West Build General Contractors Limited v Njuki (Employment and Labour Relations Appeal E005 of 2024) [2025] KEELRC 2425 (KLR) (12 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2425 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2024

ON MAKAU, J

SEPTEMBER 12, 2025

BETWEEN

WEST BUILD GENERAL CONTRACTORS LIMITED ..... APPELLANT

AND

PATRICK NYAGA NJUKI ..... RESPONDENT

(Being an appeal arising out of the Decree emanating from the judgment of Hon. S.Ouko(SRM) delivered on 5th September 2024 in Runyenjes MCELRC Cause No. E001 of 2023)

JUDGMENT

Introduction

1. The main issue in this appeal is whether the appellant was the respondent's employer or just a paymaster on behalf of the Ministry of Transport and Infrastructure. The appeal challenges the judgment of the lower court which found that the appellant was the employer and condemned it to pay the respondent compensatory damaged for unlawful termination of employment plus other dues accruing from his contract of employment. The appeal seeks setting aside of the said judgment and in its place dismiss the respondent's suit with costs.

2. The appeal raised the following grounds: -

    1. That the learned trial Magistrate erred in law and in fact by misunderstanding and misapprehending the Appellant's case and in so doing arrived at an erroneous decision.

    2. That the Learned trial Magistrate erred in law and in fact in failing to adequately consider or at all the Appellant's oral and written submission and the authorities that had been tendered and in so doing arrived at an erroneous decision.

    3. That the Learned trial Magistrate erred in law and in fact in failing to adequately consider or at all the Appellant's documents and in so doing arrived at an erroneous decision.

4. That the Learned trial Magistrate misdirected herself by completely disregarding the Appellant's oral testimony and documentary evidence proving that the Respondent's termination was caused by redundancy of the position and not summary dismissal.

5. That the Learned trial Magistrate erred in law and in fact in finding that subject to section 40 of the *Employment Act*, the Appellant was required to follow the procedure laid out therein, without applying it to the actual facts of the case, which made it impossible to apply the said procedure.

6. That the Learned trial Magistrate misdirected herself by completely disregarding the position in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR on redundancy, which was highlighted by the Appellant.

7. That the Learned trial Magistrate misdirected herself by completely disregarding the position in Meru ELRCA No.E001 of 2023 West Build General Contractors Limited v Jackline Ntinyari & 17 others, which was highlighted by the Appellant during oral testimony.

8. That the Learned trial Magistrate erred in law and in fact by neglecting and/or refusing to acknowledge that the documents produced by the Appellant proved that the nature of the redundancy in the case did not squarely fit into the circumstances envisioned by section 40 of the *Employment Act*.

9. That the Learned trial Magistrate misdirected herself by failing to consider the factual foundation of the Arbitral Award dated 29th July 2022 that confirms that the Ministry of Transport and Infrastructure cancelled the contract, resulting in the immediate redundancy of the Appellant's employees and evacuation from the work site.

10. That the Learned trial Magistrate erred in law and in fact by neglecting and/or refusing to acknowledge that since the contract between the Appellant and the Ministry of Transport and Infrastructure was terminated abruptly and unlawfully, the Appellant did not have the opportunity to follow due procedure.

11. That the Learned trial Magistrate misdirected himself by finding that the Respondent was procedurally and substantively terminated without considering the special factual circumstances of the case.

12. That the Learned trial Magistrate erred in law and in fact by adjudging that the Respondent was entitled to one month's salary in lieu of notice, when the Appellant Company was instructed by its employer to immediately vacate the work site, resulting in no time to issue proper notice to its employees.

13. That the Learned trial Magistrate erred in law and in fact by neglecting and/or refusing to acknowledge the Appellant's List of Documents that produced copies of the leave/off sheet attendance cards, which evidenced that the Respondent had taken his leave/ off days for the years worked.

14. That the Learned trial Magistrate erred in law and in fact by adjudging that the Respondent was entitled to sixty-three [63] days amounting to Kenya Shillings Forty-Two thousand Three Hundred and Seventy -Eight [Kshs.42,378/=], which is contrary to the evidence tendered by the Appellant.

15. That the Learned trial Magistrate erred in law and in fact by adjudging that the Respondent was entitled to costs and interests.

Background

3. By a Memorandum of Claim dated 6th March 2023, the respondent sued the appellant alleging that on or about 20th January 2017, he was employed by the appellant as Watchman at Kyeni-Karurumo Road Construction Site. His monthly salary was Kshs.20,180.40 and he worked diligently until on or about 5th March 2020 when his services were terminated on account of redundancy via a phone call.

4. He contested the termination for being unfair and unlawful since the statutory procedure for termination on account of redundancy was not followed including payment of severance pay. He further averred that the termination was not grounded on a justified reason and it went against the rules of Natural Justice.

5. The respondent further alleged that, the appellant had made statutory deductions from his salary, namely, NHIF and NSSF but unlawfully failed to remit to the relevant agencies. He averred that as a result of the above breaches by the appellant, he had suffered economic loss, psychological and mental anguish and prayed for;

    a. Kshs.554,054.32

    b. General damages for unfair termination of employment and breach of his rights to fair labour practices.

    c. Costs of the suit.

6. The appellant filed a Statement of defence dated 5th July 2023 denying ever employing the respondent and subsequently terminating the employment as alleged in his pleadings. However, on a without prejudice basis, it averred that, if at all the respondent was contracted, then his contract of employment was subject to the terms and conditions of an existing contract between the respondent and the contracting authority [The Principal Secretary State Department, Ministry of Transport and Infrastructure]. It further averred that the costs incurred during the project including the respondent's wages were paid by the Contracting Authority through it while acting as a Paymaster and no more.

7. It averred that in the year 2020, the said Contracting Authority revoked the contract between them without prior notice leading to Arbitration proceedings which ended in its favour and against the Contracting Authority. That the Arbitral award had affirmed that the payment of wages was to be done by the Contracting Authority.

8. It averred that the respondent's contract of service was caused by circumstances beyond its control, namely the revocation of contract between it and the Contracting Authority. Therefore, it prayed for the suit to be dismissed with costs as the respondent was not entitled to the reliefs sought.

9. The respondent filed a Reply to Defence dated 26th July 2023 joining issues with the appellant's defence and reiterating the averments and prayers set out in his statement of Claim.

10. Subsequently, the appellant sought to join the said Contracting Authority as a Third Party vide a Chamber Summons dated 22nd November 2023 but upon consideration, the trial court declined to issue the third party Notice to the Contracting Authority and the matter proceeded between the two parties herein.

11. During the hearing, the respondent testified as PW1 and called one witness while the respondent called one witness only. The witnesses adopted their respective written statements as evidence in chief and produced documents as exhibits.

12. In brief, the respondent's case was that he was employed under an oral contract by the appellant in 2017 and worked without any disciplinary issue until March 2020 when he was informed via a pone call not to report to work the following day. He produced pay slips and NHIF statements to prove that the was employed by the appellant.

13. During his period of service, he was deducted NHIF and NSSF but the respondent allegedly never remitted. He also never went for any annual leave and that he had an oral agreement that he would be entitled to gratuity.

14. PW2 was Timothy Kamau Duncan who was also employed as a watchman by the appellant from 2016 to 2020 when he was fired together with the respondent and three others through a phone call. He contended that all the five of them were verbally employed by the appellant and it asked them for NHIF, NSSF and ID documents. It also paid them. However, he contended that the appellant made statutory deductions, but only remitted PAYE to KRA and withheld the rest.

15. He confirmed that they were working at the site and road parking until the work stopped and everything returned to the site without any explanation being given to them. He contended that there was an oral agreement that they were entitled to gratuity.

16. DW1 was Wangu Mburu, a director of the appellant. She contended that the Ministry terminated the contract between it and the appellant as a result of which the construction works stopped leaving it with no option but to send home the employees. It also went for arbitration and it was awarded costs which were to be used to pay the workers.

17. She denied the claim by the respondent contending that there was no oral agreement to pay gratuity. She further stated that the respondent took his annual leave and that he worked for only one and half years.

18. During cross examination, she admitted that the appellant had a site at Gakwegori where it employed the respondent to guard and paid his salary. She also admitted that the respondent was not present when the appellant entered into contract for road construction with the Ministry and he was not a party to the contract. She further admitted that in 2021, the respondent had a leave of 21 days. She contended that the appellant remitted NHIF and NSSF contributions but she had not proof.

19. She confirmed that everyone was sent home on account of redundancy without any wrong doing. She further confirmed that no notice was given to the employees before the termination. Finally, she stated that the Ministry was found liable to pay it.

20. After considering the evidence and submissions rendered, the trial court [Hon.S.Ouko-SRM] concluded that the appellant had unfairly and unlawfully terminated the services of the respondent and awarded him six months compensation for unfair termination, one-month salary in lieu of notice, leave, unpaid salary, costs and interest. The appellant was aggrieved and appealed.

Before this court

21. The appeal was disposed of by written submissions. For the appellant, it was submitted that the trial court was informed countless times that the relationship between the appellant and the respondent was that of paymaster and overlooked that evidence. The trial court further failed to address itself, scrutinize, mention or acknowledge the Arbitral Award in arriving at the impugned judgment. It was argued that the Arbitral Award confirmed that the appellant was only a paymaster or agent of the Ministry of Transport and Infrastructure, which was solely liable for the payments.

22. This court was also urged to find that the trial court failed to consider the evidence and submissions outlined by the appellant including the leave records in page 151 of the Record of Appeal. Further that the court failed to properly weigh the evidence and erroneously applied the law and legal principles and therefore arrived at a wrong decision.

23. It was further submitted that by the trial court failure to properly assess the appellant's evidence, it failed to appreciate that the special facts of this case revealed a case of redundancy as defined in section 2 of the *Employment Act*. An analysis of the facts further revealed that it was impossible for the appellant to comply with section 40 of the Act since its agency relationship with the Ministry was as well terminated with immediate effect.

24. According to the appellant, the abrupt termination of its contract by the Ministry, rendered the procedural fairness contemplated by section 40 of the *Employment Act* practically impossible in this case. It was argued that, had there been sufficient time, the appellant would have complied with the redundancy procedure in section 40 of the *Employment Act*. In view of the foregoing, this court was urged to re-evaluate and analyze the evidence and enter judgment in favour of the appellant.

25. To emphasis the above submissions, several court decisions were cited including Selle & Another v Associated Motor Boat Co.Ltd & others [1968] EA 123, Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, Jane Khalechi v Oxford University Press EA Ltd [2013] eKLR, and Charles Muthusi Mutua v Kathi No Kakoka Services Limited [2022].

26. On the other hand, it was submitted for the respondent that the appellant was the employer of the respondent and therefore it was bound to pay his salary. For that reason, it was submitted that ground 1, 2, 3, 4,6 and 7 of the appeal must fail.

27. It was further submitted that since there was employer -employee relationship between the parties herein, the appellant was bound to comply with section 40 of the *Employment Act* before terminating his employment on account of redundancy. Consequently, it was argued that ground, 5, 8,9,10 and 11 must also fail and the award of six months' salary compensation and one-month salary in lieu of notice upheld as it was properly awarded.

28. It was further submitted that, a cursory look at the appellant's submissions on the failure by the trial court to analyze evidence, lacks specificity and clarity. Besides, as regards the award of leave, the trial court properly adjudged that the appellant did not produce evidence that the respondent took leave days since no proof was tendered in court. Consequently, this court was urged to dismiss the appeal and uphold the entire judgment of the lower court.

29. This being a first appeal, my mandate is to re-evaluate the evidence on record and make my own independent conclusions leaving allowance because I did not see the witnesses giving their testimonies. See Selle v Associated Motor Boat Company Ltd [1968] EA 123 where the Court of Appeal held thus: -

> " 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 consider the evidence, evaluate 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."

30. Having considered the evidence on record and the submissions made herein, the following issues fell for determination: -

    a. Whether the trial court failed to consider appellant's evidence and submissions.

    b. Whether the parties herein were in an employer-employee relationship.

    c. Whether the employment relationship was unlawfully and unfairly terminated by the appellant.

    d. Whether award of damages by the trial court should stand.

Failure to consider appellant's evidence and submissions.

31. The appellant largely based its appeal on the allegation that the trial court failed to consider its evidence and thereby reached a wrong decision. It contended that, its evidence that it was not the employer of the respondent but a paymaster, and further that it was not possible to comply with redundancy procedure due to time constraint, was disregarded by the trial court.

32. However, having read through the impugned judgment, its clear that the trial court considered the appellant's evidence in reaching its judgment. The court stated so on page 2 of the judgment that: -

> " The respondent in their defence did not deny that the claimants were its employees and that they were summarily dismissed. They argue that it was as a result of unforeseeable circumstances as a result of the contract between the Ministry and the respondent being terminated. That the employees' positions became redundant as the company was forced out of the work site...
>
> The court did not receive any evidence, oral or documentary to establish what process was followed by the respondent. No evidence was produced to demonstrate the process used in declaring the claimants redundant."

33. Again, in page 5 of the Judgment stated as follows: -

> " The claimant claimed for accumulated leave for the 3 years worked. The respondent argued that as per their oral agreement, the claimant was not eligible for leave [sic] his first year of employment.
>
> On cross examination, DW1 for the respondent admitted that the claimant had 21 unpaid leave days."

34. Without belabouring the point, it is evidently clear from the above excepts that the trial court considered the appellant's evidence in the impugned judgment. Consequently, I find that the alleged failure to consider the evidence adduced by the appellant was not factual as the court summarised the evidence in the judgment and evaluated it before making conclusions in favour of the employee.

Employer-employee relationship

35. The appellant alleged that it related with the respondent as a paymaster on behalf of the Ministry of Transport and Infrastructure which was the Contracting Authority. The respondent, however, maintained that the appellant was its employer and that he was not privy to the contract between the

appellant and the Ministry. I have read the evidence by the DW1 on page 415 of the Record of Appeal where on cross examination he stated as follows: -

> " -We have a contract.
>
> -The contract was with the Ministry.
>
> -The claimants were not present or party to the contract.
>
> -We had a site at Gwakegori.
>
> -We contracted them to guard the site under the contract with the Ministry.
>
> -West build employed them.
>
> -I can't confirm their monthly pay.
>
> -West build would pay them."

36. There cannot be any doubt that the foregoing evidence is an admission that the appellant had employed the respondent as security guard under a contract of service. The appellant was the employer and the respondent was the employee. Section 2 of the *Employment Act* defines employee, employer and contract of service as follows: -

> " employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;
>
> "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;
>
> "Contract of service," as an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship"

37. It follows from the evidence on record that the appellant was the employer of the respondent under a contract of service and not a mere Paymaster or Agent of the Ministry to transmit salary to the respondent. As admitted by DW1, the respondent was a stranger to the contract between the Ministry and the appellant.

38. This case is distinguishable from the earlier case of West Build General Contractors Ltd v Ntinyari & 17 others [2023] KEELRC 2265 [KLR] because in that case, the employees involved were not hired by the contractor but the Resident Engineer [agent of the Ministry at the construction site]. In that case, the contract between the contractor and the Ministry was that the contractor would pay the staff of the Resident Engineer and recover the cost from the Ministry.

39. As it is clear from the evidence, the present case involves an employee of the appellant and not the Ministry or agent of the Ministry. The employees was hired by the appellant to perform its contractual obligations and the Ministry had no contract of service with the respondent. further thatFthe appellant did not enter into any contract of service with the respondent while acting as an agent of the Ministry. It did so as the direct employer of the respondent and was therefore subject to the requirements of the law during the formation, execution and termination of the employment contract with the respondent.

Unlawful termination

40. There is no doubt that the termination of the employment contract between the parties herein was on account of redundancy. The appellant on paragraph 29 of its submissions herein acknowledged that: -

> " [a] The special facts of this case squarely lie within the ambit of the definition of Redundancy as stated in section 2 of the *Employment Act*.
>
> [b] An analysis of the fact reveal that it was impossible for the appellant to comply with section 40 since its agency relationship with the Ministry terminated effective immediately as well."

41. The foregoing submissions is an admission that the appellant terminated the contract of service for the respondent because a redundancy situation had occurred. It is further an admission that the redundancy was not done in compliance with the procedure set out under section 40 of the *Employment Act*.

42. Section 40 [1] of the Act provides that: -

> " [1] An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-
>
> [a] where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
>
> [b] where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
>
> [c] the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
>
> [d] where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
>
> [e] the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
>
> [f] the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

[g] the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

43. The above procedure is mandatory and the failure to comply with it exposes the employer to serious claims by the employee. It is now trite law that where termination of employment is not done in accordance with the procedure laid down by the law, the contract, collective agreement, employers HR Policy or both, the termination becomes unfair and unlawful. That was the case herein, as admitted by the appellant, and therefore the failure to comply with the mandatory procedure set out under section 40 of the Act rendered the termination unlawful and unfair.

Reliefs

44. In view of the foregoing conclusion, I am satisfied that the respondent was entitled to compensation for unfair termination and salary in lieu of notice under section 49 as read with section 50 of the *Employment Act*. In awarding compensation, the trial court considered relevant factors including the length of service, and whether the respondent's conduct contributed to the termination. Besides, the appellant did not state whether or not the award was manifestly excessive. Therefore I decline to interfere with the award.

45. As regards the claim for leave, there is evidence on record that the respondent took leave of 24 days for year 2017, and thereafter he took 7 days in January 2019 to compensate for the Christmas holiday. He never took any other leave according to the records submitted by the employer except off-duty sheets for one day every week. It follows that, for the three-year served, the respondent earned 63 leave days and utilized 24 days leaving a balance of 39 accrued leave days.

46. In view of the foregoing, it is evident that the trial court erred by awarding 63 leave days as opposed to 39 days. Accordingly, I interfere with the said award since it was not supported by evidence and reassess the leave award as follows:

    Kshs.16,817 x 39/30 = Kshs.21,862.10

47. As regards the award of the unpaid salary for 5 months, being Kshs.100,902, the appellant alleged that the person liable to pay is the Ministry [Contracting Authority]. However, I have already made a finding of fact that the employer in this case was the appellant and not the Ministry. Consequently, the award of unpaid salary stands undisturbed as no grounds for interfering with it have been shown.

Conclusion

48. I have found that the appellant was the employer of the respondent and it unfairly and unlawfully terminated the employment contract without complying with the procedure for redundancy laid down under section 40 of the *Employment Act*. I have further found that respondent is entitled to the award of damages made by the trial court, and save for the award of leave, the rest are not disturbed. Consequently, I enter judgment as follows: -

    a. The appeal fails save for the variation of the leave award.

    b. The judgment is varied by reducing the leave award to Kshs.21,862.10.

    c. The rest of the awards by the trial court in the impugned judgment remains undisturbed.

    d. The respondent is entitled to half the costs of the appeal since the appeal was partially successful.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 [3] of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE