

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E 243 OF 2024

STANELY KARANJA GACHIE.....

APPELLANT

VERSUS

LOCHAB TRANSPORTERS LTD,

RESPONDENT

*(Being an appeal against the Judgment delivered on 17th
October 2024 by Hon. E. M. NYAKUNDI, Senior Resident
Magistrate, in Mombasa CMELRC No. E 303 of 2024]*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 10th November 2024, the Appellant challenges the Judgment and Decree of the Learned Principal Magistrate in the cause mentioned above, on the principal grounds that he erred in law and fact:

[a] By finding that the Appellant did not prove payment of his monthly salary, failing to appreciate

that the Employer is the custodian of the employment record.

[b] In not appreciating that there was no termination notice issued to the Appellant prior to the termination, hence not awarding one month's pay in lieu of notice.

[c]. In not appreciating the fact that there was no disciplinary meeting prior to the Appellant's dismissal.

[d] By not awarding house allowance.

[e] In not awarding compensation for unfair termination even after establishing that there existed an employer-employee relationship between the parties herein.

[f] When she failed to award the Appellant pay for the days worked but not paid for, to the Appellant, yet there was no evidence that it was paid.

[g] When she failed to award compensation for earned but unutilized leave days.

[h] When she failed to allow the claim for underpayments, yet the Respondent hadn't discounted the same.

[i] By not finding that the Appellant made substantive submissions on each of the relief sought.

2. This appeal was canvassed by way of written submissions.

The case before the Trial Court

3. The Respondent's case was that she first came into the employment of the Appellant sometime in 2002 at a monthly salary of KShs. 29,975.

4. On or about April 2024, while in the course of his duties, he was instructed by the Yard in Charge to leave the Respondent's premises, as at that moment, the Respondent was not going on with any operations.

5. During the period of employment with the Respondent, he was not paid a reasonable house allowance. He was paid a salary that was below that provided under the relevant Wage Orders. Additionally, the Respondent did not at any time allow him to proceed for leave as per the stipulations of the Employment Act or at all.

6. He alleged that the termination was unfair. In the circumstances, he was entitled to;

- a. One month's salary in lieu of notice.....
KShs. 29,975.00
- b. Leave pay [29, 975 x 22 yrs.]
KShs. 659,450.
- c. Unpaid salaries for February, March, and April 2024..... KShs. 89, 925.00
- d. Underpayments [34,302-29,975]x 12x22.....
KShs. 1,142,328.00.
- e. Compensation for unfair termination [35,000x12]...
KShs. 359,700.00
- f. House allowance [4, 496 x22] x3.....
KShs. 49, 530.

g. Compensation for unfair termination [KShs. 12,700 x 12 months], KShs. 152,400.

7. The Respondent did not enter appearance and or file a response to the Appellant's Statement of Claim. The claim was heard under formal proof proceedings.

The Judgment by the Lower Court.

8. After hearing the Appellant, the Court concluded that the Appellant had not discharged his burden of proof under Section 47[5] of the Employment Act, and as such, his claim had to fall at that hurdle. She dismissed the entire claim.

The Appeal.

9. The Appellant, aggrieved by the decision of the Trial Court, filed the present Appeal on the grounds set out hereinabove.

Analysis and Determination

10. It is now trite that the role of a first Appellate Court is to subject the evidence and material that were placed before

the trial Court to fresh scrutiny, allowing it to come to its own independent findings and conclusions. This position was aptly elaborated in the case of **Selle -vs- Associated Motor Boat Co. [1968] EA 123) where** the Court held: -

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not necessarily bound to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case

generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

11. In **the German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment)** the Court of Appeal held that: -

“A first appeal is a valuable right of the parties and, unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court’s conscious application of its mind and record findings supported by reasons, on all the issues arising, along with the contentions put forth, and pressed by the parties for the decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court

and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact, ordinarily, and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212).”

12. Bearing in mind its mandate as aforesaid, this Court has carefully considered and analysed the material that was placed before the Learned trial Magistrate, the submissions filed by the Appellant, and hold that the grounds can be condensed and justly interrogated and determined under two broad issues, thus, whether the Appellant’s claim before the trial Court was proven to the requisite standards and whether the Appellant was entitled to the reliefs sought.

13. The clear tone of the trial Court's Judgment is that the Appellant's claim before it was not proved to the required legal standards. It is at this point that this Court must point out that it does not matter whether or not a Respondent files a response to a Claimant's statement of claim, particularly in employment disputes, where the law requires both the employee and the employer to discharge particular burdens at specific times and sequentially. The Appellant's submissions did not appreciate this point.
14. Section 47[5] of the Employment Act, 2007, provides for a reverse burden of proof. The employee alleging unfair termination of employment or wrongful dismissal must, prima facie, prove that an unfair termination or wrongful dismissal occurred. It is then that the burden of proof shifts to the employer to demonstrate the reason[s] for the termination or dismissal, and that the termination or dismissal was justified. As will emerge shortly hereunder, the material before the Learned trial Magistrate was ample for a conclusion that the Respondent discharged the burden.

15. In my view, this burden contemplated under the provision can seldom be discharged where the employee is unreasonably sketchy in their evidence regarding the existence of employment during the alleged material times, the date when the employment relationship commenced, the date when it came to termination, and how it came to termination.

16. In his pleadings and witness statement, the Appellant casually stated that the Respondent first employed him “sometime in 2022”. Specific details were lacking, as the specific month and date were not provided. In employment disputes such as the present case, where the precise months and days are significant, and where the disclosure of the commencement date of the relationship is crucial, such casualness cannot be condoned. In appropriate cases, this may lead to the conclusion that the existence of the relationship was not sufficiently proved.

17. The Appellant, in his pleadings and evidence, was not specific about the date when his employment was terminated. He relied solely on a purported statement from the National Social Security Fund, which was neither certified nor presented as an original but only as a copy before the trial court, to show that he was an employee of the Respondent from 2002. Inexplicably, the date of registration of the Appellant as a member of the Fund is indicated on the statement as 12th October 2004. One might wonder then how remittances could have begun in 2002, a time when the Appellant was not yet a member.
18. I respectfully dissent from the findings of the learned trial Magistrate regarding the sufficiency of the document to establish an employer-employee relationship between the Appellant and the Respondent. This, coupled with the aforementioned considerations, I hold that the learned trial Magistrate did not err in concluding that the Appellant failed to meet his burden of proof under section 45[7]. Consequently, his claim for unfair termination was appropriately dismissed.

19. This Court notes that the remedies sought by the Appellant in the lower Court fell into two categories: those based on the claim for unfair termination, and those that were independent of that claim. Having found, as the learned trial Magistrate did, that the claim for unfair termination was not proved, the remedies related to that claim rightly fell away. The remedies that were independent of the claim, in my view, cannot be granted to the Appellant since he did not demonstrate that he was an employee of the Respondent.

20. The Appeal herein lacks merit. It is hereby dismissed with no order as to costs.

21. Orders accordingly.

Read Signed and Delivered this 23rd Day of October 2025.

OCHARO KEBIRA.

JUDGE

ORIGINAL