IN THE COURT OF

APPEAL AT NYERI

(CORAM: JAMILA MOHAMMED, KIMARU & MUCHELULE JJ.A.)

CIVIL APPEAL NO. 55 OF 2019

BETWEEN

ESTHER WANGUI MAINA.....APPELLANT

AND

JANE WAIRIMU NDIRANGU.....1ST RESPONDENT THE PRESBYTERIAN FOUNDATION.....2ND RESPONDENT JOSPEH MAINA MUCHIRI.....3RD RESPONDENT

(Being an appeal from the Judgement and Decree of the (Nzioki Wa Makau, J.) in the Employment & Labour Relations Court at Nyeri dated and delivered on 13th December 2018)

in

ELRC Cause No. 319 OF 2017

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JUDGMENT OF THE COURT

Background

1) **Esther Wangui Maina** (the appellant) challenges the judgment of the Employment and Labour Relations Court (ELRC) **(Nzioki wa Makau, J.)** which dismissed her claim for unlawful termination against **Jane Wairimu Ndirangu, the Presbyterian Foundation** and **Joseph Maina Muchiri** (the 1st - 3rd respondents).

2) The appellant contended that she was engaged in 2010 by the Local Church Committee (LCC) of the PCEA Kirathimo Church under the PCEA King'ong'o Parish as a cleaner cum gardener. It was her further contention that she was paid a salary starting at Kshs.6,000, later rising to Kshs. 7,500, without payslips but acknowledged in an exercise book. She claimed the pay was below statutory minimum wages and alleged that her employment was terminated on 28th December 2016 via telephone by the 3rd respondent, effective 1st January 2017.
3) The appellant sought declarations, severance pay, underpayment arrears, service pay, unremitted statutory deductions, overtime, public holiday pay, certificate of service, and interest.
4) The 1st and 2nd respondents denied employing the appellant, contending that she merely volunteered to clean the church in return for financial assistance. The 2nd respondent argued that it had no mandate to employ church workers. The 3rd respondent admitted that he chaired the LCC but maintained that the appellant was only given casual tasks and paid small allowances from church offerings.
5) The respondents urged dismissal of the claim for want of privity of contract and misjoinder of parties.
6) The ELRC dismissed the claim, holding that the appellant sued the wrong parties and failed to prove employment. The court branded the appellant

dishonest and observed that she had been a beneficiary of the church's benevolence rather than an employee.

7) Aggrieved by that decision, the appellant filed eight grounds of appeal, arguing *inter alia* that the trial court erred by: failing to vindicate her statutory rights and wrongly branding her dishonest; ignoring the role of the 3rd respondent who terminated her employment; failing to consider that the respondents admitted that she worked as a cleaner cum gardener; overlooking the respondents' failure to produce relevant church records and minutes; and failing to interpret the church's Constitution in line with the Constitution and Employment Act. She sought reversal of the decision and award of her monetary claims.

Submissions by counsel

8) At the hearing of the appeal, **Mr. Peter Muthoni** represented the appellant while **Ms. Gichama** instructed by **Mr. Kibuka Wachira** represented the respondents. Both counsel had filed written submissions which they orally highlighted. **Mr. Muthoni** submitted that the respondents were proper parties as recognized church agents. That no preliminary objection was raised and no third-party notice was issued against the LCC. Counsel asserted that the appellant was not a volunteer but worked full-time for six years, thus entitled to protection under the Employment Act. Counsel asserted that the respondents' failure to produce employment records was

deliberate. Counsel further asserted that the appellant's termination violated her constitutional and statutory rights.

9) **Ms. Gichama** opposed the appeal and submitted that the appellant sued the wrong parties as the LCC was the actual engager. Counsel further submitted that the 3rd respondent was improperly joined and never served with summons, contrary to **Rule 10(7)** and **Rule 11(2)** of the **ELRC Rules**. Counsel relied on the decision of this Court in ***Pithoni Waweru Maina vs. Thuka Mugiria (1983) KECA 75*** where it was held that the court has no discretion where it appears that no proper service was done. Counsel also relied on the decision of ***Julius Njoroge Muira vs Harrison Kiambuthi Mburu (2011) eKLR*** where it was held that where an act is void, then it is a nullity in law but not a mere irregularity. Counsel asserted that there was no contract of service between the appellant and the respondents. Counsel urged us to dismiss the appeal.

Determination

10) This being a first appeal, the Court is bound to re-evaluate the record, per ***Makube v Nyamuro (1983) KECA 29*** which stated as follows:

> ***"However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have***

acted on wrong principles in reaching the finding he did."

11) We have considered the record of appeal, the submissions by counsel, the authorities cited and the law. We discern the issues for determination in this appeal to be whether an employment relationship existed between the appellant and the respondents; and whether the ELRC erred when it found that the appellant was wrongly suited.

12) Regarding the employment relationship between the parties, the appellant alleged that she was paid a monthly payment, which, if proved, would negate a casual status of employment. However, she failed to produce records or witnesses to corroborate her claim.

13) On the question whether the respondents were proper parties in this case, from the record, the appellant's engagement was through the LCC. The 2nd respondent's mandate was limited to property, the 1st respondent had no role, and the 3rd respondent acted only as chair of the LCC. We therefore find that in the circumstances, the ELRC did not err in finding that the appellant was wrongly suited.

14) On the burden of proof of the claims sought, under section 107 of the Evidence Act, the burden lay on the appellant. This Court in ***Anne Wambui***

Ndiritu vs Joseph Ropkoi & Another (2004) KECA (KLR) held as follows:

> ***"As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act There is however the evidential burden that is cast***

upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in

sections 109 and 112 of the Act…The two sections carry forward the often-repeated evidential adage: 'he who asserts must prove."

15) Further, in ***Tadis Travel & Tours Limited & Another vs Astral Aviation Limited (2015) KECA 405 (KLR)*** it was also held that:-

"Of relevance to this appeal is the general rule that the standard of proof required in civil claims is proof on a balance of probabilities or preponderance of probability. This means that the claimant must adduce evidence that leads the court to a conclusion that it is more probable than not, that the facts happened as alleged by the claimant. Where there are two versions and there is a probability of both versions being true, or both being untrue then the burden of proof is not discharged. In an action anchored on a contractual relationship the burden of proving the existence of a contract, performance of conditions precedent, breach and damages, lies with the claimant…"

16) The appellant did not compel production of employment records under Order 16 of the Civil Procedure Rule. The alleged dismissal call was in the circumstances, unsubstantiated.

17) On the issue of joinder of parties, a suit may be struck out for misjoinder.

In the instant appeal, the appellant failed to sue the LCC, the proper party. The Supreme Court of Kenya addressed itself on the nature of parties sued in a suit in the case of **Trusted Society of *Human Rights Alliance v Matemu & 5 Others (2014) KESC 32 (KLR)*** and stated as follows:

"A suit in Court is a 'solemn' process, "owned" solely by

the
parties. This is the reason why there are laws and Rules,

under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it."

18) By parity of reasoning, we find that the ELRC did not err in finding that the appellant was wrongly suited and was not entitled to the prayers sought as she had sued the wrong parties.

19) In the circumstances, we find that the appellant failed to prove employment by the respondents or wrongful termination attributable to them. Further, the proper employer, the LCC, was never enjoined. The ELRC's decision dismissing the claim was therefore sound.

20) The upshot is that the appeal is dismissed for lack of merit. In view of the appellant's indigence, we make no order as to costs.

Dated and delivered at Nyeri this 3rd day of October, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original
Signed

DEPUTY REGISTRAR