

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E242 OF 2025

ONESMUS KITEMA MARETE.....APPELLANT

-VERSUS

CECILIA WAMAITHA MWANGI.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. I.F. Koome (SRM)
delivered on 3rd July 2025 in Thika MCELRC E062 of 2024)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, dissatisfied with the Judgment and Decree of the Hon. I.F. Koome (SRM) delivered on 3rd July 2025 in Thika MCELRC E062 of 2024 between the parties filed a Memorandum of Appeal dated the 25th July 2025 seeking the following orders: -
 - a) The Appeal be allowed
 - b) An Order setting aside the Judgment and Decree of the Honourable Magistrate made on 3 July, 2025.
 - c) An Order allowing Claimant's Claim dated 4 July 2024
 - d) Such other and/or further orders as this court may deem just and expedient.

- e) The costs of this appeal be provided for.

GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law and/or fact in arriving at the judgment which was informed by an erroneous analysis of the issues in dispute, a total disregard of material evidence adduced, wrong presumptions, adverse inferences hence the judgment is perverse warranting interference.
3. The Honourable Magistrate erred in law in dismissing the claimant's claim against the pleadings, evidence and submissions on record which was an erroneous action in consideration of the Constitutional principles of exercise of judicial authority and power set out in Article 159 of the Constitution of Kenya, 2010.
4. The Honourable Magistrate erred in law by failing to take cognizance of the legal fact that all material evidence produced in a suit as long as the same is admissible should be analyzed, utilized and correlated in the determination of the suit, governed by the Evidence Act Cap 80 Laws of Kenya.
5. The Honourable Magistrate erred in law and or in fact by completely and totally disregarding the material evidence produced by the claimant in his further list of documents dated 09/10/2024 which evidence the claimant clearly produced and adopted in court.
6. The Honourable Magistrate erred in law and or in fact by finding that the claimant did not sufficiently prove being a former employee of the respondent given that the respondent herself and three (3) other witnesses in witness statements filed in court via the claimant's

further list of documents dated 09/10/2024 all admitted to the Claimant being a former employee of the respondent.

7. The Honourable Magistrate erred in law and/or in fact by failing to appreciate that the Claimant produced in evidence Mpesa statements that however sporadic, all amounted to the monthly salary payments due and payable to the claimant by the respondent, as was the recognized and standard salary payment arrangement between the claimant and the respondent.
8. The totality of the decision by the Honourable Magistrate was marred by the injudicious interpretation of the law, total disregard of material evidence, consideration of the wrong issues and arrival at the gross error of the law and injustice to the appellant.

BACKGROUND TO THE APPEAL

9. The Claimant/Appellant filed a claim against the Respondent vide a memorandum of claim dated the 6th of July 2024 seeking the following orders: -
 - a) A declaration that the claimant has been summarily dismissed from employment.
 - b) A declaration that the claimant's employment was unlawfully, wrongfully and unfairly terminated by the respondent.
 - c) The respondent does hereby pay the claimant's terminal dues, inclusive of the May2024 salary of Kes.50,000/-
 - d) The respondent does hereby pay the claimant for accrued leave days not taken.
 - e) The respondent does hereby pay the claimant twelve (12) months' salary as compensation for unfair termination amounting to Kshs. 600,000/-

- f) One month's salary in lieu of notice amounting to Kshs. 50,000/-
- g) Compensation for unlawful, unwarranted and wrongful summary dismissal.
- h) Certificate of service from the respondent.
- i) Costs.
- j) Interest on 3,4,5, and 6 above from the respective dates they were due at the court rate until payment in full.
- k) Any other order that the Honorable Court may deem fit to make.

(pages 5-7 of Appellant's ROA dated 28th July 2025).

14. The Claimant filed his list of witnesses dated 6th July 2024; witness statement dated 4th July 2024; and list of documents of even date with the bundle of documents attached (pages 9-19 of ROA). The Claimant later filed a further list of documents dated 9th October 2024 with the bundle of documents attached (pages 20-29 of ROA).
15. The Respondent failed to enter appearance or file a response to the claim, hence the matter proceeded as an undefended case by way of formal proof.
16. The Claimant/Appellant's case was heard on the 27th of February 2025 where the claimant testified in the case, relied on his filed witness statement as his evidence in chief, and produced his documents as exhibits. (pages 42-43 of ROA).
17. The court gave directions on filing of written submissions after the hearing, and the Claimant complied.

18. The Trial Magistrate Court delivered its judgment on the 3rd of July 2025, dismissing the Claimant/Appellant's claim in its entirety, with no orders as to costs (judgment at pages 45-48 of ROA).

DETERMINATION

19. The appeal was heard through the documentation filed by the Appellant.

Issues for determination

20. The appeal was unopposed. The appeal arose out of an undefended cause. The appellant outlined the following issues for determination –

- a) Whether the Appeal should be allowed?
- b) Whether the Hon. trial Magistrate disregarded the material evidence produced by the claimant in his further list of documents dated 09/10/2024 and therefore erred in law 5 and/or in fact by finding that the claimant did not sufficiently prove being a former employee of the respondent?
- c) Whether the Hon. trial Magistrate failed to appreciate the standard salary payment arrangement between the claimant and the respondent?

21. The court having perused the appeal and judgment of the trial court found the issue for determination to be-

- a) Whether the trial court erred in finding no evidence of employment of the appellant by the respondent

- b) Whether the trial court erred in law and fact in failing to find there was unfair termination,
- c) Whether the appellant was entitled to reliefs sought in the claim

Whether the trial court erred in finding no evidence of employment of the appellant by the respondent

Appellant's submissions

22. The entire judgment by the Learned Trial Magistrate hinged on the first issue which was “whether the claimant was an employee of the respondent”. On this issue, the Learned Trial Magistrate stated as follows; “According to the claimant, he was an employee of the respondent. I have perused the documents filed in court. In his witness statement, the claimant did not explain the details of his contractual agreement with the respondent whether written or oral. He only says that he was a manager of the respondent’s business described as Venus Club & Restaurant & William Hostel. The claimant relies on an Mpesa statement to lay basis for the alleged employment by the respondent. I have perused the said statement. I have not seen payments of KSHS. 50,000 per month to prove allegation that he was retained at Kshs. 50,000 a month. Secondly, nothing has been placed before court to prove that indeed the claimant was employed as a manager of the said business. Thirdly, this court has not been supplied with any material to prove the existence of the said business.” (See para. 8 of the Judgment/page 45 & 46 of the Record of Appeal) It is our submission that from the said excerpt from the Judgment of the Learned Trial Magistrate it is clear that the Trial Magistrate disregarded the material evidence duly produced and adopted by the claimant in his further list of documents dated 09/10/2024. The material evidence alluded to in the claimant’s further list of documents dated 09/10/2024 are the following documents; a copy of Charge Sheet in Thika Criminal Case No. E1752/24; Copies of Four (4) witness

statements in Thika Criminal Case No. E1752/24 and a copy of Covering report in Thika Criminal Case No. E1752/24 which were marked as Exhibits 4-6 during hearing. (See page 20-28 of the Record of Appeal) That Exhibit 5 which are the copies of Four (4) witness statements in Thika Criminal Case No. E1752/24 (which is the case in which the claimant was incarcerated over); clearly outline the averments of the respondent herself, two other witnesses and a police officer, who all attest to the existence of the respondents business known as; Venus Club & Restaurant & Wiliam Hostel, and to their knowledge of the claimant as being a former manager in the respondent's said business. Specifically; the four (4) witness statements are: the Respondent; Cecilia Wamaitha Mwangi; One Gabriel Kamami Njui who was a chauffeur to the Respondent, One James Ngaruka Mwangi who was the Current manager that had replaced the Claimant and One PC Patrick Mutua who was the investigating officer in said criminal case. The Respondent in her statement states as follows; ".....I do recall very well that on the 3rd day of June 2024, I was at my business, Venus Club when at around 1400 hrs. my former manager who I had dismissed his duties a week before came to the business....." (See pages 22 & 23 of the Record of Appeal). The second witness one Gabriel Kamami Njui who was a chauffeur to the Respondent stated as follows in his witness statement; ".....I do recall very well that on the 3rd day of June 2024, I was at Venus Club where by I was on my normal duties since I had brought my boss Cecilia Mwangi at the Club on supervision duties as the owner of the premises. At around 1400 hrs. one man named Onesmus Kitema who happens to be the former manager of the club stormed inside" (See page 24 of the Record of Appeal). The Third witness one James Ngaruka Mwangi who was the Current manager that had replaced the Claimant stated as follows in his witness statement; "I am the above-named Kenyan citizen 42 years, married with five children and currently working at Gatwanyaga as a manager at

Venus Club. I do recall very well that on the 3rd day of June 2024, at around 1400 hrs. I was at my work place sited at the same table with my boss Cecilia Mwangi briefing her on the normal daily work briefings. Suddenly one man well known to me as KITEMA stormed in..... I later learnt that he worked as the manager at the same club before I replaced him.....” (See pages 25 & 26 of the Record of Appeal). 24. The Fourth witness one PC Patrick Mutua who was the investigating officer in said suit stated as follows in his witness statement; “ I do recall very well that on the 3rd day of June 2024, at around 1513 hrs. I was at the police post on stand by duties when one kikuyu female adult came to the report office desk and submitted a report that her former manager at Venus Club which she owns, stormed..... The accused person one ONESMUS MARETE KITEMA availed himself to the post and was arrested (See pages 27 of the Record of Appeal). 25. My Lady, the Learned Trial Magistrate in his judgment clearly states that “nothing has been placed before court to prove that indeed the claimant was employed as a manager of the said business; and that “this court has not been supplied with any material to prove the existence of the said business.” He relies on this erroneous conclusion to dismiss the claimant’s suit. However my Lord, from the above excerpts from witness statements duly adopted by the claimant as his evidence in chief in this suit, (See page 41 of the Record of Appeal); it is crystal clear that indeed the claimant had placed before the trial court and submitted enough material to prove that indeed the business existed and that he indeed was employed as a manager in said business. Reasons whereof we implore this honourable court to justly find that the Hon. trial Magistrate disregarded the material evidence produced by the claimant in his further list of documents dated 09/10/2024 and therefore erred in law and/or in fact by finding that the claimant did not sufficiently prove being a former employee of the respondent and subsequently allow this appeal and the orders prayed therein.

23. The respondent did not enter appearance in the appeal. The appeal is unopposed.

Decision

24. This being first appellate court I'm guided by decision in Selle V Associated Motor Boat Company Ltd [1969] EA 123 where Sir Clement De Lestang, V.P stated that the appellate court must reexamine and evaluate the evidence to draw its own conclusions. However, it should remember that it did not see or hear the witnesses directly. The appellate court is not required to follow the trial judge's findings if it believes the judge overlooked important details or if the judge's impression of a witness's behavior does not match the overall evidence. The court is also guided by the words of Sir Charles Newbold, P. as expressed in Mbogo & Another V. Shah [1968] EA 98 as follows: ".....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice." The court on re-evaluation of the evidence before the trial court established that the appellant had produced documents in prove of his employment as a manager of the of the respondent. In witness statement the appellant pleaded that he was a former manager of the business of the respondent known as Venus Club and Restaurant & Walian Hotel located at Muguga within Thika(page 12 of ROA). As his evidence, the appellant had produced a demand letter by the Ministry of Labour addressed to the Manager of the aforesaid business for salary arrears. (page 15 of ROA), a demand letter addressed to the respondent (page 16 pf ROA) and MPESA statements for period December 2023 to May 2024 on payments by

the respondent (pages 17-19 of ROA). The appellant stated his monthly salary was Kshs. 50,000. The payments were done in several instalments. The court found that the instalments amounted to approximately Kshs. 50,000 taking month of March 2024 as a sample. The appellant further produced statements by the police on complaint of breach of peace in the same business where the respondent is indicated as 1st complainant against the appellant (page 21 of ROA). The appellant produced what appeared to the court as statement in the police case by the said Cecilia Wamaitha of 3rd June 2024 where inter alia she stated that while at her business Venus Club on 3rd June 2024 her former manager, the appellant, whom she had dismissed his duties a week before, came to the business and abused her and issued threats (page 22 of ROA was the statement). A further statement of Njui to the police indicated that the claimant was a former manager and was demanding payment. The burden of proof in employment claims is on the balance of probabilities. There was sufficient evidence before the trial court to prove employment, termination and payment of salary by the respondent to the appellant. The court holds that the trial court erred in failing to find so.

Whether the trial court erred in law and fact in failing to find there was unfair termination.

25. The appellant pleaded unfair termination and the court found to prove termination of the employment. The appeal was not opposed. The court on perusal of the statement to the police noted the respondent had indicated having dismissed the appellant but did not state the reason. The court finds that the appellant met the threshold of prove under section 47 (5) of the Employment Act to wit- *‘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.” By opting not to defend the suit, the respondent forgo her opportunity to justify the reason for the termination and demonstrate it was as per fair procedure. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- ‘45(2) *A termination of employment by an employer is unfair if the employer fails to prove—*

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.” To pass the

fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013] eKLR).

26. The court holds that the appellant proved on balance of probabilities that there was termination of the employment without a valid reason and a procedural fairness. The court on appeal holds the termination of the employment of the appellant by the respondent was unfair and unlawful.

Whether the appellant was entitled to reliefs sought in the claim

27. Compensation for unfair termination – section 50 of the Employment Act obliges the court to consider award of compensation on finding unfair termination and award remedies under section 49 of the Employment Act. On finding unprocedural termination, the court awards notice pay of the Kshs. 50,000 as the salary as reflected in the M-Pesa statement and the

demand by the Ministry of Labour. Compensation may be awarded to a maximum of 12 months gross salary where there are no valid reasons for termination. The factors to be applied are stated in section 49(4) of the Employment Act. The appellant had worked from 18th November 2023 to 25th May 2024(see witness statement at page 12 of ROA). That is a period of approximately 5 and ½ months and had mitigated his losses as he told the court he was a hotelier and was working as a manager in another establishment. The court awards compensation equivalent to 1 month's salary.

28. On the claim for salary for May 2024 , the court found it was supported by the demand letter by the Ministry of Labour and a witness statement before the police that the appellant had gone to the club to demand salary(see statements at pages 24,25 and 29 of ROA). The court found the claim for salary arrears was proved on a balance of probabilities and is awarded for 1 month salary Kshs 50,000.
29. On claim for leave -the appellant did not support this claim. He asked for accrued days and not taken. Section 108 of the Evidence Act applied. He who alleges proves. The appellant did not prove accrued leave or even plead it in witness testimony, and it was not in the demand letter by the Ministry of Labour (page 15 of ROA). The claim for leave is disallowed.

CONCLUSION

30. The appeal is allowed. The Judgment and Decree of the Hon. I.F. Koome (SRM) delivered on 3rd July 2025 in Thika MCELRC E062 of 2024 is set aside and substituted as follows-
Judgment is entered for the claimant against the respondent as follows-

- a. The termination is held as unfair and unlawful
- b. Compensation for unfair termination equivalent of 1 months' salary Kshs 50,000
- c. Notice pay 50,000
- d. May 2024 salary Kshs. 50,000
- e. Total sum of Kshs. 150,000 plus costs with interest at court rate from judgment date.
- f. costs of the suit.

31. The appellant is awarded costs of the appeal.

32. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY
OF JANUARY, 2026.**

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Muhuni

Respondent - No appearance.