REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E012 OF 2023

HIGHTECH CYLINDER MANUFACTURING
CO. LIMITED…………………………………………………………………………...APPELLANT

VERSUS

CHRISTOPHER WANYAMAWAMUKOTA...RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. E.K. Suter (M) delivered on 1st December, 2023 in Mavoko MCELRC Cause No. E026 of 2022)

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. E.K. Suter (M) delivered on 1st December, 2023 in Mavoko MCELRC Cause No. E026 of 2022 between the parties filed a Memorandum of Appeal dated the 24th October, 2023 seeking the following orders: -

a. The Appeal be allowed in whole.

ORIGINAL

b. The Judgment by the Hon. Principal Magistrate E.K. Suter delivered on 5th October 2023 in Mavoko Chief Magistrate ELRC No. E026 of 2022 and subsequent decree thereof be varied or set aside.

c. The appellant be awarded costs of the Appeal and costs in the Subordinate Court.

GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law and fact in finding that the Appellant unlawfully terminated the Respondent's employment.

3. The Honourable Magistrate erred in law and fact by finding that the parties were in an employer employee relationship without any evidence produced in court.

4. The Honourable Magistrate erred in law and fact in finding that the Respondent was unfairly and unlawfully terminated from employment by the Appellant and making an award of five-months' salary compensated for unlawful termination one month's salary in lieu of notice and house allowance.

5. The Honourable Magistrate erred in law and in fact by failing to appreciate that no factual evidence had been tendered by the Respondent that sufficiently demonstrates that he was procedurally and unfairly terminated from employment and the learned magistrate found.

6. The Honourable Magistrate erred in law and in fact by failing to consider the applicant's submissions which were duly filed.

ORIGINAL

7. The Honourable Magistrate erred in law and fact by failing in appreciating and considering the Appellant's submissions only to the prejudice and detriment of the Appellant.

8. The Honourable Magistrate erred in law and fact in misapprehending the evidence on record.

9. The Honourable Magistrate erred in law and fact by failing to properly and exhaustively evaluate the evidence on record.

10. The Honourable Magistrate erred in law and fact in arriving at conclusions and inference which are not supported by evidence and/or based on any documentation.

BACKGROUND TO THE APPEAL

11. The Respondent filed a suit against the Appellant vide a memorandum of claim dated the 21st of June 2018 seeking the following orders: -

   a. The Respondent pays the Claimant dues as tabulated below:

i.	Compensation for wrongful, unlawful and/or unfair termination of employment Kshs. 276,000.00	
ii.	One month's pay in lieu of notice	Kshs. 23,050.00
iii.	House Allowance at 15 % of basic salary for 37 months	Kshs. 127,928.00
iv.	Unpaid leave days	Kshs. 48,405.00
	Total	Kshs. 475,983.00

ORIGINAL

v. Interest on (i), (ii), (iii) and (iv) above from the same became due until payment in full.

vi. Certificate of service, and

vii. Costs of the suit.

b. Any other relief that this Honourable Court deems fit to award under the circumstances.

(pages 1-3 of Appellant's ROA dated 4th November 2024).

14. The Respondent filed his Verifying Affidavit sworn on 21st June 2022, list of witnesses, witness statement, and list of documents with bundle of documents attached, all of even date (pages 8-16 of ROA).

15. The claim was opposed by the Appellant who entered appearance and filed a response to claim dated 3rd October 2022 (pages 18-19 of ROA). They also filed a list of witnesses, and list of documents of even date (pages 20-32 of ROA).

16. The Respondent's case was heard on the 16th of March, 2023. The Respondent testified in the case, relied on his witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Appellant Mr. Waliula (pages 5-6 of Supplementary ROA dated 18th September 2025).

17. On the other hand, the Appellant's case was heard on 17th May 2023 with the Appellant calling one Sylvester Kayega as its sole witness. He relied on his filed witness statement as

ORIGINAL

his evidence in chief, and produced the Respondent's documents. He was cross-examined by counsel for the claimant Ms. Wambui (pages 8-9 of Supplementary ROA).

18. The parties took directions on filing of written submissions after the hearing. The parties complied.

19. The Trial Magistrate Court delivered its judgment on 5th October 2023 partially allowing the Claimant/Respondent's claim to the tune of Kshs. 266,228/- comprising of notice pay, compensation for unfair termination, and house allowance, plus costs of the suit and interest (judgment at pages 18-30 of ROA).

DETERMINATION

20. The appeal was canvassed by way of written submissions. Both parties complied.

Issues for determination

21. In their submissions dated 11th February 2025, the Appellant identified the following issues for determination, namely:-

    i. Whether there existed an employer-employee relationship between the Appellant and Respondent.

    ii. Whether the Respondent was unlawfully and unfairly terminated from employment.

    iii. Whether the trial court erred in awarding terminal dues to the Respondent.

    iv. Who should bear the costs of the suit.

ORIGINAL

22. Conversely, the Respondent, in his submissions dated 22nd September 2025, submitted generally on the grounds of appeal.

23. The court adopted the issues as outlined by the appellant seeing the respondent submitted on all grounds of appeal-

a) Whether there existed an employer-employee relationship between the Appellant and Respondent.

b) Whether the Respondent was unlawfully and unfairly terminated from employment.

c) Whether the trial court erred in awarding terminal dues to the Respondent.

d) Who should bear the costs of the suit.

24. As the first appellate Court, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. In Selle & Another -V Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus: "...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..."

Whether there existed an employer-employee relationship between the Appellant and Respondent.

25. The ground of appeal was that - *The Honourable Magistrate erred in law and fact by finding that the parties were in an employer employee relationship without any evidence produced in court.*

ORIGINAL

26. The Appellant submitted as follows- That it consistently maintained that the Respondent was engaged on a purely casual basis, with no contractual obligation to provide regular work or employment benefits typically accorded to permanent employees. That he was engaged when work was available. The Appellant contends that the Respondent was not a permanent employee but rather a casual worker, as defined under Section 2 of the Employment Act, 2007, whose engagement was contingent upon client orders. The Appellant asserts that the Respondent's remuneration was solely based on the work completed, which varied depending on client requests for gas cylinders. The bank statements produced by the Respondent indicate that payments were made on an irregular basis, with some instances of remuneration occurring twice within a single month. During cross-examination, the Respondent admitted that his payments were dependent on the volume of work completed. We place reliance in the case of Peter Wambugu Kariuki And 16 Others V Kenya Agricultural Research Institute [2013] Eklr And Samwelokinda Aponga & Another V Match Master Limited[2015] Eklr. Where it was stated that ‘’The Employment and Labour Relations court has in the wake of the Employment Act 2007 nevertheless appreciated that failure to pay wages at the end of the day does not by itself remove one from the ambit of a casual worker. For instance, Justice Abuodha in Josphat Njuguna V High Rise Self Group [2014] Eklr held that: “It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours. The provisions of section 37(1) therefore does not oblige an employer to absorb in

ORIGINAL

his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates." The Appellant respectfully submits that the Respondent was engaged as a casual worker, whose services were retained only when work was available and who was remunerated on a task-completion basis. The nature of the Respondent's engagement did not create an obligation on the part of the Appellant to provide continuous employment, nor did the Respondent receive a fixed salary indicative of a permanent employment relationship. Despite the Appellant's clear evidence demonstrating that the Respondent's engagement was irregular and dependent on the availability of work, the trial magistrate failed to properly consider this fundamental aspect. The trial court erred in concluding that an employer-employee relationship existed between the parties, as the evidence on record does not support such a finding.

27. Conversely the respondent submitted that - At Paragraphs 9 – 16 of the Appellant's Submissions, the Appellant alleges that the Respondent was a casual worker. Therefore no employer-employee relationship existed. We humbly submit that Section 2 of the Employment Act defines a "casual employee" as 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. The Claimant herein worked for the Respondent from February 2018 to 15th March, 2021. He had been continuously employed for a period of more than Three [3] Years. We invite your Ladyship's attention to Pages 14 and 16 of the Record of Appeal. The Respondent tendered his employee ID Card as Exhibit 2. The ID Card clearly indicates that the Respondent was a Welder in the Appellant Company and not

ORIGINAL

a casual labourer. His employee Number is also indicated in the ID Card. We humbly submit that casual labourers are not issued with Identity Cards. The Appellant did not tender any evidence to demonstrate the Respondent was a casual labourer. We urge your Ladyship to find that the Respondent was not a casual employee. He was employed on a permanent basis. Therefore, he is entitled to the safeguards available to an employee under the Employment Act.

Decision

28. The issue was about whether the respondent was a casual or contractual employee. By the very definition of a casual worker under the Employment Act means they are employees. Section 2 states as follows as concerns casuals- *"casual employee" means 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;* The definition means that casuals are employees. Then the issue as understood by the court was whether court erred by finding the respondent was a contractual employee thus entitled to the basic terms of work under the Employment Act pursuant to section 37 of the Employment Act to wit- *''37. Conversion of causal employment to term contract (1) Notwithstanding any provisions of this Act, where a casual employee— (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service. (2) In calculating wages and the continuous working days under subsection (1), a casual*

ORIGINAL

employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days. (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee. (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act. ''During the trial, the court found that DW1 Khayega in his testimony treated the Respondent as an employee. DW1 told the trial court that they did not terminate any one. That Ernest and others left. That they had met with the employees on reduction of salary due to the COVID-19 pandemic. That when the job was minimal they would be given permission to have off days and even work elsewhere . When they got back to their feet, the appellant asked for a comeback but the respondent had moved on.(page 5-7 of the proceedings. The record was not paginated) The trial court noted the job card produced by the respondent indicated he joined the appellant on February 2028 with expiry of February 2020. During the hearing, the document was issued by Rongers, who DW1 told the trial court was their accountant. The court looked into the document produced as C-exhibit 2 before the trial court, and the same was titled Employee ID Card. Taking the totality of the foregoing, I find no basis to disturb the trial court's finding that the respondent was a contractual employee of the respondent.

ORIGINAL

Whether the Respondent was unlawfully and unfairly terminated from employment.

29. The grounds of appeal were-

i. ***The Honourable Magistrate erred in law and fact in finding that the Appellant unlawfully terminated the Respondent's employment.***

ii. ***The Honourable Magistrate erred in law and fact in finding that the Respondent was unfairly and unlawfully terminated from employment by the Appellant and making an award of five-months' salary compensated for unlawful termination one month's salary in lieu of notice and house allowance.***

iii. ***The Honourable Magistrate erred in law and in fact by failing to appreciate that no factual evidence had been tendered by the Respondent that sufficiently demonstrates that he was procedurally and unfairly terminated from employment and the learned magistrate found.***

iv. ***The Honourable Magistrate erred in law and in fact by failing to consider the applicant's submissions which were duly filed.***

v. ***The Honourable Magistrate erred in law and fact by failing in appreciating and considering the Appellant's submissions only to the prejudice and detriment of the Appellant.***

vi. ***The Honourable Magistrate erred in law and fact in misapprehending the evidence on record.***

vii. ***The Honourable Magistrate erred in law and fact by failing to properly and exhaustively evaluate the evidence on record.***

ORIGINAL

viii. The Honourable Magistrate erred in law and fact in arriving at conclusions and inference which are not supported by evidence and/or based on any documentation.

The appellant's submissions

30. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows: "(5) 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 of the termination of employment or wrongful dismissal shall rest on the employer." The Court of Appeal, in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, reaffirmed the principle that the burden of proof in claims of unfair or wrongful termination rests initially on the claimant. The court emphasized that under Section 47(5) of the Employment Act, the claimant must first establish a prima facie case by demonstrating not only that termination occurred but also that such termination was unfair or wrongful. Only upon satisfying this threshold does the burden shift to the employer under Section 43(1) of the Act to justify the reasons for termination. The court further underscored that where an employer fails to provide justification for termination, such termination shall be deemed unfair within the meaning of Section 45 of the Employment Act. In dismissing the claimant's appeal, the Court of Appeal observed that the claimant had been referred for a refresher course, which was a requirement for continued employment. However, rather than complying with this directive, the claimant opted to resign. The court found that the claimant's decision to leave was voluntary and that he failed to demonstrate any efforts to return to work or engage his employer on the matter before instituting the claim several months later. Accordingly, the claim for unfair termination was dismissed. In the present case, the Respondent was not an employee of the Appellant but was invited to render services

ORIGINAL

on specific terms. In the course of the meeting regarding a proposed salary reduction of Ksh 2,000/-, the Respondent voluntarily chose to discontinue offering his services. At no point did the Appellant issue a formal letter of termination or take any affirmative steps to terminate the Respondent's engagement. The Appellant's intention was not to terminate the Respondent's services but rather to negotiate and agree on revised terms of engagement. Furthermore, the Appellant did not at any point express dissatisfaction with the services rendered by the Respondent. There is no evidence on record, whether in the form of a formal letter or any other communication, indicating that the Respondent's performance was unsatisfactory or that he was incompetent in the course of offering his services or any misconduct to warrant unlawful termination. The absence of any documented grievance or disciplinary action against the Respondent further reinforces the Appellant's position that the Respondent voluntarily ceased offering his services in the course of a meeting on the revised remuneration terms. It is our humble submission that the Respondent voluntarily withdrew from the workplace upon disagreeing with the proposed remuneration adjustments. No documentary evidence has been adduced to suggest that the Appellant terminated the Respondent's services. Further, the Respondent has not demonstrated any efforts made to clarify his alleged employment status or seek reinstatement before instituting the present claim. Instead, the Respondent filed a claim for unlawful termination approximately nine months later without providing any justification for the delay. Consequently, we submit that the Respondent's claim lacks merit and should be dismissed. Reliance is equally made in the case of Kenya Union of Commercial, Food & Allied Workers v Meru North Farmers Sacco Ltd [2013] eKLR, (supra) where the court emphasized that termination must be clearly demonstrated, and an employee must show they were dismissed rather than having left on their own accord. Therefore, it is our humble submission that the learned magistrate erred in

ORIGINAL

finding that the Respondent was unfairly terminated, despite the absence of sufficient evidence to establish dismissal as required under Sections 43 and 47 of the Employment Act. The Respondent failed to discharge the initial burden of proof by demonstrating that his employment was indeed terminated by the Appellant. In the absence of such proof, the burden did not shift to the Appellant to justify the alleged termination. Accordingly, we respectfully urge this Honourable Court to find that the Respondent was not unlawfully dismissed and that the trial magistrate erred in holding that the Respondent's employment was unfairly terminated. We therefore pray that the decision of the trial court be set aside in its entirety.

Respondent's submissions

31. Section 41 of the Employment Act, 2007 creates a statutory obligation on an Employer who is desirous of terminating the services of an Employee on the Grounds of misconduct, poor performance or physical incapacity to first explain to the Employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a Representative present whilst the Employee is presenting the explanation. We humbly submit that your Ladyship, has first to determine whether the Respondent's employment was terminated. Secondly, whether the Appellant complied with the requirements of section 41 of the Employment Act before terminating the Claimant's employment. For that proposition, we rely on the following exposition by the Court in the course of its Judgment in Mombasa ELRC Cause No 146 of 2012; Alphonse Maghanga Mwachanya –vs– Operation 680 Limited:- "Section 41 of the Employment Act, 2007 has now created a statutory obligation on an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity to explain to the employee the reasons for the termination and to listen to any explanations by

ORIGINAL

the employee. The employee is also entitled to have a representative present. This is what is now referred to in employment law and practice as procedural fairness… In my considered view in order for an employer to meet the legal requirements of procedural fairness section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following: (i) Explained to the employee in a language the employee understood the reasons why it was considering the termination. (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons. (iii) Heard and considered any explanations by employee or his representative. (iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules." The Respondent testified that on 15th March, 2021, he reported to work in the morning. His Supervisor, Mr. Sylvester Khayega, told him that he had been instructed by his Boss Mr. Abdullahi, to instruct the Respondent and his other colleagues to go home because there was a shortage of work. The Respondent was promised that he would be called back to work at the appropriate time. Sometime in September, 2021, the Respondent received a call from Mr. Khayenga. He was requested to report to work. The Respondent reported to work and found Mr. Abdullahi together with the Appellant's Managers and Supervisors at the Appellant's premises. Mr. Abdullahi informed the Respondent and his colleagues that in light of the hard economic times, they shall be required to take a Kshs 2,000 pay cut. The Respondent and a few of his colleagues protested. They told Mr. Abdullahi to pay their Service pay and pending leave days before engaging them in different employment terms. Mr. Abdullahi stated that whoever did not wish to take the pay cut should leave the Appellant's premises. The Respondent left and has never been let back into the Appellant's premises. The Respondent testified that the

ORIGINAL

termination of his employment was baseless, unfair, unilateral, without any prior warning and in complete disregard of the procedure expressly set out in the Employment Act, 2007.Section 10 (1) of the Employment Act, 2007, states that "a written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment." Section 10 (2) (h) states that a written contract of service shall state the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits. Section 10 (5) of the Employment Act, 2007 states that where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing. Article 47 (1) of the Constitution of Kenya states that "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair". Article 47 (2) states that "if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"that Salary is a fundamental term of employment whose reduction has a negative impact on an employee's livelihood. Therefore, it should not be done arbitrarily or unilaterally by an employer. It should be done in writing and be accepted by the employee. At Page 12, Paragraph 5 of the Record of Appeal, the Respondent confirmed that he protested the reduction of his salary. He testified that he requested to be paid his service and pending leave pay before being engaged on new terms. The Respondent was directed to leave the Appellant's premises if he did not wish to take a pay cut. During cross-examination, Mr Khayega confirmed that the Appellant did not issue to the Respondent a written notice to indicate his salary would be reduced and why it was being reduced. The Respondent was neither given verbal nor

ORIGINAL

written notice of the reduction of his salary. Appellant contravened Article 47 of the Constitution of Kenya, Section 10 (5) of the Employment Act, 2007 and Section 4 of the Fair Administrative Action Act. We rely on the exposition in the Employment and Labour Relations Court in Nairobi ELRC no 1112 of 2015, Ibrahim Kamasi Amoni -vs- Kenital Solar Limited. The Court stated as follows in the last Paragraph at Page 4: Page 5 of 6 “2. Unilateral Reduction of Salary I agree with the claimant that the reduction of his salary was unilateral. For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted by the employee. This is because salary is a fundamental term of employment whose reduction has negative impact on an employee’s livelihood and should not be done arbitrarily or unilaterally by an employer.” the termination of the Respondent’s employment amounted to constructive dismissal. The Respondent’s salary was unilaterally reduced. The reduction was detrimental to the Respondent and constituted a repudiatory breach of the Respondent’s employment terms. We rely on the exposition of the Court of Appeal in Nairobi CACA No 20 of 2012; Coca Cola East & Central Africa Limited - vs- Maria Kagai Ligaga. The Court stated as follows at Page 9, Paragraph 29:- 29. What is the key element and test to determine if constructive dismissal has taken place" The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is

ORIGINAL

that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test.

Decision

32. The court found that it was not in dispute that the issue leading to the termination of the employment was the decision of the appellant to propose a reduction of the salary of the respondent by Kshs. 2000, which proposal was not acceptable to the respondent. DW1 confirmed at the cross-examination that the claimant did not agree to the salary cut. The trial court held that the unilateral decision of a salary cut by the respondent and the employee's non-acceptance amounted to unfair termination. The court finds that the circumstances of the exit were based on repudiation of the contract by act of unilateral reduction of salary, thus amounting to constructive dismissal as expounded by the Court of Appeal in Nairobi CACA No 20 of 2012; Coca Cola East & Central Africa Limited - vs- Maria Kagai Ligaga(above). The court then finds no basis to interfere with the finding of the trial court that the termination was unfair. In this case, the process that the employer should have followed was a declaration of redundancy on account of being unable to pay the salaries. The procedure for termination was thus also unlawful and is so held.

Whether the trial court erred in awarding terminal dues to the Respondent.

33. The trial magistrate awarded the Respondent the following:

'a) Notice pay Ksh 23,050

b) Compensation for unfair termination Ksh 115,250/-

ORIGINAL

c) Housing allowance Ksh127,928/-.Total Ksh 266,228/- ‘ It is the Appellant’s submissions that these awards were erroneous and should be set aside.

34. I proceed to re-evaluate the evidence before the trial court to reach my own conclusions as guided in Selle v Associated Motor Boat Co. [1968] EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”*

35. Notice pay- The appellant submitted that the Respondent was not entitled to notice pay under Section 35(1)(c) of the Employment Act, 2007. The provision applies to employees whose contracts of service are terminated by the employer, either through dismissal or redundancy, requiring the employer to give notice or pay in lieu of notice. In the present case, the Respondent was neither an employee of the Appellant in the conventional sense nor was he dismissed by the Appellant. Instead, he voluntarily ceased offering his services following a disagreement over revised remuneration terms. There is no evidence on record indicating that the Appellant terminated the Respondent’s engagement or took any steps to prevent him from continuing his duties. Consequently, the Respondent’s departure cannot

ORIGINAL

be construed as termination by the Appellant, and as such, he is not entitled to notice pay. Accordingly, they urged the Court to find that the award of notice pay was erroneous and unjustified, and the same should be set aside. The court having upheld the finding of the trial court that the termination was unfair substantially and procedurally, the award of notice pay under section 35 of the Employment Act is upheld.

36. Compensation for Unfair Termination - the appellant submitted that the trial court erred in awarding the Respondent compensation for unfair termination under Section 49(1)(c) of the Employment Act, 2007. This provision allows for compensation only in cases where an employee has successfully proven that they were unfairly terminated as per the requirements set out under Sections 43, 45, and 47(5) of the Act. In the present case, the Respondent failed to discharge the burden of proof to establish that he was dismissed by the Appellant. There is no termination letter, no evidence of summary dismissal, and no proof that the Appellant took any steps to sever the working relationship. Instead, the evidence on record indicates that the Respondent voluntarily withdrew from his engagement following a disagreement over revised remuneration terms. Furthermore, the Respondent did not make any attempts to return to work or seek clarification regarding his employment status before filing the claim, which he did approximately nine months later without justification for the delay. In the absence of proof of termination, the threshold for awarding compensation under Section 49(1)(c) of the Employment Act was not met. Therefore, the trial court's finding that the Respondent was entitled to compensation for unfair termination was erroneous and unsupported by both law and evidence. Accordingly, we urge this Honourable Court to set aside the award of compensation as it was unjustified and legally unsound.

ORIGINAL

37. The court upheld the finding of the trial court on the unfair termination. The trial court took into account the period of employment from 2018 to 2021 and awarded compensation equivalent to 5 months. I find the award reasonable taking into account factors under section 49(4) of the Employment Act which includes the period of service among others. (See Mbogo v Shah). The award is upheld.

38. On the award of house allowance the appellant submitted as follows- It is our respectful submission that the trial magistrate erred in awarding the Respondent housing allowance, as the Appellant was not legally obligated to provide the same under the circumstances of this case. Section 31(1) of the Employment Act, 2007, requires an employer to either provide housing for an employee or pay the employee a sufficient housing allowance as part of their remuneration. However, this obligation applies specifically to employees under a contract of service, and it does not extend to individuals engaged on a task-based or piece-rate arrangement. In the present case, the Respondent was paid on a task basis, and there was no continuous employer-employee relationship that would give rise to an entitlement to housing allowance. Furthermore, the Respondent failed to provide any documentary evidence, such as payslips, to substantiate his claim that house allowance was not included in his remuneration. In the absence of such proof, the claim remains unsubstantiated and should not have been awarded. It is trite law that he who alleges must prove, and in this case, the Respondent did not discharge his burden of proof. Accordingly, we urge this Honourable Court to find that the trial magistrate erred in awarding the Respondent housing allowance and to set aside the award in its entirety.

39. The court having held the claimant was a contractual employee and having upheld the findings of the trial court on the employment conversion, that being the basis of the

ORIGINAL

challenge on the award on housing, the award is upheld. Section 31of the Employment Act provides for housing as a basic condition of service for employees to wit-‘’ 31. Housing (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation. (2) This section shall not apply to an employee whose contract of service— (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)’’ The award of housing is upheld.

40. In the upshot, the appeal is dismissed with costs to be paid to the respondent by the appellant.

41. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 17TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

ORIGINAL

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Maina h/b Waliula

Respondent – absent

ORIGINAL