



**Chanan Agricultural Contractors (Kenya) Ltd v Mbaya (Appeal
E041 of 2024) [2025] KEELRC 3072 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3072 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E041 OF 2024
JK GAKERI, J
NOVEMBER 6, 2025**

**BETWEEN
CHANAN AGRICULTURAL CONTRACTORS (KENYA) LTD APPELLANT
AND
ALOICE OUMA MBAYA RESPONDENT**

JUDGMENT

1. This is an appeal from the Judgment of Hon. D. O. Onyango, CM delivered on 15th August 2024 in Kisumu CMELRC No. E332 of 2019.
2. The respondent's case before the trial court was that he was employed by the respondent as a truck driver in 2014 stationed at Kibos Kisumu at Kshs.20,000.00 per month and worked from 8:00am and occasionally for 12 hours in a day transporting sugar to various places.
3. That he was involved in an accident in 2016 while on duty and was underpaid and employment was terminated on 30th October 2018 after having served the respondent diligently and claimed a total of Kshs.902,708.2 as underpayment, unpaid leave, damages for wrongful dismissal, salary in *lieu* of notice and service pay at 15 days, certificate of service and costs.
4. The appellant denied the respondent's claim in totality stating that the claimant worked from 29th June, 2017 to 31st March 2018. That he took all leave days, did not work on public holidays and opted to retire from employment.
5. That he failed to collect the Certificate of service. The appellant sought dismissal of the respondent's case.
6. After considering the respective cases by the parties and the evidence placed before the court, the trial court found that the respondent had voluntarily resigned from employment and awarded the



respondent underpayment, unpaid leave and service pay total Kshs.485,779.00, Certificate of service, costs and interests from date of judgment.

7. This is the judgment appealed against on the grounds that the trial court erred in law and fact by:
 1. Failing to appreciate the principle of burden of proof on the respondent to prove his case.
 2. Making an award of service pay yet the respondent was a member of the NSSF.
 3. Failing to take into account the fact that the respondent had not adduced evidence to prove underpayment and service pay.
 4. Failing to appreciate the significance of want of documentary evidence by the claimant to prove his case.
 5. Disregarding the principle of stare decisis on comparable cases.
 6. Applying incorrect general wage Orders making erroneous computation of amounts due.
 7. Failing to consider the appellant's submissions.
 8. Failing to take into account the totality of the material placed before him by way of exhibits and submissions.
8. These grounds of appeal are essentially challenging the manner in which the court applied the evidence before the court, the guiding principles and non-consideration of submissions.

Appellant's submissions

9. On service pay, counsel for the appellant placed reliance on the provisions of Section 107 of the Evidence Act to assert that the respondent adduced no evidence to prove that NSSF deductions had not been remitted and produced a letter from the appellant to NSSF on processing of the respondents benefits and also provided a provisional NSSF statement which showed that he was a member of the NSSF and thus not entitled to service pay by dint of Section 35(6) of the Employment Act.
10. Counsel submitted that the claimant provided no evidence to prove that he was underpaid. He had no CBA or relevant wage guidelines.
11. Reliance was placed on the decision in Independent Electoral & Boundaries Commission & another v Stephe Mutinda Mule & 3 others [2014] eKLR for the proposition that parties are bound by their pleadings.
12. Counsel prayed for the striking out of the respondent's case before the trial court.
13. The respondent had not filed submissions by 27th October, 2025 when the court mentioned the matter to confirm compliance after according the parties 14 days each to file and exchange submissions.

Analysis and determination

14. The appeal is uncontested because the respondent did not file submission even after being accorded 14 days after service by the appellant.
15. The appeal is hinged on the trial court's appreciation and application of the evidence on record as well as its findings.
16. This being a first appeal, the court appreciates that its essential role is that of re-trial by reconsidering, re-evaluating and analysing the evidence on record and make its own conclusions but acknowledging



that it neither saw nor heard the witnesses and thus make due allowance as held in *Peters v Sunday Post* [1958] EA 424, *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, *Kenya Ports Authority v Kutson (Kenya) Ltd* [2009] 2 EA 21R and *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA 123.

17. The first issue for determination is whether the court trail appreciated and applied the evidence placed before the court.
18. First, although the respondent testified in court that he worked for 3 years, he adduced no evidence as to when he was employed and the nature of his employment. He could not recall when he was employed and that he was involved in an accident in 2016 and he returned to the work place, was dismissed by word of mouth and had nothing to show that his salary was Kshs.20,000 per month.
19. The respondent admitted that indeed he had no evidence to establish any of his allegations. He could not even tell the vehicle he was driving for the alleged 3 years.
20. According to RWI, Mr. Protus Simiyu Wekesa, the respondent salary was Kshs.15,000 per month and he was a general casual labourer and RWI was unaware of any accident involving the respondent. He admitted that the claimant was employed in 2016 and retired voluntarily vide letter received on 30th October, 2018 to enable him obtain NSSF dues.
22. The respondent availed a copy of his driving licence renewal for 2019 and being the hard copy, he ought to have availed evidence of having had a driver's license from 2016. The copy on record was issued on 8th August 2018 two months before he retired.
23. However, being a duplicate copy, it is sufficient evidence that he previously held a driving licence and licensed to drive commercial vehicles, tractors and class A vehicles.
24. Documentary evidence also showed that NHIF paid his inpatient charges of Kshs.25,909.00 for the admission from 29th November 2018 to 4th December 2018 and also paid charges of admission from 27th May 2016 to 7th June 2016 Kshs.27,500.
25. It is unclear as to what occasioned the second admission.
26. The copy of DOSHS Form I on record was incomplete for purposes of compensation as it had no assessment nor authentication by the DOSHS.
27. Finally, a copy of the claimant's NSSF provisional statement dated 26th November 2018 was availed and contribution had been remitted up to January 2018.
28. From the evidence on record, it is clear that the respondent was an employee of the appellant from sometime in 2016 until the two separated sometime in 2018.
29. It is also discernible that the claimant was involved in an accident in May 2016 and was hospitalized for about 10 days but his claim for compensation under the Work Injury Benefit Act (WIBA) does not appear to have been pursued to its logical conclusion. It was not an issue before the trial court.
30. Contrary to the evidence by RWI Mr. Protus Wekesa, the respondent was not a casual labourer even though he may have commenced employment as such in 2016; he transitioned to term contract by dint of the provisions of Section 37 of the *Employment Act*.
31. As for the respondent's salary, none of the parties provided verifiable evidence of the amount due and payable to the respondent per month.



32. The appellant's assertion that it was Kshs.15,000.00 was unreliable for want of prove as the appellant was legally required to maintain employment by law.
33. The respondent's assertion that his salary was Kshs.20,000 per month is reinforced by the provisions of Section 10(7) of the [Employment Act](#) which provides:
34. If in any legal proceedings an employer fails to produce a written contract or the written particulars, prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
35. The decision in *Abigail Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR, cited by the trial court was spot on the employers duty to keep employment records for at least 5 years.
36. Having failed, refused or neglected to provided written evidence of the respondent's salary, the burden of proof was on the appellant to demonstrate that it was Kshs.15,000.00 as opposed to Kshs.20,000.00 alleged by the respondent.
37. As regards the burden of proof, the learned trial magistrate did not fall into error as he relied on the provisions of Section 47(5) of the [Employment Act](#) on the alleged termination of the respondent from employment.
38. This provision requires that:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
39. This provision has been construed to mean that whenever an employee alleges that his or her employment was terminated unfairly or the dismissal was wrongful, the employee is required to demonstrate a *prima facie* case of the unfair termination of employment or wrongful dismissal for the burden of proof to shift to the employer who is required to show that the termination of employment or dismissal was neither unfair nor wrongful.
40. In this appeal, the respondent was required to show how, when and by whom the dismissal as effected including what he did but failed to do so and the trial magistrate correctly held that the respondent had failed to prove that termination of his employment was unfair.
41. Moreover, the appellant adduced evidence in the form of hand written letter from the respondent showing that he left employment voluntarily. The allegation that the letter was forged had to supportive evidence.
42. The trial court's refusal to award salary in *lieu* of notice and compensation for the alleged wrongful dismissal is a clear testimony that it appreciated the burden of proof on the part of the respondent and appellant on the alleged unfair termination.
43. The trial court is further assailed for having awarded service pay notwithstanding the fact that the respondent was a registered member of the National Social Security Fund and thus ineligible for service pay by dint of Section 35(6)(d) of the [Employment Act](#).



44. The court is in agreement with the appellant's submissions that the award by the trial court was erroneous because the respondent was a registered member of the National Social Security Fund (NSSF) effective 1st January 1993.
45. The provisional statement of the NSSF dated 26th November 2018 was conclusive evidence of the respondent's membership. It follows that the learned trial magistrate fell into error for failing to appreciate the import of the provisional NSSF statement on the respondent's claim for service pay. The respondent was not entitled to service pay by virtue of being a member of the National Social Security Fund.
46. Similarly, although the appellant's counsel did not cite any decision where the ELRC or the Court of Appeal has held that members of the NSSF are not qualified for the award of service pay by dint of Section 35(6)(d) of the Employment Act, there are legions of authorities for that proposition.
47. Undoubtedly, the learned trial magistrate fell into error in awarding service pay and disregarding the doctrine of judicial precedent or *stare decisis*.
48. Concerning underpayment, it is evident that the respondent did not adduce evidence to prove the underpayment but having raised the issue, it behooved the trial court to ascertain whether the law had been complied with as the trial court did.
49. The minimum wage or salary in Kenya is a prescription of law and the issues for determination were what was the respondent employed to do and whether he underpaid? The appellant could not escape liability by contending that the respondent did not prove that he was underpaid.
50. The respondent's alleged salary fell within the categories prescribed by the Regulation of Wages (General) (Amendment) Orders promulgated by the Cabinet Secretary Labour and Social Protection and employers are obligated to abide by those prescriptions.
51. As to the position or cadre the respondent was employed by the appellant, while the respondent alleged that he was employed as a driver, the appellant's written statement made no mention of the respondent's role but in his oral testimony in court, RWI repeated that he was general casual labourer.
52. Puzzlingly, the only piece of evidence the respondent availed was the duplicate driving licence issued on 8th August 2018, which of itself cannot establish that he was employed as a driver by the appellant.
53. Having been employed sometime in 2014, as a truck driver, the respondent ought to have availed detailed and verifiable evidence of having been a driver of a truck for at least 3 or 4 years, but regrettably had nothing to show.
54. It is trite law that he who alleges is required to adduce evidence to prove the allegations as ordained by the provisions of Section 107, 108 and 109 of the Evidence Act.
55. The court found it inconceivable that the respondent was not aware of the type or make of vehicle he was driving, registration number or anything associated with the vehicle including tonnage.
56. The court is at a loss as to whether it was a heavy commercial vehicle or medium sized vehicle or a small pickup truck.
57. Although the law obligates the employer to keep employment records if the employer disowned the position of employment alleged by the employee, it is incumbent upon the employee to show the role he was discharging as an employee. There must be some evidence associating the employee to the alleged role for the employer to rebut.



58. The alleged accident sometime in 2016 at Ojala area ought to have been reported to the police, but no report was made and RWI testified that was unaware of it and the respondent could not recall the date or month it occurred but was injured and hospitalized.
59. The evidence on record is insufficient for the court make a finding of fact that the respondent was employed as a driver of heavy commercial vehicles.
60. Equally, the salary of Kshs.20,000.00 per month was unproved other than the provisional NSSF statement, the respondent availed no verifiable evidence of having received any salary or payment from the appellant and did not allege that he used to sign for his salary or when it was paid or how it was paid.
61. In the circumstances, it is difficult to find what his correct salary was as he was the receiver. The respondent's witness testified that the salary was Kshs.15,000.00 but had no evidence in support of the amount. He ought to have availed concrete evidence on the amount paid to the respondent as salary or wage.
62. In the circumstances, and in accord with the trial court the court finds that the respondent was employed as driver of medium sized vehicles at Kshs.20,000.00 under the Regulation of Wages (General) (Amendment) Order 2015 effective May 1st 2015, the minimum wage for a driver of a medium sized vehicle was Kshs.18,595.20 in Kisumu excluding a house allowance of Kshs.2,789.28 total Kshs.21,384.48 an underpayment of Kshs.1,384.48 from November 2015 to 30th April 2017 Kshs.24,920.64.
63. Under the Regulation of Wages (General) (Amendment) Order 2017, the salary of a driver medium sized vehicle was raised to Kshs.21,942.30 exclusive of 15% house allowance Kshs.3,291.35 total, Kshs.25,233.65 an underpayment of Kshs.5,233.65 for 12 months Kshs.62,803.74.
64. Finally, under the Regulation of Wages (General) (Amendment) Order 2018, the salary of a driver was Kshs.23,039.40 excluding house allowance of Kshs.3,455.91, total Kshs.26,495.31 an under payment of Kshs.6,495.31 for 6 months Kshs.38,971.86. Total underpayment for 36 months Kshs.126,696.24.
65. In the court's view, the learned trial magistrate cannot be faulted on the ground of having applied the wrong Regulation of Wages (General) (Amendment) Order.
66. However, while the trial court made a finding of fact that the claimant was an employee of the respondent, it did not make any finding as to the type of vehicle he used to drive as no evidence was availed but used the salary scale of a driver of heavy commercial vehicles which was not borne by facts.
67. This court used the salary scale of a driver of a medium sized vehicle on the premises that claimant failed to discharge the burden of proof as to motor vehicle he was driving and disclosed nothing on the driving excepts the alleged accident on a date he could not recall.
68. The duplicate copy of the licence showed that he was licensed to drive various categories of vehicles.
69. As regards unpaid leave, the trial court reasoned that in the absence of employment records the claim was uncontroverted and awarded leave pay far from 2014 to 2017 Kshs.130, 338.00
70. In his witness statement, the respondent stated the he used to work for 24 hours without leave on off days and night outs were never paid.
71. In his oral evidence, the respondent testified that he was involved in an accident in 2016 and when he went back to work, his employment was terminated by word of mouth. The witness statement had no such information.



72. Intriguingly, the respondent had nothing to show to prove that he worked for 24 hours, what he was doing and had neither leave no off-days for the entire duration of employment, which sounds not believable as it was not feasible.
73. Although RWI testified that the respondent utilized his leave days he did not avail leave records as by law required.
74. The court is satisfied that the respondent is entitled to leave pay for 3 years only as follows:
- i. 2015, Kshs.14,696.14
 - ii. 2017, Kshs.17,663.56
 - iii. 2018, Kshs.18,546.72
- Total Kshs.54,756.99
75. Flowing from the foregoing, it is discernible that the appellant has demonstrated a justification for interference with the exercise of discretion by the trial court.
76. It is trite law that the principles that govern the circumstances in which an appellate court may interfere with the exercise of discretion by a trial court are well settled as articulated in a catena of decision such as Price and another v Hilder [1986] KLR 95 and United India Insurance Co. Ltd and another v East Africa Underwriters (Kenya) Ltd [1985] eKLR among others.
77. In the instant appeal, it is clear that such a case had been made out as regards the awards made by the learned trial magistrate.
78. Consequently, the court interferes with the judgment of the trial court to the extent that:
- a. The award for underpayment of Kshs.345,718.00 is set aside and substituted with an award of Kshs.126,696.24.
 - b. The award for unpaid leave of Kshs.130,338.00 is set aside and substituted with an award of Kshs.54,759.99, Total award Kshs.181,453.23.
 - c. The award for service pay is set aside.
 - d. The respondent is entitled to a certificate of service as a matter of right.
 - e. In light of the partial success of the appeal, parties shall bear their own costs of the appeal and trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 6TH DAY OF NOVEMBER, 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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI.

JUDGE

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