



**New Fulila Day & Night Club v Mulinge (Appeal E186 of 2024)  
[2025] KEELRC 2699 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2699 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E186 OF 2024  
NJ ABUODHA, J  
OCTOBER 3, 2025**

**BETWEEN**

**NEW FULILA DAY & NIGHT CLUB ..... APPELLANT**

**AND**

**PIUS MUTUNGA MULINGE ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon V. Asiyo (P.M.) sitting  
at Thika Law Courts delivered on 2nd November, 2022 in ELRC No 2 of 2022)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 30<sup>th</sup> November, 2023 the Appellant appeals against the Judgement of Hon. V. Asiyo (PM) delivered on 2<sup>nd</sup> November, 2023 in Thika CMELRC No.002 of 2022. The Appeal was based on the grounds among others that:
  - i. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the appellant had paid the respondent all his employment dues prior to the respondent leaving the appellant's work premises.
  - ii. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the appellant had proven that he had paid, the respondent all his leave pay during his tenure.
  - iii. That the Learned trial Magistrate erred in law and in fact in failing to consider that the Appellant had paid the respondent his monthly salary as statutorily provided for in the *employment act*.
  - iv. The learned. trial magistrate erred in law and in fact in failing to appreciate that the Respondent herein did not provide any evidence of actual underpayment during his period, as an employee of the appellant.



2. The Appellant therefore prayed that the judgment of the trial court be set aside and orders given on 2<sup>nd</sup> November, 2023 be stayed and the appeal be allowed with costs to the appellant.
3. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

4. The Appellant's Advocate Mr. Kiare submitted among others that the Rules of this Court (Rule 41) provides for the filing of an appeal but is silent on the requirement of filing the Notice of Appeal first.
5. On the merits of the appeal, counsel submitted that the respondent was an employee of the appellant holding the position of a night guard from 2015 until 2020 when the government issued an annual lockdown for the closure of all business catering to public such as bar and restaurants. At the point of nationwide lockdown, the respondent was paid all his dues pending. Counsel further submitted that resumption of services occurred on 1<sup>st</sup> May, 2021 yet the respondent did not resume his position despite being issued with notice.
6. Regarding salary, Mr. Kiare submitted that the respondent during the time of his employment did not object to his salary and subsequent increments and that at the trial the respondent did not adduce any evidence showing which period he had not been paid. Regarding lodging a claim for salary arrears and underpayment, counsel submitted that there was limited time for making claims which was three years as was stated in the case of G4S Security Services (K) Limited v. Joseph Kamau and 468 Others.
7. Counsel further contended that the trial Court failed to appreciate that the respondent during employment was entitled to one day and one night leave on a weekly basis which was paid leave amounting to around four days a month and 48 days a year.

### **Respondent's Submissions**

8. The respondent's Counsel Mr. Ndungu on the other hand submitted that he was relying on the submissions filed in respect of the claim before the trial court found at page 20 to 28 of the record of appeal. Counsel further submitted that the appeal was incompetent since the appellant never filed and served a Notice of Appeal and relied on Rules 77(1), (2) and (3), 79(1) and 89(1) of the Court of Appeal Rules.

### **Determination.**

9. Regarding the preliminary objection over the failure or omission by the appellant to file a Notice of Appeal, the Court finds no merit in the objection since the Rules of this Court and even the Civil Procedure Rules do not require that an appeal from the decision of a lower court should be preceded by a Notice of Appeal. The Rules cited and relied on by the respondent while raising the objection are Court of Appeal Rules which do not apply to this Court.
10. Concerning the role of the Court as first appellate Court, it has always stated that it is guided by the principles set out in several decided cases by it or the Court of Appeal. For instance the Court of Appeal for East Africa in the case of Peters –vs- Sunday Post Limited [1958] EA 424 stated as follows:

“...the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
11. This appeal revolves around the question whether the trial court erred in failing to find that the respondent had been paid all his dues at the time of leaving employment and that the respondent had been paid all his salary and leave dues. The appellant also contended that the respondent did not provide any evidence to support the claim for underpayment therefore the trial erred in making an award for underpayment.
12. As previously observed in other decisions of the Court, It acknowledges that an appeal to it from a trial by the magistrate's court is by way of retrial. However in exercising this jurisdiction, the court must guard against acting whimsically and replacing its view of the judgment it could have reached if it tried the matter in the first instance with the finding of the trial court. The decision of the trial court need not be perfect but provided it is in line with the operative law and a reasonable deduction of the evidence presented before it, this court will not interfere simply because as an appellate court it is clothed with jurisdiction to reevaluate the evidence and come up with its own findings.
13. The Court has carefully reviewed and considered the judgment of the trial court vis-à-vis the evidence presented before it and the analysis by the trial court and is of the view that the trial Court exercised its discretion judicially in reaching the findings contained in the judgment appealed from. The Court therefore finds no reason to interfere with the same.
14. The Appeal is therefore found without merit and is hereby dismissed with costs.
15. It is so ordered.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER, 2025**

**DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF OCTOBER, 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

