



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT KISUMU**  
**APPEAL NO. E023 OF 2025**

CHANNAN AGRICULTURAL  
CONTRACTORS (KENYA) LTD.....**APPELLANT**

**VERSUS**

BENARD  
ODHIAMBO  
OPIYO.....**RESPONDENT**

*(Being an appeal from the judgment of Hon. F. M. Rashid (PM) delivered on 1<sup>st</sup> April 2025 in KISUMU CMC ELRC No. 124 of 2022)*

**JUDGMENT**

1. Aggrieved by the entire Judgment of the Hon. F. M. Rashid delivered on **1<sup>st</sup> April 2025 in KISUMU CMC ELRC No. 124 of 2022: Benard Odhiambo Opiyo v Chananan Agricultural Contractors**, the Appellant filed a

Memorandum of Appeal dated 26<sup>th</sup> April 2025 on the grounds that:

- (a) The Trial Magistrate erred in law and fact in failing to appreciate the applicable and gazetted wages and hence ended up awarding amounts that were far much in excess of the relevant scale.
- (b) The Learned Magistrate erred in law and fact, by making an award on house allowance when the gross salary was consolidated, hence resulting in double payment.
- (c) The Learned Magistrate erred in law and fact in relying on extrinsic factors not pleaded or supported by evidence.
- (d) The Learned Magistrate erred in law and fact in failing to appreciate the inadequacy of the Respondent's evidence resulting in the case being determined on inadequate and imprecise facts.
- (e) The Learned Magistrate erred in law and fact by failing to appreciate that the Respondent failed to discharge the burden of proof in relation to the entire claim.

(f) The Appellant has new emerging evidence of material facts which it wishes to produce under Order 24 Rule 7 of the Civil Procedure Rules.

(g) The Trial Magistrate erred in both law and fact in failing to take into account the Appellant's evidence that was sufficient to dislodge the Respondent's claim.

(h) The entire judgment was against the weight of the evidence on record.

2. On the strength of these grounds, the Appellant prays that the appeal be allowed with costs, the judgment of the trial court be set aside and substituted with an order dismissing it, or in the alternative this Court be pleased to make an appropriate award based on the evidence on record.

3. The appeal was canvassed by way of written submissions.

#### Appellant's Submissions

4. The Appellant submits that the Respondent was rightfully terminated from employment for engaging in theft. It asserts that section 44(4) of the Employment Act expressly

recognises theft as a ground for summary dismissal. It makes reference to its witness testimony in which the Respondent confessed to being part of a theft syndicate. In support of this position, the Appellant cites **Naqvi Syed Omar v Paramount Bank Limited & another [2015]eKLR**, which held:

*“Where an employer suspects the employee of stealing; or where the employee carelessly and improperly performs his role; the employer has the right to summarily dismiss the employee under section 44 (4) of the Employment Act. Employees are imbued with a high degree of trust and confidence.”*

5. The Appellant further submits that the trial court erred in holding that theft had to be proved beyond reasonable doubt. It submits that the applicable standard in internal disciplinary proceedings is proof on a balance of probabilities. It cites, **Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR**, **Palace Investment Ltd v Geoffrey Kariuki Mwenda & another [2015] eKLR**, **Jackson Mwambili v Peterson Mateli [2020]**

**eKLR, Miller v Minister of Pension [1947] All ER 372**  
and **James Muniu v National Bank of Kenya Ltd [2019]**  
**eKLR.**

6. Regarding, the remedies, the Appellant submits that the Respondent having been the author of his own misfortune, was not entitled to pay in lieu of notice and compensation for unfair termination. It maintains that the court's reliance on Legal Notice No. 117 of 2015 as the basis of the salary of Kshs. 13,800/- was erroneous as the notice did not prescribe wages for an electrician. On house allowance, the Appellant reiterates that the Respondent's salary was consolidated and the trial court erred in awarding it, thereby "rewriting" the parties' contract. To reinforce this argument, it cites **National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another [2001] eKLR** and **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR**, both affirming that courts cannot vary contractual terms agreed upon by parties. It therefore urges the Court to set aside the award on house allowance as it amounts to double payment. The Appellant further urges the court to allow it to produce

additional evidence in the form of payslips that would help clarify issues in the case. It maintains that during the hearing this evidence was not produced as the Appellant did not have a legal officer within its ranks. In conclusion it urges the court to allow the appeal.

### Respondent's Submissions

7. The Respondent identifies the following issues for determination:

- (i) Whether his termination was unlawful, unprocedural, and unfair;
- (ii) Whether he is entitled to the reliefs sought;
- (iii) Whether the Appellant should be allowed to adduce additional evidence at this stage; and
- (iv) Who should pay costs of the appeal.

8. On the first issue the Respondent submits that his dismissal from employment fell short of both the substantive and procedural test as required in **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR**. Regarding procedure, he asserts that section 41 of the Employment Act

was not complied with, as no notice to show cause was issued and no disciplinary hearing was held. He emphasizes that even in cases warranting summary dismissal, due process must still be observed, citing **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**, which emphasized that an employee was still subject to be treated as stipulated in section 41 of the Employment Act even in serious cases warranting summary dismissal under section 44 of the same act. He also references **Donald Odeke v Fidelity Security Ltd [2012]eKLR**, where it was held:

*“It does not matter what offence the employee is accused of. If the employee is not heard the termination is ipso facto unfair.”*

9. In respect of substantive justification, the Respondent submits that no valid reason for dismissal was given as required by section 45(2) of the Employment Act. He maintains that no charges were levelled against him and no evidence linking him to theft was presented. Regarding reliefs sought, he submits that he is entitled to house allowance as the Appellant failed to demonstrate that it was

paid. He relies on **Peter Murimi Mugo v Chase Bank Kenya Ltd (Cause 730 of 2015) [2024] KEELRC 2813 (KLR)**, which held that an employer asserting consolidated pay must prove it. He also cites **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] KECA 563 (KLR)** where it was stated:

*“Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to re-write a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the respondent was to be paid “other benefits as required by law “. The Judge interpreted that contract although she did not specifically mention this particular clause to mean that the appellant was liable to pay the respondent house allowance. We cannot fault the Judge for that interpretation because house allowance is a benefit that is required under the Employment Act and the contract did not provide that house allowance was consolidated in the basic wage. Counsel for the appellant*

*invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it."*

10. In respect of leave the Respondent submits that he never went on leave during his entire period of service, and the Appellant tendered no evidence to the contrary. He relies on **Fancy Jeruto Cherop & another v Hotel Cathay Limited [2018] eKLR**, in which the court stated:

*"Section 28 of the Employment Act gives every employee a right to take annual leave. The employer has the duty to ensure every employee has taken annual leave as and when due. The defence that the claimants failed to take annual leave thus forfeited the same is not a position supported in law."*

11. On additional evidence that Respondent submits that none should be adduced at this juncture. He asserts that the

Appellants contention that it did not have counsel till April 2025 was untrue as the lower court record indicates that their counsel entered appearance on 23<sup>rd</sup> June 2022. Moreover, he asserts that the Appellant has not met the threshold outlined by the Supreme Court in **Mohamed Abdi Muhamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR**, in the following terms:

- i) The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;*
- ii) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;*
- iii) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;*
- iv) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;*

- v) *the evidence must be credible in the sense that it is capable of belief;*
- vi) *the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;*
- vii) *whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;*
- viii) *where the additional evidence discloses a strong prima facie case of wilful deception of the Court;*
- ix) *The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.*
- x) *A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.*
- xi) *The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the*

*court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.*

12. On costs the Respondent urges the court to award him both of the appeal and of the trial court.

#### Disposition

13. This being a first appeal, I am enjoined to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at my own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where the Court of Appeal outlined the duties of a first appellate court as follows:

*"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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."*

[Emphasis supplied]

14. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have come to the following determination. I have duly evaluated the evidence they presented in the Trial Court, and which evidence and documents in support thereof, are before this Court.

15. The Appellant was the employer of the Respondent. In the Employment Act, the duty of an employer is contained in many sections one of which is section 74. This section obligates an employer to keep employee records chief of which is the remuneration paid to an employee. In the case before me, other than asserting the salary was consolidated, the employer did not avail a contract that demonstrates the

same. A payment slip or payslip cannot be the basis for contractual terms. It is not something one can rely on to assert a contractual term.

16. The right to terminate an employment contract on the grounds of misconduct is provided for in the law. Any employer who wishes to exercise the right must of necessity bring the termination within the purview of the law as held in the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held there must be substantive justification and procedural fairness in the termination. It matters not what the employee is accused of. There must be fairness in the process and where there is a misstep a court can hold the termination to be unfair and unlawful within the meaning of sections 41, 43, 45 and 47 of the Employment Act.

17. On the issue of additional evidence, it is the Court's view that the determination in the Supreme Court decision in **Mohamed Abdi Muhamud v Ahmed Abdullahi Mohamad & 3 others** (*supra*) is sound law. The Court has not discerned any reason to overturn the decision of the

Learned Magistrate. The Respondent was entitled to receive the recompense from the Learned Magistrate who upon weighing the evidence before her determined that the Respondent was to receive the sums ordered as against the Appellant. The appeal being devoid of merit is dismissed with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Kisii this 10<sup>th</sup> day of December**

**2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**