



**Kiriko v Chemelil Outgrowers Company Ltd (Appeal E020 of 2025)  
[2025] KEELRC 2831 (KLR) (22 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2831 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E020 OF 2025  
JK GAKERI, J  
OCTOBER 22, 2025**

**BETWEEN**

**NICHOLAS OCHIENG KIRIKO ..... APPELLANT**

**AND**

**CHEMELIL OUTGROWERS COMPANY LTD ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Judgment and decree by Hon. A. K. Makoross SPM Tamu delivered on 28<sup>th</sup> February, 2025.
2. The appellant's case was that he was employed by the respondent from 1<sup>st</sup> May, 2006 to 10<sup>th</sup> February, 2023 when he resigned from employment earning Kshs.1,000 per month which was later raised to Kshs.1,150.
3. It was the appellant's case that he did not proceed on leave, worked 7 days a week 8:00am to 6:00pm and his concerns were never addressed by the respondent. He prayed for the sum of Kshs.11,974,505 as unpaid overtime, leave allowance, rest days and underpayment for 17 years of service, certificate of service, costs and interest.
4. The respondent denied having employed the appellant as a field clerk in May 2006 or any other time. It denied all the allegations made by the appellant on non-payment of overtime, leave allowance, rest days, and underpayment and sought dismissal of the suit. It however admitted that the appellant was a filed agent as he was a cutting contractor for Kibos Muhoroni and Chemelil Sugar Companies and was earning a commission of 1% per tonne and a monthly stipend of Kshs.1,150 and payment of NSSF and NHIF and was not required to report to the office daily.
5. After considering each party's case, the learned trial magistrate found that the appellant had failed to demonstrate that he was an employee of the respondent and dismissed the case with costs.



6. This is the Judgment appealed against.
7. The appellant faults the trial court on five (5) grounds; that the learned trial magistrate erred in law and fact by:
  1. Finding that there was no employment relationship between the parties.
  2. Failing to take into consideration the documents produced by the appellant.
  3. Dismissing the suit.
  4. Failing to appreciate the provisions of Section 10 of the *Employment Act*.
  5. Failing to apply judicially and adequately evaluate the evidence and exhibits tendered.
8. The five (5) grounds may, in the court's view condensed into one (1) namely; that trial court failed to appreciate and consider the appellant's evidence in totality and thus arrived at an erroneous decision.

### **Appellant's submissions**

9. As to whether there was an employment relationship, counsel submitted that the documentary evidence availed by the appellant was sufficient for the court to find that there was an employment relationship.  
  
Reliance was placed on *Whitehead V Woolworths (Pty) 1990 20 ILJ 2133 (LC)*.
10. Concerning the prayers sought, reliance was placed on *Irungu Githae V Mutheke Farmers' Co-operative Society Ltd [2019] eKLR* on the import of Section 48 of the *Labour Relations Act* on minimum wage.

### **Respondent's submissions**

11. Concerning the terms of engagement reliance was placed on *Samuel Wambugu Ndirangu V 2NK Sacco Society Ltd [2019] eKLR* on the essence of letter of appointment, wages, power of dismissal and control of employee, to urge that the appellant was an employee.
12. The decision in *John Matete Abayo V Digital Imaging Systems Ltd [2018] eKLR* was also cited on the effect of NSSF disbursements if it was the only document relied upon.
13. That the appellant was not required to sign the attendance register and was not supervised and allowances were not wages, and the court considered the evidence before it and there was no employment relationship.
14. On reliefs, counsel submitted that a claim based on employment cannot prevail where parties had no employer/employee relationships as held in *Kenya Union of Commercial Food and Allied Workers V Mwana Black Smith Ltd [2013] eKLR*.
15. The decision in *Casmir Nyankuru Nyaberi V Mwakikar Agencies Ltd [2016] KEELRC 1323 (KLR)* was also relied upon to urge that there was no employment relationship.

The respondent prayed for dismissal of the appeal.



## Analysis and determination

16. This being a first appeal, the role of this court is as exquisitely captured by the Court of Appeal in *Gitobu Imanyara & 2 Others V Attorney General* as follows:

“An appeal to this court from a trial court by the ...is by way of a 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”.

17. See also *Abok James Odera t/a A. J. Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, *Selle & another V Associated Motor Boat Co. Ltd* [1968] EA 123 and *Mwanasokoni V Kenya Bus Services Ltd* [1985] IKLR 931.
18. Because the learned trial magistrate was faulted for having failed to appreciate and apply the appellants evidence in a wholistic manner, it is necessary to reconsider and re-evaluate the evidence on record.
19. To urge his case, the appellant availed a copy of his identity card, which was his name, Letter of Appointment as Field Clerk for North Nyando dated 1<sup>st</sup> May, 2006, counsels letter on underpayment dated 23<sup>rd</sup> January, 2023, a copy of an unclear provisional NSSF statement and resignation letter dated 10<sup>th</sup> February, 2023.
20. The respondent on the other hand provided a letter of termination of the appellant’s Agency services dated 3<sup>rd</sup> January, 2023 and commissions paid to the appellant by Chemelil Sugar Co. and Muhoroni Sugar Co.
21. On cross examination, the appellant maintained that he was employed as a Field Clerk at Kshs.1,000 per month and was not a cane cutter until after he left employment in 2023 and his work was to issue out receipts to tractors that left the farm and field delivery notes. He denied having been an agent and there was no agreement that there would be no rest days and resigned on account of underpayment.
22. RWI confirmed on cross-examination that the respondent was a company limited by guarantee and he had been seconded there by Chemelil Sugar Company but had no written document on the same. It was his testimony that the appellant was paid by millers.
- That the respondent had no Human Resource Managers.
23. That the claimant resided in his house and was not supervised and he could proceed on leave. The witness admitted that he did not have an agency agreement.
24. This appeal turns on whether the appellant and the respondent had an employment relationship.
25. While the appellant maintained that he was an employee, the respondent argued that he was an agent paid by millers and the Kshs.1,000 allowance was not a salary.
26. As to what constitutes an employee, the provisions of Section 2 of the *Employment Act* are clear that: employee means

“a person employed for wages or a salary and includes an apprentice and indentured learner”.

27. Similarly, the definition of an employer is all encompassing and includes an agent, foreman, manager or factor, public body, firm, corporation or company and encompasses the respondent in this suit.



28. For an employment relationship to exist, there must be a contract of service between the parties by which the employee agrees to serve and the employer agrees to employ the employer and the agreement may be oral, written, express or implied from “the conduct of the parties”.
29. The appointment letter on record dated 1<sup>st</sup> May, 2006 reveals that the respondent appointed the appellant as a Field Clerk for North Nyando areas effective 1<sup>st</sup> May, 2006 at an allowance of Kshs.1,000 per month to reviewed upwards depending on “workload and performance”. The respondent admitted, in its response that the monthly allowance was Kshs.1150 per month in addition to NSSF and NHIF contribution.
30. On housing, the letter stated that based on the nature of employment he was to serve his zonal farmers and thus reside at his home.
31. The appellant accepted the offer by appending his signature on an undisclosed date and served until he voluntarily resigned vide letter dated 10<sup>th</sup> February, 2023.
32. Puzzlingly, the respondent purportedly terminated the appellant’s Agency services vide letter dated 3<sup>rd</sup> January, 2023. It is unclear whether the letter was delivered and received by the appellant.
33. Under the terms of the letter, the respondent undertook to stop payment of the stipend/allowance, NSSF and NHIF contributed.
34. It is unclear to the court how the respondent was computing NSSF contributions on the stipend/allowance of Kshs.1,150 as NSSF is a pension fund to which the employer and the employee contributes.
35. Equally, and for unexplained reasons, the respondent undertook to pay NSSF and NHIF contributions for the appellant in addition to the allowance.

**Why would it do so if he was an agent whose services were being paid for by millers?**

36. Relatedly, the alleged termination of Agency Services presupposes that there was an agency agreement which the respondent did not avail as part of the its evidence to establish the agency service the appellant was engaged to render.
37. Case law is consistent that a person claiming to have been an employee of another or organisation bears the burden of proof as provided by the provisions of Section 107, 108 and 109 of the Evidence Act.
38. In Kenya Union of Commercial Food & Allied Workers V Mwana Black Smiths Ltd (supra) cited by the respondent’s counsel, the court stated as follows:

“An employment relationship has serious implications on the parties. The court must therefore be fully satisfied that it actually exists. A claimant claiming employment rights must prove the existence of an employment relationship”.
39. See also Mary M. Mbone Mbayi V Chandubhai Patel & another [2011], Transport Workers Union V Euro Petroleum Products & another [2019] eKLR, Casmir Nyankuru Nyaberi V Mwakikar Agencies Ltd [2016] eKLR and Obondo V Shunjun [2020] eKLR.
40. In determining whether a person is an employee of another or not, courts have over the years deployed various tests though none appear to be determinative, such as control test in Regina V Walker [1858]



“It is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose...

The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as being on the nature of the relationship between the parties concerned. Clearly, not all these factors will be relevant in all cases or have the same weight in all cases...”.

41. In Ready Mixed Concrete (South East) Ltd V Minister Pensions & National Insurance [1968] 2QB 497 Mackenna J enumerated the conditions established in earlier decisions as agreement to work in consideration of a wage or other remuneration, control by another person expressly or impliedly, other provisions are consistent with the relationship.
42. Applying the foregoing principles to the instant case, it is evident that there was an agreement between the parties by which the appellant agreed to serve as a Field Officer effective 1<sup>st</sup> May, 2006, the only agreement between the parties under which the respondent would pay an allowance of Kshs.1,000 per month and other benefits. The agreement had a provision on housing which is exclusive to employees. The duties would be discharged in North Nyando. Allowance could be increased based on performance and workload and was payable monthly. A clear indication in the court’s view, that the appellant was regarded by the respondent as its employee.
43. Was the fact that the respondent undertook to contribute to the NSSF and the NHIF, which are mandatory to employers constitute the appellant an employee. Self-employed person are free to voluntarily join NSFF and NHIF.

**Why would the respondent register the appellant with the NSSF as an employee and the NHIF, if he was an agent entitled to commissions by millers?**

44. The appellant confirmed on cross-examination that his work was to issue out receipts in the field and filled the respondent’s delivery notes and forwarded the same to the respondent ostensibly to assess the services he was rendering as well as the workload and levels of performance.  
He testified that he would record the transporter and the cutter.
45. Although the appointment letter dated 1<sup>st</sup> May, 2006 used the term allowance to describe the consideration payable for the services the appellant rendered, the terminology could not conclusively establish that there was no employment relationship.
46. The document itself clearly stated that the nature of the appellant’s employment required that he operated from his home for purposes of housing.
47. Persons engaged as agents or independent contractors are free to reside anywhere as the amount due to them is fixed prior to the rendering of services and varies in the case of agents.
48. For the foregoing reasons, the court finds that there was an employment relationship between the appellant and the respondent grounded on the written contract of service dated 1<sup>st</sup> May, 20226.  
The alleged agency agreement was not availed for perusal by the court.



49. The respondent's oral evidence that it had no Human Resource Managers and the witness did everything for the company could not avail the respondent whose witness admitted in court that he was aware that NSSF and NHIF deductions were statutorily ordained.

50. Concerning the reliefs sought, the court proceeds as follows:

i. Overtime

The appellant tendered no shred of evidence as to when he reported on duty and when he exited.

To claim the sum of Kshs.2,108,960 as overtime from September 2006 to February 2023 required supportive evidence to prove the number of hours claimed for and when they were incurred including why they were not paid for if a claim was made.

The claim lacks evidential support and remains unproven and it is declined.

ii. Rest days

Analogous to the previous claim, the claim for rest days lacked any supportive evidence. The appellant bore the burden of proof.

There was no scintilla of evidence before the court to demonstrate when the appellant worked and when he did not.

The court was being invited to assume that the claimant worked for 7 days a week 8:00am to 6:00pm for 17 years. The promise was unsupported by any credible evidence and it is accordingly dismissed.

iii. Leave allowance

The claim was not supported by any verifiable evidence and it is declined.

iv. Underpayment

It is common ground that minimum wage is a prescription of law and employers are bound to comply with the relevant regulations of wages Order as promulgated by the Cabinet Secretary for Labour and Social Protection.

51. It is discernible that the appellant was underpaid by the respondent and is entitled to the unpaid salary for 3 years only.

52. Contrary to the appellant's assertion that the Regulation of Wages (General) (Amendment) Order 2017 was applicable to the appellant, it was not since the appellant was Field Clerk or Farm Clerk and the applicable wage guidelines were those governing the Agricultural Industry.

53. Under the Regulation of Wages (Agricultural Industry) (Amendment) Order 2018, the consolidated salary of a Farm Clerk was Kshs.12,152.20 per month or Kshs.513.55 per day and under the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2022 the minimum consolidated wage was Kshs.13,610.50 per month or Kshs.575.15 per day.

54. The appellant was entitled to these salaries less 15% house allowance and Kshs.1150.00 paid to him every month as follows:

1. May 2018 – 30<sup>th</sup> April 2022

Kshs.12,152 – (15%)=Kshs.2,972.83



+1150=Kshs.9,179.37  
X 28 months)=Kshs.257,022.36

2. May 2022 – January 2023  
Kshs.13,610.50 – (15%)= Ksh.3191.58  
+1150=Kshs.10,418.92  
X 8 months)=Kshs.83,351.36  
Total=Kshs.340,373.72

55. The appellant is thus entitled to Kshs.340,373.72 as underpayment for 3 years.
56. From the foregoing analysis, it is discernible that the learned trial magistrate erred in law and fact by failing to consider the import of the Letter of Appointment dated 1<sup>st</sup> May, 2006, which was the only verifiable evidence as to commencement and nature of the relationship between the appellant and the respondent.
57. In sum, the appellant was engaged as a Field Clerk and in no other capacity.
58. Guided by the decisions in *United India Insurance Co. Ltd & others V East African Underwriters (Kenya) Ltd* [1985] eKLR as well as *Price and another V Hilder* [1996] KLR 95, the court is satisfied that a case has been made for interference with the exercise of discretion by the trial court.
59. In the upshot, the appellant's appeal is partially successful and the Judgment of the trial court delivered on 28<sup>th</sup> February, 2025 is set aside in its entirety and in its place an Order that the appellant was underpaid during his employment and is awarded the sum of Kshs.340,373.72.
60. In light of the partial success of the appeal, parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 22<sup>ND</sup> DAY OF OCTOBER, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

