

iii. Whether the Respondent is entitled to the reliefs awarded by the trial court.

iv. Whether the trial court was proper in failing to award the other reliefs sought.

19. The court taking into consideration the grounds of appeal was of the considered opinion that the issues for determination in the appeal were -

i. Whether the court erred in law and in fact by finding that the Respondent was an employee of the Appellant and not the third party.

ii. Whether the court erred in law and in fact when it found that the Respondent had been unfairly and unlawfully terminated.

iii. Whether the trial court erred in award of reliefs

Whether the court erred in law and in fact by finding that the Respondent was an employee of the Appellant and not the third party.

20. The grounds of appeal under the issue were-

a. That the Honourable Trial Magistrate erred in law and in fact in making a finding that the Respondent was an employee of the Appellant.

b. That the Honourable Trial Magistrate erred in law and in fact in believing and relying on the Respondent's submissions without any evidential value attached to them.

c. That the Honourable Trial Magistrate erred in law and in fact by delivering a judgment in total disregard of provisions of the law relating to proof of an employer-employee relationship.

d. That the Honourable Trial Magistrate erred in law and in fact by failing to make a finding that the Claimant was an employee of the sub-contractor who was enjoined as a third party to the suit and not the Appellant herein.

e. That the Honourable Trial Magistrate erred in law and in fact and misdirected herself by failing to consider at all the submissions made before her by the Appellant and reached an erroneous conclusion thereby occasioning a miscarriage of justice.

The appellant's submissions

21. That the learned Magistrate erred in law and fact by concluding that the Respondent was an employee of the Appellant based solely on an alleged delivery note dated 24th November, 2011. These documents, issued for material deliveries, do not establish an employer employee relationship as required under Section 2 of the *Employment Act*, 2007. The Appellant's witness, Wilson Odhiambo, testified that delivery notes are issued to any person delivering materials, including subcontractors' employees, and do not signify employment.

22. That RW1 testified that the alleged delivery note dated 24/11/2011 (page 16 of the record of appeal) document was a crossed (cancelled) order sent to suppliers, not a delivery note, and was not issued to casual workers like the Respondent, who claimed to be a mason. The trial court's finding that the

documents' authenticity was not challenged is erroneous. RW1 explicitly clarified that such orders are sent to suppliers, signed by the director, and not given to masons or casual workers such as the respondent. The document was a handwritten, cancelled order, not a signed delivery note, and the court failed to address this distinction, which undermines its evidential value in proving employment. The Respondent who confirmed in his evidence as well as pleadings that he was a mason, provided no explanation for handling material orders, a task outside his alleged role. RW1 testified that delivery notes accompany materials transported by trucks, and casual workers like the Respondent would not be involved in such tasks. The court's failure to interrogate this anomaly constitutes an error of fact. The trial court failed to consider this evidence and erred in its judgment in holding that the said documents were never challenged by the appellant. The Respondent admitted during to having no employment contract, appointment letter, payslips, or NSSF/NHIF records linking him to the Appellant. The Respondent failed to meet this threshold. The court's overreliance on the delivery notes, without requiring direct evidence of employment, constitutes an error of law and fact warranting appellate intervention. In the case of Linus Songwa Musamali v Bamco Construction Company [2020] eKLR on the issue of subcontractors Justice Abuodha held as follows: The concept of Labour outsourcing has in the recent past gained ground especially in the construction industry where jobs come as projects and a contractor need not keep a workforce unless there is work to be undertaken. The Court is not new to cases where at the conclusion of a contract some of the outsourced workers sue he contractor claiming unfair termination even where as is the case before me a written Labour outsourcing contract between the contractor and the Outsourcing company.The learned Magistrate erred by dismissing the Appellant's evidence that the Respondent was employed by a subcontractor, Eliud Oyido Odero. The Appellant produced a subcontract agreement effective from 2013 to April 2016, which stipulated that the subcontractor hired and paid his own employees, including the Respondent. The trial court's reasoning that the Respondent worked for the Appellant before 2011 and after 2017 the subcontract period is not tenable. The delivery notes do not prove direct employment, and the court failed to consider whether other subcontractors employed the Respondent outside the 2013–2016 period. The Appellant's witness testified that the company subcontracts all construction work and does not engage casual workers directly, a common practice in the construction industry. In Linus Songwa Musamali v Bamco Construction Company [2020] eKLR, the court upheld a similar subcontracting arrangement, dismissing claims against the main contractor. The lower court's failure to apply this precedent was an error of law. The claimant alleged in his evidence that he was employed as a permanent employee by the Respondent from the year 2010. He confirmed in his evidence that he did not have any document to confirm that he was employed by the Respondent. The claimant confirmed that he was a member of NSSF but he failed to adduce statements to prove that the Respondent was indeed remitting funds to his account. He did not state anywhere in his pleadings as well as his statement that the Respondent failed to submit statutory deductions on his behalf. The claimant even though admitting that he was a permanent employee of the Respondent, he failed to produce evidence as contained in his bank or Mpesa statements to corroborate the evidence that indeed he was working throughout the entire period continuously as alleged in his oral testimony. By failing to produce evidence of continuous employment contrary to the assertions of the Respondent, the claimant has failed to discharge the burden of proof. Section 109 of the *Evidence Act* states that: The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person It's my humble view that in the light of the facts adduced at the trial it was incumbent upon the Claimant to comply with Section 107 and 108 of the *Evidence Act* Chapter 80 laws of Kenya which states:- "S. 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists. 107 (2) When a person is bound to prove the existence of any fact it is that the burden of proof his on that person. (108):

The burden of proof in a suit or proceedings his on that person who would fail if no evidence at all were given on either side". The Appellant produced both oral and documentary evidence to prove that the claimants were engaged by a subcontractor and was not their employee. There was no evidence adduced by the Claimant to show that they were engaged as employees by the Respondent. The evidence of the claimant in so far he was employed by Premji was evidence that was only adduced by the Claimant as he was testifying. The same was not contained in his pleadings as well as his statement that was adopted as his evidence. The above evidence was equally introduced from the witness stand by CW1 and disadvantaged the Appellant who at that point was unable to introduce evidence by calling witnesses to rebut the same. This was trial by ambush and we are guided by Order 2 rule 4 of the Civil Procedure Rules which provides that: "4.(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statue of Limitation or any fact showing illegality – (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or (c) which raised issues of fact not arising out of the preceding pleading. This was important evidence which was concealed by the Claimant to the detriment of the Appellant and the trial court erred in failing to dismiss the same. The Subcontract agreement confirmed that it covered the scope of works within which the Claimant was allegedly engaged in and therefore the right party to sue was the subcontractor and not the Appellant herein. In the case of Linus Songwa Musamali v Bamco Construction Company [2020] eKLR on the issue of subcontractors Justice Abuodha held as follows: 'In the case before the respondent has reasonably shown that it had Labour outsourcing contract with one Mr. Mbay. The latter came to Court and testified as much. The Claimant on the other hand did not show, a part from merely alleging that there was an employer employee relationship between himself and the respondent. From the evidence before me, it was clear that the person who was liable to be sued for unfair termination if at all took place was Mr. Daniel Mbay Musila and not the respondent. The Appellant confirmed that they have site offices in all the construction sites where they have ongoing works and the office would usually have their documents but the subcontractor was the one to provide the labor force.RW1 stated that the name of the Claimant appearing on an order book could not be proof of employment as the said books are usually kept at the site office where the workers would be. Further to the above, the said order note that was produced as CLEX1 was not even signed by the Appellant which raised doubt as to its authenticity. The claimant indeed only relied on that one document to prove that he has been employed by the Respondent for a period of ten years. If indeed the Claimant was in employment of the Appellant for a period of ten years he should have been able to prove by way of evidence an employment relationship to the production of NHIF and NSSF records which were being paid on his behalf by the Respondent, bank or Mpesa statements to prove any form of salary remittance by the Respondent or even a payslip to demonstrate that he was indeed an employee of the Respondent. In the case of Stephen Edwin Okoth v Attorney General [2019] eKLR Justice on proof of employment status held that: I find no evidence of employment of the claimant by the respondent. Work ticket entries of 79 days over a period of five months during 2010 and 2011 cannot constitute proof of employment over a period of 5 years. The claimant could not have worked for five years for the Ministry of Roads without pay, without a contract and without a work ticket covering the entire period. I find no proof of any employment relationship between the claimant and the Ministry of Roads for which the respondent would be liable. The Appellant's witness was consistent in his evidence, and confirmed that the Claimant was not their employee but an employee of the Subcontractor. In the case of Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited (2016) eKLR as was quoted in the case of Zarika Adoyo Obondo v Tai Shunjun & another [2020] eKLR on the issue of the jurisdiction of an employment court it was held that: The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the

Court must always satisfy itself on this account before proceeding any further.This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice."

23. The Claimant did not issue any notice of production of documents which would have been in the Respondent's possession to prove indeed he was an employee. The Appellant's witness was consistent in his evidence, and confirmed that the Claimant was not their employee but an employee of the Subcontractor. In the case of Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited [2013] eKLR as was quoted in the case of Zarika Adoyo Obondo v Tai Shunjun & another [2020] eKLR the court held that;- ''That settled, I will now deal with the status of the Claimant vis a vis Charles Asiaba. The Claimant did not produce a single document to prove an employment relationship between the grievant and the Respondent, not even the letter of resignation which the grievant claimed to have written to the Respondent. An employment relationship has serious implications on the parties. The Court must therefore be fully satisfied that it actually exists. A Claimant claiming employment rights must prove the existence of an employment relationship.'' In the case of Mary Mmbone Mbayi v Chandubhai Patel & Another (Industrial Cause No. 761 of 2011) as was quoted in the case of Zarika Adoyo Obondo v Tai Shunjun & another [2020] eKLR the Court stated that: "Even in cases where there may be no documentary proof of an employment relationship or termination thereof, the Claimant retains the burden of proving their case through viva voce evidence." The Claimant did not adduce any evidence to prove the existence of an employment relationship between the grievant and the Respondent.

The respondent's submissions

24. Section 2 of the *Employment Act* 2007 defines an employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner. 33. The Respondent-maintains that he was employed by the Respondent as a Mason on or about January 2010. That he discharged his duties continuously with due diligence for a period of 9 years up until his dismissal. That he would receive a salary of Kshs. 230/= per day from January 2010 to September 2011. Thereafter his salary was raised to Kshs. 400/= per day. Further in May 2012, his salary was increased to Kshs. 800/= per day until his dismissal. That during this period he would receive the said amounts in cash. That during the pendency of his employment, he would receive reports and or instructions from the Respondent through his supervisor Mr. Premji or Mr. Mwangi the site agent, individuals who have since been confirmed to be employees of the Respondent during the hearing.

25. In evidence the Respondent/ Claimant produced two delivery notes dated 24th November 2011 and 10th February 2017 respectively, which deliveries were made by himself and bore his signature. Further you will note that the same delivery notes also bear the heading of the Appellant Company's name. (Page 127 of Record). 36. Additionally, it was the Respondent's testimony that he reported the dispute before the Kenya Building Construction, Timber and furniture Industries Employees union and in evidence he produced a letter dated 19th June 2020 (page 26 of the Complete Record of Appeal) together with a Union Membership Card to prove his membership (page 28-29 of the Complete record of appeal) noting that the law regulating trade unions provides that membership of trade unions should be sector specific.

26. The Appellant denies to have employed the Claimant as a Mason and maintained that the Respondent/ Claimant was engaged as a casual worker by Eliud Odera who was a sub-contractor of the Respondent, tasked to carry out all construction works. That Eliud Odera, the subcontractor, engaged its own employees at the site including the Respondent/Claimant and who were under his own supervision. In evidence the Appellant produced a sub contractual agreement for building works made between the Appellant herein Rabdiya Construction Co. Ltd and Eliud Oyido Odero, the sub-contractor. That a cursory look at the said contract indicates September 2013 as the date of commencement of works and April 2016 as the date of practical completion of the works. (Page 72 of the Record). That had it been that the Respondent/ Claimant indeed was employed by Eliud Odera then his assignment too could have come to an end in April 2016. The Appellant in his submissions has contended that the delivery notes do not establish an employer- employee relationship as required under Section 2 of the *Employment Act*, yet the completion date of the construction was April 2016 and the Respondent/Claimant was in possession of a delivery note dated 10th February 2017 (Page 34 of the Complete Record). In furtherance, the Appellant's have equally submitted that the delivery note dated 24/11/2011 was a crossed order sent to the supplier. Yet, the main interest in the document is the bearing of the Appellant's letterhead and the Respondent's name, which proves the link between the two parties long before the commencement of the alleged sub contractual agreement. That notably, the Appellant's never questioned the authenticity of the said document and neither did they object its production as evidence. The allegation raised that the same was erroneous as it was handwritten and a cancelled order is moot to this issue raised. The court in Kaiga v Das [2023] KEELRC 2194 (KLR) the court in citing the case of Joseph Munene Murage v Salome Ndung'u (2019) held that there was past existence of an employer employee relationship between the parties on a balance of probabilities. The Respondent urged that the delivery notes proved a link between the Appellant and the Respondent and thus established existence of an employer employee relationship. The delivery note dated 24/11/2011 clearly proves that the Respondent was in employment long before the coming into force of the alleged sub contract agreement which came into effect in September 2013. Equally the delivery note of 10/2/2017 proved that the Respondent was still in employment despite the assigned construction work having completed in April 2016. The Appellants claim that the trial court failed to consider whether other subcontractors had employed the Respondent outside the period of 2013-2016 yet the burden of proof was on their side to establish existence of if any other sub contracts. Section 10 (7) of the *Employment Act*, stipulates that if in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in subsection [1] the burden of proving or disapproving all an alleged term of employment stipulated in the contract shall be the employer. Based on the foregoing it is our submission that the trial Court was well guided in holding that the Respondent/ Claimant was an employee of the Appellant and not the subcontractor's based on the balance of probabilities of the evidence produced by the parties.

Decision

27. The role of the court at first appeal is as stated in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

28. The Respondent in statement of claim contended that he was employed by the appellant in January 2010 as a mason until January 2020 when the appellant told him his services were no longer required without a formal notice. He served continuously for 9 years. The claimant filed supplementary witness statement of Stephen Omondi Ojuang who stated that he knew the claimant/respondent as they worked together for the appellant. He was a painter employed in 2012 and found the claimant working for the appellant as a mason. (page 32 of ROA2 filed by respondent) The claimant produced a document dated 24th November 2011 of which it was indicated hand delivery Shadrack from Kindaruma site to Uppperhill site.

29. A defence was filed in denial of the claim. In witness statement for the respondent of Wilson Odhiambo who said he was employed as supervisor by the appellant. Wilson stated that the appellant does not engage casual workers at the site. That the appellant was engaged in work of sourcing of construction contracts. That all actual works are subcontracted to different independent subcontractors who hire all workers on site. That the site where the claimant alleged to have been working had subcontracted to Eliud Oyido Odero to carry out the work and had engaged own employees including the claimant who were under his supervision. That the subcontractor operates independently from the appellant, hires and pays own workers including the claimant. That the appellant provides delivery books to record all delivered material and any person delivering material is issued with a delivery note and the same is not evidence of employment by the appellant, That the subcontractors use delivery notes provided by the appellant. That the claimant/respondent was an employee of Eliud Oyido Odero. (statement at page 25 of ROA1).

30. The appellant produced the agreement and conditions of subcontract for building works between it and the said Eliud Oyido Odero. The agreement stated the works started in April 2013 to April 2016. (page 42 of ROA1).The respondent issued a third party notice to Eliud Oyido Odero which was dated 27th July 2022 which stated that the appellant claimed against Odero as the employer of the claimant (page 75og ROA2).

31. During the cross-examination, the claimant/respondent told the trial court that he was employed in 2010. That his main employer was Mavji. At site there are contractors and sub-contractors. The last site was Riara with contractor called Suarez and the appellant was the contractor. He was employed by Remji and was a permanent employee of the appellant and not casual. He worked till January 2020. He worked throughout, had no letter of employment or payslip. He had no prove of payment. He had reported the case to the union. He had in letter of 18th February 2020 indicated he had not taken leave. He was paid daily wage of 800 paid weekly. He was a member of NSSF. He had no termination letter. He knew Eliud from 2014 (the third party). During re-examination the claimant stated he was paid in cash. CW2 was Ojuang and he knew the claimant as they were working for the appellant since 2012. That when the claimant services were terminated he was in employment and left later in March 2020. CW2 was also a permanent employee and had a case of termination against the appellant.

32. Wilson Odhiambo was called as RW1. He adopted his witness statement as evidence in chief for the appellant. He produced the subcontract agreement between the appellant and Eliud as D-exh1. He knew Pemji as a site agent. During cross-examination, RW1 told the trial court he was employed in 2010. He told the court that all materials are transported by trucks. That the delivered material is accompanied by delivery notes provided by the appellant. He said that the appellant did not engage casuals. On re-examination RW1 told the court that all machines, materials are by the contractor(Appellant) the labour and workforce is by the sub-contractor. On the delivery note relied on by the claimant, RW1 said it was a sample of an order the appellant uses to purchase material from hardware. He further told the court the note had the name of the claimant , that at no instance a casual woerker is given the note, that the claimant was a mason. He said Premjee represents the appellant but

does not hire or fire. That the claimant in pleadings did not mention Premjee and that is the reason they did not call him as a witness. That they did not call Eliud as he is not their employee.

33. The trial magistrate in judgment found that the claimant produced two documents one dated 24th November 2011 being a delivery note and another dated 10th February 2017 whose authenticity was not questioned. The court finds that is a correct finding by the trial court. The alleged subcontractor agreement came into effect in September 2013, when the claimant was already working for the appellant as per the delivery note of 24th November 2011. Similarly, the subcontractor Eliud ought to have completed work in April 2016, and the claimant produced evidence of being at work in 2017. Based on the foregoing the trial court found the claimant / respondent was an employee of the appellant and not the alleged sub-contractor. Having re-evaluated the evidence before the trial court as above, I uphold the finding of the trial court. I further uphold the finding of the trial court that the respondent was a permanent employee for having worked continuously for more than 3 months after the initial engagement as a casual. The employment converted to a contractual employment under section 37 of the *Employment Act* to wit- '37. Conversion of casual employment to term contract

    (1) Notwithstanding any provisions of this Act, where a casual employee—

        (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

        (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

    (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

    (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee." I find no basis to fault the decision of the trial court on decision that the respondent was a contractual employee of the appellant.

Whether the court erred in law and in fact when it found that the Respondent had been unfairly and unlawfully terminated.

34. The grounds of appeal under the issue were -

    a. That the Honourable Trial Magistrate erred in law and in fact by failing to appreciate and consider the evidence before her and finding that the Claimant had not proved unlawful termination against the Respondent.

    b. That the Honourable Trial Magistrate erred in both law and in fact in deciding the case against the weight of evidence and in further allowing the Claimant's suit in the court below whereas there was want of sufficient evidence.

35. The trial court held the termination of the Respondent's employment was unfair for lack of procedural fairness, notice and reasons for termination. The defence focussed on lack of employee-employer relationship. The defence was defeated. The burden of prove of unfair termination lies with the employee according to section 47(5) of the *Employment Act* to wit- '47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.''. To prove the unfair termination the claimant/ respondent pleaded in paragraph 7 and 8 of his witness statement dated 5th May 2021 that on or about January 2020 the appellant informed him that his services were no longer required and his employment was terminated. He was not given any reason for the termination, and there was no notice. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.'' To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).

36. Section 43 of the *Employment Act* provides for proof of reasons for termination as follows:- '43. Proof of reason for termination

(1) 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.''

37. The court finds the claimant laid the basis of his termination being unfair, and the burden passed to the employer to justify the reasons for the termination. The appellant never offered any explanation as it took the position it was not the employer. That defence failed. The court then finds no basis to fault the trial court's finding that the termination was unfair on the basis of lack of procedural fairness and a valid reason.

Whether the trial court erred in award of reliefs.

38. The trial court in judgment awarded notice pay of one month salary Kshs. 20,800 which was due for lack of procedural fairness under section 35 and 36 of the *employment act*. The same is upheld.

39. Leave pay was awarded for years 2018 and 2019 as per the letter by his union filed in court. The employer did not provide evidence of leave to the contrary being the custodian of employee records as stated in section 74 of the *Employment Act* . I find no basis to fault the award of leave for 2 years for Kshs. 33600/-

40. The court declined to award housing allowance as the daily wages are inclusive. That is the correct position under the minimum wages orders and I find no basis to interfere. The gratuity was also denied on the basis of the respondent being a member of NSSF, and that is the correct legal position pursuant to section 35(6) of the *Employment Act*.

41. On the compensation for wrongful termination the claimant was awarded the equivalent of 6 months compensation based on the duration of service, the manner in which the termination occurred and the possibility of securing an alternative job for Kshs. 124,000. The court finds that the award was justified applying the factors in section 49(4) of the *Employment Act*. It is settled law that the quantum for damages as compensation is at the discretion of the trial court. In Edward Sargent v Chhotabhai Jhaverbhat Patel [1949] 16 EACA 63, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially. (See also Spry VP in Haman Singh & Others v Mistri [1971] EA 122, 125). The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of Mbogo & AnothervShah [1968] EA 93, where it was held at page 96 that:-

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...." The trial court applied the guiding factors under section 49(4) of the *Employment Act* in arriving at award of 6 months. The Court has no basis to interfere with the trial court's discretion on the compensation. The same is upheld.

Conclusion

42. The appeal is dismissed with costs to the respondent. The Judgment and Decree of the Hon. S.N. Muchungi (SRM) delivered on 8th September, 2023 in MCELRC E1105/2021 is upheld.

43. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Ms. Wachira h/b Kiwinga

Respondent: Ms. Murage h/b Ms. Thiongo