



**Kayaa v Tushirikiane Enterprises Limited (Appeal E004 of 2024)
[2024] KEELRC 1487 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1487 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E004 OF 2024**

**M MBARŪ, J
MAY 16, 2024**

BETWEEN

ESTHER DAMA KAYAA APPELLANT

AND

TUSHIRIKIANE ENTERPRISES LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. R.M. Amwayi delivered
on 31st January 2024 in Kaloleni CMELRC No. E032 of 202)*

JUDGMENT

1. The appeal arises from the judgment delivered on 31st January 2024 in Kaloleni CMELRC No.E032 of 2023. The appellant is seeking orders that the trial court judgement be set aside and the claim be allowed with costs.
2. There is no Record of Appeal filed. The respondent filed the Replying Affidavit of Lewa Mwangovya the managing director in response to the Memorandum of Appeal.
3. The appeal is based on the grounds that;
 1. The trial magistrate erred in law and fact in failing to find the appellant fell within the definition of an employee as set out under Section 2 of the *Employment Act*.
 2. The trial magistrate erred in law and fact in failing to find that the payment vouchers attached by the respondent indeed confirmed the appellant was paid a monthly wage.
 3. The trial magistrate erred in law and fact in failing to find that no proof was availed by the respondent that the appellant claimant was a commission agent.



4. The trial magistrate erred in law and fact in dismissing the appellant's prayer for a declaration that her termination of illegal and/or unlawful and/or unfair and not awarding compensation for the same.
 5. The trial magistrate erred in law and fact in dismissing the appellant's prayer for one month's salary in lieu of notice.
 6. The trial magistrate erred in law and fact in dismissing the appellant's prayer for unpaid salary for two months which was a distinct prayer not dependent on the employment status.
 7. The trial magistrate erred in law and fact in dismissing the appellant's prayer on the issue of underpayments.
 8. The trial magistrate erred in law and fact in dismissing the appellant's prayer for service pay.
 9. The trial magistrate erred in law and fact in dismissing the appellant's prayer for an award of a certificate of service.
4. In response, the respondent filed the Replying Affidavit of Lewa Mwangovya the managing director and aver that the appeal is an abuse of the court process and frivolous and should be dismissed with costs. The appellant was not an employee but engaged ad hoc not under the exclusive control of the respondent. The allowances and fees paid related to specific tasks undertaken. There was no employment relationship between the parties. The appellant failed to produce any records upon which the alleged employment relationship could be discerned. The appeal should be dismissed.
 5. The appellant filed written submissions. The respondent relied on the filed Replying Affidavit of Lewa Mwangovya.
 6. The appellant submitted that on 28 August 2021, the appellant was employed by the respondent to undertake the duties of a credit officer in Kaloleni and worked until December 2022 when she resigned due to underpayment of her wages from September to December 2022. This resulted in constructive dismissal. She claimed there was unfair dismissal, compensation, notice pay, underpayments and her terminal dues.
 7. The trial court delivered judgment and dismissed the claim on the grounds that the appellant was not an employee as defined under Section 2 of the *Employment Act*, 2007 (the Act). The appellant had not adduced any evidence of her employment and failed to call any witnesses to support her case. In the case of *Robai Musinzi v Safdar Mohamed Khan* [2012] eKLR, the court held that the employer has the duty to produce work records and where there are none, the court must believe the employee. The court should rely on the provisions of Section 10(7) of the *Act* and make a finding that there was employment and award the appellant as claimed in the Memorandum of Claim.
 8. The appellant submitted that the production of payment vouchers is sufficient evidence of employment. There was no evidence by the respondents that the relationship between the parties related to an independent contractor.
 9. There was constructive dismissal following resignation due to underpayment of wages. In the case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the court held that where the employee is placed under intolerable working conditions and forced to resign from employment, such is constructive dismissal and the employee is entitled to claim unfair termination of employment. The position of reiterated in the case of *Peter Kaburu Karanja v Kirinyaga Construction (K) Limited* [2020] eKLR.



10. The appellant claimed that the claim for compensation at 12 months is justified and should be awarded. Notice pay is due as there was constructive dismissal.
11. The underpayment of wages is not justified and results in unfair termination of employment. From September to December 2022 the respondent paid two salaries which are taken into account above the current salary for November 2022. The monthly salary was Ksh.9, 926.39 which was not remitted for two months and the total due is Ksh.18, 652.78. In the case of *Catherine Njoki Mwangi & Another v Wagika Holdings Ltd* [2018] eKLR the court held that any wage not paid within the legal minimum, the difference is due to the employees upon demand. The total due to the appellant is Ksh.14, 921.58.
12. Upon dismissal, the trial court ought to have awarded service pay for 15 days worked each year at ksh.5, 380.65. A certificate of service is an entitlement at the end of employment together with costs.

Determination

13. This is a first appeal. At this stage, the court should and ought to be guided by the trial court record as the basis of its analysis and re-evaluation.
14. As noted above, there is no Record of Appeal.
15. Under rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 an appellant is allowed to file the Memorandum of Appeal and attach the Record of Appeal.
16. Under Rule 8(4), an appellant is directed as follows;
 - (4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.
17. Therefore, upon filing the Memorandum of Appeal without the Record of Appeal, a party is allowed more time to file such records. These should be filed within a reasonable time.
18. The record of appeal can always be filed later after the memorandum of appeal has been served on the respondent and before the appeal is listed for directions under Order 42 Rule 13 of the *Civil Procedure Rules*.
19. On 13 March 2024, the appellant's advocate attended court and submitted that the Record of Appeal had been filed and served upon the respondent. There is no Record of Appeal in the file or on the CTS. None is available to the court.
20. Of importance, the appeal relates to the judgment of Hon. R.M. Amwayi delivered on 31st January 2024 in Kaloleni CMELRC No.E032 of 2023. This judgment is not available to this court for re-evaluation, assessment or ascertainment of the facts addressed in the written submissions in support of the appeal. The typed proceedings resulting in the subject judgment are not attached. The pleadings leading to the subject judgment are not availed to this court.
21. In the written submissions by the appellant dated 19 March 2024 on page 5, there is a reference to the respondents' exhibits of payment vouchers. These are necessary records for assessment by this court on appeal but have not been filed.
22. I take it these omissions are not by error. They are deliberate and on purpose. These are meant to waste court time in dealing with a frivolous appeal. This is a gross abuse of the court process.



- 23. This should not be condoned.
- 24. The respondent did not raise any objections. Attendance of the respondent was in person through the person of Lewa Mwangovya who was the managing director of the respondent company. Without the benefit of legal representation, the court acknowledges he may have failed to address this omission and requirements of Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 read together with Order 42 Rule 13 of the *Civil Procedure Rules*.
- 25. The respondent officer faithfully attended court as required. His costs are hereby assessed at Ksh.10,000.
- 26. Without the Record of Appeal, the appeal herein is fatally defective. It cannot stand on the Memorandum of Appeal and filed written submissions only. It is hereby dismissed with costs of Ksh.10,000 to the respondent to be paid within 30 days after which date the same shall accrue interests at court rates.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 16TH DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

