



**Nyakundi v Banbros Limited (Appeal E002 of 2022)
[2024] KEELRC 1771 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1771 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E002 OF 2022**

**J RIKA, J
JULY 12, 2024**

BETWEEN

EDWARD NYAKUNDI APPELLANT

AND

BANBROS LIMITED RESPONDENT

*(An Appeal from the Judgment of the Chief Magistrate's Court at
Mavoko, delivered by the Hon. H. Jalang'o on 8th day of December 2021)*

JUDGMENT

1. The Appellant herein, was the Claimant in the Trial before the Chief Magistrate's Court, at Mavoko, Machakos County.
2. He initiated the Claim against his former Employer, the Respondent herein, seeking salary for April 2019; arrears of house allowance of 5 years, 2014-2018; annual leave; leave allowance of 5 years, 2013-2018; paternity leave of 2 years, 2014 and 2017; salary increments of 5 years, 2013 to 2018; service pay over a period of 5 years, 2013-2018; costs; interest; and any other suitable order.
3. The Trial Court dismissed the Claim in its entirety, in a Judgment dated 8th December 2021.
4. The Appellant appeals against that Judgment, through his Memorandum of Appeal, dated 13th January 2022.
5. He sets out 3 broad grounds of appeal, that: the Trial Court proceeded on wrong principles, while dismissing his Claim; the Trial Court failed to adequately evaluate evidence, arriving at an erroneous decision; and, the Trial Court erred in finding that the Claimant was not unlawfully dismissed.
6. He proposes that the Court re-evaluates the evidence, and makes an independent determination.



7. It was agreed that the Appeal is considered and determined, on the strength of the Record of Appeal and Written Submissions. Parties confirmed filing and exchange of Submissions at the last appearance before the Court, on 12th March 2024.
8. The Appellant submits that the Respondent did not adduce evidence, to prove that it had paid house allowance to the Appellant, for the period 2014 to April 2018. The Respondent only exhibited pay slips for January 2019 to April 2019. The burden of exhibiting records on house allowance paid, rested on the Respondent, by dint of Section 74 of the *Employment Act*.
9. On annual leave, the Appellant submits that again, it was for the Respondent to prove that he had utilized his annual leave. The Appellant claimed annual leave from 2013 to 2016. The Respondent only produced leave application forms, for 2017 and 2018.
10. The Trial Court did not appreciate clause C of the applicable CBA, which extended 7% pay increment to the Appellant on the first year, and 7% increment on the second year.
11. Leave traveling allowance of Kshs. 4,400 was a benefit granted to the Appellant, under the CBA. It was not subject to discretion as interpreted by the Trial Court.
12. It is the submission of the Appellant that the Trial Court erred, in placing the burden of proof on paternity leave, on the Appellant. According to the Appellant, the burden rested with the Respondent, under Section 74 of the *Employment Act*.
13. The Respondent submits that the Appellant resigned, was paid terminal dues, and executed a discharge voucher, after receiving his terminal dues.
14. He was paid a daily wage, which included the housing element. He did not at any time deny that he received a daily wage. He worked sporadically, and did not merit annual leave. This notwithstanding, he was paid annual leave for January 2019 to February 2019, following an agreement between the Respondent and his Union.
15. He was not entitled to salary increment under the CBA. He did not belong to a designated category of Employees, under clause A, who were entitled to salary increment. He similarly was not entitled to leave traveling allowance, under the CBA. He was paid leave traveling allowance for January–April 2019 on the strength of an agreement between the Respondent and his Union.
16. The Respondent submits at no time did the Appellant, make an application for paternity leave, which was denied by the Respondent.
17. The Respondent submits that the Appeal has no merit. It is proposed to the Court to uphold the Judgment of the Trial Court, and dismiss the Appeal with costs to the Respondent.

The Court Finds: -

18. The 3rd ground of appeal is absurd. The Appellant states that the Trial Court misdirected itself, in finding that the Appellant was not unlawfully terminated.
19. The Trial Court pleadings and proceedings, do not disclose an allegation or prayer by the Appellant, concerning unfair or unlawful termination. He resigned voluntarily. He did not pursue any prayer for involuntary or unlawful termination. The Judgment of the Trial Court did not make any finding concerning unlawful termination. There was no issue relating to unlawful termination, before the Trial Court.



20. There is no submission made by the Appellant with respect to his prayer for service pay. In his evidence on cross-examination, he told the Trial Court that the Respondent was submitting his N.S.S.F contributions. He was not entitled to service pay.
21. The Appellant did not adduce evidence in support of his prayer concerning paternity leave. It is not correct as submitted by the Appellant, that the burden of proof on paternity leave, rested with the Respondent. It was for the Appellant to prove that he had sired children; prove details of birth; and show that he at a specific time, applied for paternity leave, which was denied by the Respondent. How was the burden of proof on paternity leave, to be shifted to the Respondent? How was the Respondent to prove paternity leave, for a paternity it was not responsible for? If it was true that the Appellant sired children, and wished to take paternity leave, it was his responsibility to make the relevant application to the Respondent, supported by evidence of birth of his children. It was for him to show the Trial Court that he made such application, which was declined by the Respondent.
22. The Appellant repeatedly submits that the burden of proof rested with the Respondent, by dint of Section 74 of the *Employment Act*. This is not correct. Section 74 merely places the duty of keeping custody of employment records, on the Employer. How the documents leave the custody of the Employer, and find their way to Court, as evidence, is primarily the responsibility of the Party who seeks to rely on the documents. It is not to be presumed, that he who has the custody of employment documents, bears the burden of their production before the Court. The Appellant did not testify that he filled any application form for paternity leave, which was returned to the him un-approved. There was no such application form, shown to have been in the custody of the Respondent. There was no demand made on the Respondent by the Claimant during trial, for the Respondent to produce any document in its custody.
23. The other prayers concerning house allowance, annual leave, leave allowance and salary increments, were rendered moot, when the Appellant received a net sum of Kshs. 28,216 in terminal benefits, and executed discharge voucher on 16th May 2019.
24. The discharge voucher was contained in a list of documents dated 20th August 2020, filed by the Respondent.
25. Parties gave evidence before the Trial Court and rested their respective cases, on 4th March 2021.
26. The Appellant did not at any time, contest the production of the discharge voucher, or ask the Trial Court to have it struck out. He made generalized protestations at the hearing: that he saw the discharge voucher for the first time in Court on 4th March 2021 [it was contained in a list of documents dated 20th August 2020]; the signature was not his; and inexplicably, that all the documents filed by the Respondent were forged. The Appellant ought to have resisted production of forged documents, applied for their striking out and escalated forgery of multiple documents, a very serious criminal offence, for investigation of the relevant agencies. There was nothing placed before the Court, to show that any of the document filed by the Respondent was forged. There was nothing to show that the discharge voucher was not executed by the Appellant, on receiving his terminal dues, after he resigned.
27. There was no obligation on the part of the Trial Court to consider the prayers for additional terminal benefits, once there was evidence, that the Appellant had executed discharge voucher, having received Kshs. 28,216, in full and final settlement.
28. A discharge voucher is a valid and binding contract between the Parties, as held in Court of Appeal decision, *Coastal Bottlers Limited v. Kimathi Mithika* [2018] e-KLR.



29. The Claim and the Appeal prosecuted by the Appellant herein, were both in the nature of vexatious proceedings, the Appellant having voluntarily resigned, received his terminal benefits, and discharged the Respondent from further claims. He ought to meet the costs of his Claim and Appeal.

It is ordered: -

- a. The Appeal is declined.
- b. Costs to the Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS 2020, THIS 12TH DAY OF JULY 2024.

JAMES RIKA

JUDGE

