



**Makori v Kisii County Government (Civil Appeal 9 of 2020)
[2025] KECA 1904 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1904 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 9 OF 2020
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
NOVEMBER 7, 2025**

BETWEEN

DAMARIS MAGOMA MAKORI APPELLANT

AND

KISII COUNTY GOVERNMENT RESPONDENT

(An appeal against the judgment and decree of the Employment and Labour Relations Court at Kisumu (M.N. Nduma, J.) dated 9th July 2019 In Trade Dispute No. 274 of 2016)

JUDGMENT

1. The jurisdiction of this Court under Rule 31(1)(a) of the Court of Appeal Rules, 2022 is to re-appraise the evidence that was tendered before the trial court and draw our own conclusions thereon, while bearing in mind that we did not have the benefit of seeing and hearing the witnesses as they testified (see *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR).
2. In the Memorandum of Claim dated 9th September 2016 and filed before the Employment and Labour Relations Court (ELRC) at Kisumu, the appellant, Damaris Magoma Makori, pleaded that on or about 2nd September 2008 she was employed by the Municipal Council of Kisii as a Social Welfare Officer II on permanent and pensionable basis. She had various deployments until she was absorbed by the respondent, Kisii County Government when the 2010 Constitution came into effect. In 2013, she had health challenges that kept her out of duty for some time. Her salary was stopped for a while before it was reinstated, and salary arrears paid. By letter dated 13th August 2013, her status as employee was confirmed by the Town Administrator; but that in November 2013 the County Secretary declared that she had ceased to be an employee of the respondent. She sought a declaration that the verbal suspension and/or laying off was improper, unprocedural wrongful and illegal; and a declaration that she was still an employee of the respondent. She asked that her withheld salaries be paid, together with interest and the costs of the cause.



3. The respondent denied the Claim in the response dated 27th October 2016. It was stated that the appellant constantly absented herself from duty; that on 17th December 2009 her salary was stopped and reinstated in 2010 with a warning; and that in July 2010 she deserted duty; and on 27th November 2011 her salary was stopped, and her name removed from the payroll. It was pleaded that by that time the respondent was constituted in March 2013, the appellant had ceased to be an employee of Municipal Council of Kisii for two years, and therefore could not have been absorbed by the respondent; that the letter by the Town Administrator indicating that she was an employee or the respondent was written without authority, as only the County Secretary under section 44(3) of the County Government Act had authority to write such a letter or restore her into employment; that the letter of the Town Administrator, in any case, had no supporting documents or minutes to show that she had been reinstated following the laid down disciplinary process; that in February 2014 all the employees (including those with pending disciplinary process) were required to subject themselves to a head count, but the appellant did not show up; that by newspaper advertisement in the Daily Nation, the respondent asked those who had not been counted to submit their documents by 17th April, 2014, but the appellant did not comply; and, lastly, that there was a national and county governments widely publicized Biometric Data Registration of public officers which the appellant failed to subject herself to.
4. This is the dispute that the trial court was asked to determine. The appellant and the respondent consented to not calling witnesses for either side, and to have the case determined on the basis of written submissions. In the brief judgment that was delivered by the learned M. B. Nduma, J. on 9th July 2019, it was held as follows:-
 - “ 5) No material facts averred in the memorandum of claim and witness statements have been admitted by the respondent. The averments in these documents do not constitute evidence and cannot be admitted to prove the case by the claimant.
 - 6) The claimant elected not to testify before court at her own peril. The advocate for the claimant Mr. Sagwe and Mr. Onsembe for the respondent on 15th October 2018 recorded a consent that the suit will proceed by way of written submissions and that oral evidence had been dispensed with.
 - 7) It is this court’s considered finding that the claimant has not proved the particulars of claim, on a balance of probabilities and the suit against the respondent is dismissed in its entirety. Since no hearing took place, parties are to bear their own costs of the suit.”
5. The appellant was aggrieved by the decision and filed the present appeal in which the grounds were that the trial court had erred by not considering the self-explanatory documents that had been annexed to the Claim and the witness statements; that, had the learned Judge considered them, he would have found that the appellant had proved her case on the balance of probabilities.
6. When the appeal came before us on 12th May 2025, learned counsel Mr. Sagwe was for the appellant and learned counsel Ms. Bonareri appeared for the respondent. Learned counsel stated that each had filed written submissions on which they were relying. Unfortunately, none had filed submissions. We asked the registry to contact them for the submissions. They did not give copies of the said written submissions.



7. Having considered the impugned judgment and the grounds in the memorandum of appeal, the question for our determination is whether, on the material that was available to the trial court, it can be said that there was any error in the determination that the appellant had failed to prove her case on the balance of probabilities.
8. We reiterate that under section 107(1) of the Evidence Act (Cap 80):

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist.”
9. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] IEA 334, this Court stated that:-

“As a general proposition under section 107(1) of the Evidence Act, Cap. 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. 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 its existence which is captured in sections 109 and 112 of the Act.”
10. The respondent filed a defence to deny the appellants claim. The claims by the appellant that she was the respondent’s employee who had been improperly, unprocedural, wrongfully and illegally terminated and or laid off were specifically denied. Whatever documents and or witness statements that had been filed along with the claim, it was incumbent upon the appellant to testify in a bid to prove her case, now that there was no admission by the respondent. The contents in the claim, in the documents and in the witness statements remained allegations that required proof. The appellant could only discharge the burden placed upon her under sections 107(1) and 109 of the Evidence Act by testifying to prove the claims she had made against the respondent.
11. In *CMC Aviation Ltd v Cruis Air Ltd (1)* [1979] KLR 103, Madan, J.A. observed as follows:-

“Pleadings contain the averments by the three concerned until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted to investigation. Until the truth has been established or otherwise, they remain unproven..... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend on evidence for proof of their contents.”
12. In the matter before the learned Judge, the appellant sought to rely on her pleading, the documents and the witness statements as proof of her claim. None of them was on oath. None of her averments had been admitted by the respondent. In the circumstances, we agree with the learned Judge that the appellant failed to call evidence to prove her claim. The claim was therefore rightly dismissed with costs.
13. Consequently, we find no merit in the appeal, which we dismiss with costs.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 2025

ASIKE - MAKHANDIA



JUDGE OF APPEAL

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H.A. OMONDI

JUDGE OF APPEAL

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A.O. MUCHELULE

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

