



**Adika v Security 24 Limited & another (Appeal E048 of 2023)
[2024] KEELRC 2476 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2476 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E048 OF 2023
CN BAARI, J
OCTOBER 11, 2024**

BETWEEN

GEOFFREY OMONDI ADIKA APPELLANT

AND

SECURITY 24 LIMITED 1ST RESPONDENT

HOMES UNIVERSAL LIMITED 2ND RESPONDENT

*((Being an appeal from the Judgment of Hon. F.M. RASHID (PM) Winam
delivered on 25th July 2023 in Winam SPMEELRC CAUSE NO. E001 OF 2023))*

JUDGMENT

Introduction

1. Judgment in this matter was initially delivered on 24th January, 2024 setting aside the Magistrate's judgment and substituting it with a declaration that the termination was unfair.
2. In an application dated 2nd February 2024, the Respondent sought to set aside the Judgment on the grounds that they were not aware that an appeal had been filed.
3. On 27th June 2024 the court allowed the application, set aside the judgment of 24th January, 2024 and granted the Respondent leave to file submissions.

The appeal

4. The Appellant impleaded the Respondent before the Magistrate court alleging unfair termination and non-payment of terminal dues. The Respondents did not enter appearance and the matter proceeded to formal proof.



5. In a judgment delivered on 25th July, 2023, the Trial Court found that the Appellant had not established an employment relationship and dismissed the claim.
6. Aggrieved by this outcome, the Appellant lodged a Memorandum of Appeal before this court on 18th August, 2023 contending that:
 - i. The Learned Trial Magistrate erred in law and fact in finding that there was no employer/employee relationship.
 - ii. The Learned Trial Magistrate erred in law and fact in failing to take into consideration the documents produced by the Claimant.
 - iii. The Learned Trial Magistrate erred in law and fact in dismissing the suit.
 - iv. The Learned Trial Magistrate erred in law and fact in failing to appreciate the provisions of Section 10 of the [Employment Act](#).
 - v. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered, and thereby arrived at a decision unsustainable in law.
7. The Appellant prays that his appeal be allowed and the decision of the Trial Court set aside.
8. The Appellant filed his submissions on 18th of December, 2023 while the Respondents filed theirs 17th July, 2024 pursuant to leave granted on 27th June 2024.

The Appellant's Submissions

9. The Appellant submits that the Magistrate erred in holding that an employment relationship could only be proven by an employment letter, termination letter and/or pay-slips. He argues that his testimony, along with the occurrence book showing his place of work and the fact that the suit was undefended, constitutes sufficient proof of an employment relationship.
10. It is his submission that Section 9 (2) & 10 of the [Employment Act](#), 2007 obligates an employer to issue an employee with an employment contract. He sought reliance in the case of Joseph Omollo v Board of Management Kisumu Boys High School [2016]eKLR for the holding that an employment relationship existed despite the absence of an employment letter or a termination notice.

The Respondents' Submissions

11. It is the Respondents' submission that the appeal is unmerited as the Magistrate's judgment was arrived at after full consideration of the facts and evidence. They assert that there was no proof of an employment relationship, as no employment contract was produced. They rely in the case of Transport Workers Union v Euro Petroleum Products and Another (2019) eKLR where the court stated that the Claimant ought to have at least established an employment relationship between the Appellant and the Respondents before the Respondents could be allowed to produce records.
12. The Respondents also cite the case of Joseph Munene Murage v Salome Ndungu (2019)eKLR where the court stated:-

“The determination of the other heads of claims advanced by the Claimant will depend on whether the court finds there was employment relationship.”



13. It is the Respondents' submission that Section 10 of the *Employment Act* does not apply in this suit. They had reliance in the case of Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited (2016) eKLR where the court stated:-

“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.”

14. For the foregoing reasons the Respondents submit that the balance of convenience tilts in their favour.

15. The Respondents submit that they are entitled to costs having established that the appeal was unmerited. They urge the court to exercise discretion in their favour considering that costs typically follow the event. The Respondents cite Section 27 of the *Civil Procedure Act* and the case of Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR where the court while making reference to Section 27 of the *Civil Procedure Act* stated: -

“Costs of any action or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts.”

Analysis and Determination

16. I have considered the Record of Appeal and the rival submissions. The issues that crystallizes for determination are:
- i. Whether the Appellant was employed by the Respondent; and if so
 - ii. Whether he is entitled to the prayers sought under the Memorandum of claim
17. The role of a first appellate court is to re-evaluate, re-assess and re-analyse the extracts on record and determine whether the conclusions reached by the learned trial Magistrate are to stand or not and give reasons either way. (see Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR).
18. It is now settled that the only instance an appellate court can interfere with the decision of the trial court is if it is based on no evidence, based on misapprehension of evidence or the Magistrate obviously acted on the wrong principles in reaching her decision. (See *Ramji Ratna and Company Limited V Wood Products (Kenya Limited), Civil Appeal No. 117 of 2001*).



Whether the Appellant was an employee of the Respondents

19. The issue of the Appellant's employment status is the major point of contention in this appeal. In her judgment, the Trial Magistrate found that the Appellant had not established an employment relationship, she stated thus:-
- “In this case, the Claimant produced a demand letter, wages regulation for 2018 and 2022 and a copy of the occurrence book extract as exhibits herein. The Claimant did not produce an employment letter, termination letter or pays slips as proof of an employer employee relationship..... From the evidence on record, there is no proof that there was an employment relationship between the Claimant and the Respondent and that he was paid a monthly salary of Kshs 9,400/- as alleged or any other averments of fact in the Memorandum of Claim.”
20. On his part the Appellant was emphatic that he was an employee of the Respondents. In so doing, the Appellant drew the court's attention to the occurrence book produced in evidence, the undefended case before the Magistrate's court and the Respondent's duty to reduce the employment contract into writing.
21. Conversely, the Respondents argue that the onus is on the Appellant to prove the existence of an employment relationship. They contend that regardless of the provisions of Section 10 of the *Employment Act*, the Appellant still needed to provide evidence of employment.
22. It is not disputed that the Appellant's evidence before the Magistrate's court was uncontroverted. The Respondent's did not refute that the occurrence book belonged to them or in any other way controvert the information therein linking the Appellant to them.
23. By producing the occurrence book, the onus shifted to the Respondents to disprove this evidence. In the majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR the court had the following to say on the evidential burden of proof at paragraphs 132 and 133 thereof: -
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
- (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.....
24. In as much as the above case was in relation to an election petition the principle still rings true in this case. The Respondents woefully failed to impugn the credibility of the occurrence book.
25. Section 9 (1) (b) of the *Employment Act* behoves the Employer to reduce an employment contract of more than three years into writing. In instances where the employer fails to do so Section 10 (7) of



the Employment Act makes it incumbent on the employer to disprove the terms of the employment contract.

26. The persuasive authorities cited by the Respondents differ from this case, as none involved documentary evidence comparable to the occurrence book produced here.
27. The upshot of the foregoing is that the learned magistrate erred in finding that there was no employment relationship between the Appellant and the Respondents.

Whether the Appellant is entitled to the orders sought in the Memorandum of Claim.

28. The Appellant testified before the Magistrate's court that sometime in December, 2022 he was unlawfully terminated without reason, notice or a disciplinary hearing. This remains uncontroverted and the court returns the finding that the Appellant was unlawfully terminated contrary to Section 35(1) (c) and 41 of the Employment Act.

Damages for unlawful termination

29. Amongst the parameters set for damages under this head under Section 49 (4) of the Employment Act, is the length of service. The Appellant herein, served the Respondents for two years.
30. In the circumstances, I deem the equivalent of two months' salary sufficient compensation for the unfair termination, and which is hereby awarded.
31. Further, the Appellant having provided the Minimum Wage Regulations applicable in the year 2022, and having shown that the minimum wage was Kshs 16,959/=, the payment shall be computed using this minimum wage.

Pay in lieu of notice

32. The Appellant was evidently dismissed without notice, which finding entitles him to one months' salary in lieu of notice.

Underpayments

33. The Appellant contends that from March 2020 to April 2022, he was entitled to Kshs 15,141.95/= but was paid Kshs 9,400/=, making his underpayments Kshs 149,290.70/=.
34. It is his further assertion that from May 2022 to December 2022 he was entitled to Kshs 16,959/= per month, but was paid Kshs 9,400/= amounting to an underpayment of Kshs 60,472/=.
35. The fact that the Appellant was paid a salary of Kshs 9,400/= was uncontroverted. Taking cognisance of the wages order, this court allows this head of the claim in the sum of Kshs 209,762/= in underpayments.

House Allowance

36. The wages orders produced by the Appellant are inclusive of house allowance. House allowance is thus catered for in the underpayments granted hereinabove. This claim therefore fails.

Leave allowance

37. By dint of the obligation to keep employee records, it is the employer's burden to show that an employee has utilized his leave days and if not, show that it paid the employee at exit for the pending leaves days.



38. The Respondent did not lead any evidence to show that the Appellant utilized his leave. In the circumstances, I find the claim for Kshs 58,508/= on account of leave having not been controverted to have merit and is hereby awarded as prayed.

Overtime

39. The Appellant's testimony is that he worked from 6.00 pm to 6.00 am and his evidence in this regard was uncontroverted. Taking into cognisance the 12-hour shift as opposed to the requisite 8 hour shift means that the Appellant worked 4 hours overtime every day. The claim for overtime in the sum of Kshs 570,082/= is thus allowed.

Rest Days

40. The Appellant did not provide any evidence in support of this head of the claim. It is accordingly declined.

Certificate of service

41. A certificate of service is a statutory requirement under Section 51 of the Employment Act. The Respondents are directed to issue one to the Appellant within 7 days of this judgment.

Conclusion and orders

42. The net effect of the foregoing is that the judgment of the trial court is set aside, and substituted with therewith the following orders: -

- a. A declaration that the Appellant's termination is unfair
- b. Damages for unlawful termination at Kshs 33,918/=
- c. Pay in lieu of notice Kshs 16,959/=
- d. Underpayments Kshs 209,762/=
- e. Overtime Kshs 570,082
- f. Unpaid leave Kshs 58,508/=
- g. The Appellant be issued with a certificate of service within 7 days.
- h. The costs of the appeal and the claim before the trial court shall be borne by the Respondent.

43. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Appellant

Mr. Nyamagwa present for the Respondents

Mr. Kirui - C/A



