Ramzan v Misango (Appeal E005 of 2025)
[2025] KEELRC 3083 (KLR) (6 November 2025) (Judgment)

Neutral citation: [2025] KEELRC 3083 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E005 OF 2025

JK GAKERI, J

NOVEMBER 6, 2025

BETWEEN

RAHIM IBRAHIM RAMZAN ..... APPELLANT

AND

GLADYS MISANGO ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. F. M. Rashid delivered at Kisumu on 11th February 2025 in Kisumu MCELRC No. E170 of 2024 in Grace Misango V Rahim Ibrahim.

2. The brief facts of the case before the trial court was that the respondent employed the claimant in March 2018 at Kshs.4,000.00 per month who served diligently until 15th March 2024 when her employment was unfairly terminated without reason or notice and the respondent neither provided housing or allowance nor leave pay, NSSF deductions were not remitted and the claimant was underpaid.

3. The claimant prayed for the sum of Kshs.1,265,381.81 for underpayment, house allowance, arrears, leave pay, gratuity, salary in lieu of notice, 12 months compensation, certificate of service, interest on the award, costs of the suit and any other or further relief the court deemed just and fit to grant.

4. The respondent admitted that the claimant was their house servant and worked from March 2018 to 16th April 2024 and worked between 9:00am to 12:20pm for Kshs.4,000 per month in cash or or mpesa and denied having discriminated the claimant. The respondent's case was that the claimant absconded duty and did not return and thus terminated her employment.

5. The respondent prayed for dismissal of the suit.

6. After considering the respective cases and submissions by counsel, the learned trial magistrate found that the claimant worked for the respondent on a full-time basis and termination of her employment was unfair.

7. The trial court awarded salary in lieu of notice, underpayment, house allowance, leave payment, gratuity and costs.

   This is the judgment appealed against.

8. The trial court is faulted on six (6) grounds, that it erred in law and fact by:

   1. Finding and holding that the appellant did not prove his case on a balance of probabilities.
   2. Failing to note that the respondent was a casual employee reporting to work once in a while for a few days in a month.
   3. Failing to appreciate the totality of the evidence before the court and submission.
   4. Awarding Kshs.683,328.00 yet the claimant was not entitled to the reliefs.
   5. Disregarding all the evidence adduced by the appellant as proof of breach of contract by the respondent.
   6. Misunderstanding the evidence before the court and analysing it wrongly.

9. These grounds may be condensed into nature of the respondent's employment, appreciation and application of the evidence and submissions and awards.

Appellant's submissions

10. As to whether there was an employment relationship between the appellant and the respondent, counsel submitted that the respondent was a casual employee reporting to work only once in a while, for a few days in a month and was not entitled to the award of Kshs.683,328.00

11. Reliance was placed on the decision in Samuel Wambugu Ndirangu V 2NK Sacco Society Ltd [2019] eKLR and Daniel Kipkoech Kenduiywo V County Government of Uasin Gishu [2017] eKLR on the elements of an employment relationship and definition of the term employee respectively, to urge that the respondent was not an employee.

12. As to whether the court erred on facts and evidence, counsel submitted that the trial court failed to appreciate the totality of the evidence before the court and submission and arrived at a conclusion contrary to the evidence, disregarded evidence adduced by the appellant as proof of breach of contract by the respondent and introduced matters not raised in the pleadings contrary to the principle that parties are bound by their pleadings as held in I.E.B.C. & another V Stephen Mutinda Mule & 3 others [2014] eKLR.

13. Counsel argued that the trial court's decision was against the weight of the evidence.

Respondent's submissions

14. Counsel submitted that based on the evidence on record, termination of the respondent's employment was unfair as no disciplinary pleadings were conducted, appellant failed to prove desertion and RW2 confirmed the respondent's indisposition in March 2024.

15. On the employment status of the respondent, counsel submitted that she was a house servant with a monthly salary a fact the appellant admitted, working 6 days per week and did so for 5 year as and no evidence of casual employment was adduced.

16. That the question of the employment was never an issue in the trial court and the awards were justified.

17. Reliance was placed on the sentiments of the court in Maroo Polymers Ltd V Winfred Kasyoki Willis [2023] KECA 84 (KLR).

18. Concerning underpayment, counsel submitted that the trial court made a finding that the respondent was underpaid and worked in the City of Kisumu.

19. Reliance was placed on the sentiments of the court in Ngang'a V Christ the King Parish & another [2023] KECA 1100 (KLR) on the application of Wage Orders on minimum wage.

20. As regards house allowance, counsel submitted that there was no evidence that the respondent's salary was consolidated citing the sentiments of the court in Chemelil Sugar Co. V Ebrahim Ochieng Otuori & 2 others [2015], to urge that no evidence was adduced to show that the respondent's salary was consolidated.

21. On leave pay, counsel submitted that the appellant tendered no evidence to controvert the respondent's evidence that she did not proceed on leave, which is a statutory right.

22. Finally on gratuity, counsel contended that because the appellant was not making and remitting NSSF deductions on behalf of the respondent, gratuity was payable on account of the respondent having availed her national identity card.

    Counsel submitted that the appeal lacked merit and was for dismissal.

Analysis and determination

23. This being a first appeal the role of the court is to reconsider, re-examine and evaluate the evidence before the trial court and make its own conclusions bearing in mind that it neither saw nor heard the witness and thus make due allowance as held in Selle & another V Associated Motor boat Co. Ltd [1968] EA 123 Peters V Sunday Post [1958] EA, Gitobu Imanyara V Attorney General & another [2016] eKLR and Kenya Ports Authority V Kutson (Kenya) Ltd among others.

24. Granted that the judgment of the learned trial magistrate is generally faulted on appreciation and application of the evidence on record and awards, it behoves the court to reconsider the evidence wholesomely.

25. Although the appellant submitted that the trial court erred by not finding that the respondent was a casual employee, the trial court addressed the issue and as correctly submitted by counsel for the respondent, the nature of the respondent's employment was contested and the learned trial magistrate found that the respondent was and employee of the appellant.

26. In his submissions, counsel for the appellant did not address the specific evidence which supported his submission that the respondent was a casual employee. He did not specify whether it was RWI or RWII who gave such evidence.

27. In his written witness statement dated 6th November, 2024, the appellant stated that the respondent worked as his house servant from 9:30am to 12:30pm under an oral agreement at Kshs.4,000.00 per month and the respondent worked under the supervision of the appellant's wife from March 2018 to March 2024, a duration of 5 years, facts the appellant confirmed on cross-examination.

28. None of the appellant's witnesses testified or suggested that the respondent was a casual employee.

29. For starters, Section 2 of the *Employment Act* defines a casual employee to mean

> " a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.

30. To suggest that the respondent was a casual employee in the context of the evidence before the trial court is nothing short of overstretching imagination.

31. RWI and RWII admitted in court that the respondent was their employee serving as house girl/servant and RWIII confirmed as much.

32. Based on the testimony adduced by the appellant's witnesses, the inescapable conclusion was that the respondent was an employee of the appellant and this court so finds. The trial did not err in its finding.

33. As regards the respondent work day, evidence on record revealed that she worked for the appellant from 8:00am to 4:00pm and for the appellant's sister from 4:00pm.

34. The respondent admitted that she had not informed the appellant she was pregnant but RWII confirmed that the was unwell on 16th March 2024 and went to hospital and did not work again thereafter as she had been replaced. The appellant testified that the respondent absconded duty; yet RWII testified that the respondent was unwell and had proceeded to hospital and neither of the witnesses attempted to call her even after she did not report to work.

35. The appellant admitted that he had no evidence to show that the respondent proceeded on leave or her work day and or written contract of employment.

36. As regards termination of the respondent's employment, while the appellant testified that she absconded duty, the respondent testified that after she proceeded to hospital and was bedridden for some time and was not allowed back when she reported. She did not however disclose when she returned to the workplace after her indisposition.

37. Other than RWI, RWII (Zakina Abdul Razak) and RWIII (Sumeya Ibrahim) did not testify on how the respondent and the appellant separated.

38. It is trite law that for a termination of employment to pass the fairness test in accord with the provisions of the *Employment Act*, it must have been substantively justifiable and procedurally fair as held by the Court of Appeal in Naima Khamis V Oxford University Press (EA) Ltd [2017] eKLR and Ndolo J in her often cited sentiments in Walter Ogal Anuro V Teachers Service Commission [2013] eKLR that:

> "...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination, while procedural fairness addresses the procedure adopted by the employer to effect termination".

39. Put in the alternative terms, the employer must have had reason(s) for termination of the employee's employment and the procedure adopted by the employer must meet the threshold of fairness in consonance with the provisions of Sections 41, 43, 44, 45 and 47(5) of the *Employment Act*.

40. In the instant appeal, while the respondent's case was that she was not welcomed back after her illness, the appellant's case was that the respondent deserted the workplace.

41. Desertion takes place when an employee leaves the work place and keeps off with no intention of returning. In the case of absconding, the employee returns after some time.

42. Desertion is the wilful and unjustified abandonment of a person's duties or obligation. See Seabolo V Belgravia Hotel [1997] 6 BLLR 829 (CCMA).

43. Both are unlawful if proved because they amount to absence of the employee from the workplace without permission or lawful excuse and amount to gross misconduct under Section 44(4) of the *Employment Act*.

44. The jurisprudence emerging from the Employment and Labour Relations Court is that whenever an employer relies on the defence of desertion or absconding of duty by an employee, it is incumbent upon the employer to demonstrate the reasonable steps it took to ascertain the employee's whereabout to resume duty and is required to issue a notice to show cause to the employee to explain why disciplinary action should not be taken against him or her for failing to report to work and if unresponded, a letter of termination of employment ought to issue.

45. In Felistas Acheha Ikatwa V Charles Peter Otieno [2018] eKLR where Maureen Onyango J held:

> " The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate the efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered".

46. See also Simon Mbithi Mbane V Inter-Security Services Ltd [2018] eKLR and Joseph Nzioka V Smart Coatings Ltd [2017] eKLR.

47. Relatedly, even in such circumstances the employer is still required to show that the separation was fair.

48. In Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd [2020] KEELRC 609 (KLR), Maureen Onyango J held:

> " Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing prior to her termination".

49. In this appeal, although RWI testified that the respondent absconded, he confirmed on cross-examination that he did not follow up after the respondent absconded or ask her to resume duty or invite her for a disciplinary hearing. He however denied having chased the respondent.

50. Similarly, RWII, who was aware that respondent had left the place of work while unwell confirmed on cross-examination that she had no evidence of having called the respondent.

51. The foregoing testimony leaves no doubt that the appellant failed to prove that the respondent absconded and the respondent's evidence that her termination of employment was unfair was uncontroverted.

52. The decision in Ragose Katana Chidyanga & another V China Jiangxi International Kenya Ltd [2018] eKLR, Stanley Omwoyo Onchweri V Board of Management Nakur YMCA Secondary School [2015] eKLR and Dickson Matingi V Db Schenker Ltd [2016] eKLR relied upon by the trial court were correct for the proposition that desertion, whenever relied upon by an employer must be proved.

53. The finding by the learned trial magistrate that termination of the respondent's employment was unfair was firmly rooted on the evidence before the court and the court cannot be faulted as having misunderstood the evidence.

54. Having explained what transpired after the respondent left the work place on 16th March 2024 and the appellant's refusal to allow her to resume duty, it behooved the appellant to prove otherwise but failed to do so.

55. A panoramic view of the appeal in the court's view, reveals that the learned trial magistrate appreciated the evidence placed before the court and applied it wholesomely in the determination of the case and did not fall into error of disregarding evidence or misapprehend it.

56. On submissions, the court indicated that it had considered the rival submissions and addressed issues similar to those highlighted by the parties in their submissions.

57. It is trite law that a court of law is not required to reproduce or capture submissions as evidence that it had considered them in determining the suit.

58. Finally, the judgment of the learned trial magistrate is faulted on the awards made in favour of the respondent.

The court will address the reliefs distinctively as follows:

Underpayment

59. It is common ground that the appellant was paying the respondent a monthly salary of Kshs.4,000.00 and confirmed the same in court and payment was either in cash or Mpesa, a fact the respondent did not contest.

60. On the applicability of the Regulation of Wages Amendment Orders in Ng'ang'a V Christ the King Parish & another (supra) the Court of Appeal held:

> " ...The minimum wage is what the Government sets from time to time through amendments to the wages order. A contract of employment with wages and terms descending below the minimum standards is therefore unlawful. This Court in Kenya Tea Growers Association V Kenya Plantation & Agricultural Workers Union [2018] eKLR albeit dealing with a collective bargaining agreement adopted a similar reasoning and interpretation of Section 26(2) of the *Employment Act*".

61. See also Irungu Githae V Mutheka Farmers Co-operative Society Ltd [2019] eKLR, where the court was categorical that:

> " ...Under the law, any employer paying below the minimum wage commits an offence".

62. Minimum wage is a prescription of the law and binds all employers of employees in those categories and the appellant was liable to pay the respondent accordingly.

63. The respondent qualified for underpayment for 3 years or 36 months as follows:

    1. Regulation of Wages (General) (Amendment) Order 2018, Kshs.13,572.90.
    2. Regulation of Wages (General) (Amendment) Order 2022 Kshs.15,201.65.

64. These salaries in the Wages Orders are exclusive of house allowance of 15% which an employee is entitled to.

65. Having relied on the correct Regulation of Wages (General) (Amendment) Orders, the trial court's computation of underpayment cannot be faulted, Kshs.403,259.40.

66. Needless to emphasize, house allowance is a statutory right, the amount due is as correctly computed by the trial court, Kshs.82,088.91.

67. On leave, the appellant admitted that he had no evidence to show that the respondent took annual leave from her employment.

68. Analogous to house allowance, annual leave is a statutory right of every employee and if not taken, the employer is required to pay for the leave days the employee worked. In this case, the total amount due was Kshs.31,923.47 for 21 days per year for 3 years.

69. Concerning gratuity, it is trite that this is an amount paid by the employer to the employee in appreciation of the services rendered. It is a gift and is neither pension or service pay nor severance pay and is only payable if it is contractually agreed upon either under a collective bargaining agreement or employment contract.

70. The fact that the appellant did not make National Social Security Fund (NSSF) remittances could not be the basis of awarding gratuity as the trial court appeared to have reasoned.

71. Gratuity cannot be a substitute for NSSF pension. The respondent ought to have prayed for service pay under Section 35(5) of the *Employment Act*.

    The award for gratuity was undeserved.

72. Having upheld the trial court's finding that the termination of the respondent's employment was unfair, the respondent qualified for compensation under Section 49(1) of the *Employment Act* and considering that the respondent served for 6 years, which is not long, had no recorded cases of misconduct, but did not express her wish to remain in the employment of the appellant or appeal the termination of employment, and contributed to the termination by failure to keep the employer informed. A simple phone call would have been sufficient, the equivalent of two (2) month's salary was fair Kshs.34,963.80

73. The respondent was also entitled to one (1) months salary in lieu of notice Kshs.17,481.90, Total Kshs.569,717.48.

74. The foregoing leaves no doubt that the appellant has demonstrated justification for the court to interfere with the exercise of discretion by the trial court pursuant to the principles enunciated in Price and another V Hilder [1986] KLR 95 and more elaborately captured by Madan JA in United India Insurance Co. Ltd and another v East Africa Underwriters (Kenya) Ltd [1985] eKLR. See also Mbogo & another V Shah [1968] EA 93 and Mrao Ltd V First American Bank of Kenya Ltd & 2 others [2003] KLR 125.

75. In conclusion, the appellant's appeal is nominally successful and the judgment of the trial court is interfered to the extent that:

    a. Award of gratuity is set aside.

    b. Equivalent of four (4) months gross salary is set aside and substituted with an award of two months Kshs.34,963.80.

c. Salary in lieu of notice Kshs.17,481.90

Total award Kshs.569,717.48.

Other Orders of the trial court are upheld.

76. Owing to the partial success of the appeal, each party shall bear their own costs.

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.