University of Nairobi v Kitumbui (Appeal E198 of 2024)
[2026] KEELRC 212 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 212 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E198 OF 2024

M MBARŨ, J

JANUARY 29, 2026

BETWEEN

UNIVERSITY OF NAIROBI ..... APPELLANT

AND

VICTOR KITUMBUI ..... RESPONDENT

(Being an appeal from the judgment delivered on 24 September 2024 by Hon. Lewis K. Gatheru in Mombasa CMELRC No. E797 of 2021)

JUDGMENT

1. The appeal arises from the judgment delivered on 24 September 2024 in Mombasa CMELRC No. E797 of 2021.

2. The appellant is seeking that the judgment be set aside and the claim dismissed with costs. The appellant is also seeking that it be allowed to recover public funds irregularly and unlawfully paid to the respondent.

3. The appeal is on the grounds that the learned magistrate erred in law and fact in finding that the disputed letter of 18 January 2019 was a valid and authentic document of the respondent when, in fact, it showed the same lacked legal basis as a document of the appellant, the employer of all employees of the appellant. The trial court ignored the appellant's pleadings with findings that there was irregular and unlawful termination of employment contrary to sections 35, 36, and 40 of the *Universities Act*.

4. Other grounds are that the trial court ignored the legal authority of the appellant's counsel in the approval and use of the name, logo, stamp, and seal in all employment contracts as a matter of legal requirement under the *Universities Act*. The court therefore ignored the fact that an individual employee lacked the authority to recruit and appoint employees on behalf of the appellant.

5. The award of Ksh. 240,500 as salary arrears was in error, together with Ksh.60, 000 as general damages. The finding of constructive dismissal was irregular, as there was no contract conferring enforceable legal rights. The only witness called by the appellant was dismissed over an alleged lack of authority from the council.

6. The finding of constructive dismissal was in error in law and fact. The actions of Prof. Christopher Mwangi Gakuu were questionable and negated sections 35, 36, and 40 of the *Universities Act*.

7. The learned magistrate erred in law and fact in failing to appreciate that the irregular and questionable acts of staff did not vary or negate the statutory functions and powers of the council under sections 35, 36, and 40 of the *Universities Act*. The burden of proof of employment was on the respondent; however, the trial court failed to appreciate the employer's role. The trial court hence ignored the appellant's submissions and the fact that the respondent was irregularly employed by a staff member rather than by the council. He had previously worked for the council, and the dispute concerned the renewal of his contract. The appeal should be allowed, and the judgment of the trial court set aside.

8. The background to the appeal is a claim filed by the respondent before the trial court. His case was that the appellant employed him as a part-time lecturer in the Department of Open Learning Programmes in Mombasa Campus from 18 January 2019 to May 2020, when his contract was not renewed due to the COVID-19 pandemic. He was paid Ksh. 1,000 per hour taught, payable at the end of the semester upon submission of scripts. The claim was that the respondent had not been paid from January 2019 to May 2020, with accrued salary arrears of Ksh. 240,500. The contract required payment after each semester. The appellant failed to pay, made promises in October 2021, but has since refused to pay. He thus claimed there was unfair termination of employment and breach of the employment contract on the grounds that there was a refusal to pay salary arrears without justification and failing to abide by the law, leading to him suffering mental anguish, emotional, and economic loss. He claimed the following:

    a. A declaration that employment was terminated unlawfully and unjustly.

    b. An order compelling the appellant to pay salary arrears of Ksh. 240,500.

    c. General damages.

    d. Costs of the suit.

    e. Any other reliefs.

9. In reply, the appellant filed a response and counterclaim, challenging the employment relationship and asserting that the respondent's claim was not founded on any legal or contractual basis. That he was not an employee of the appellant, that the monies paid to him were irregular and without council approval, and that they should be refunded as public funds, and that the claims be dismissed with costs.

10. The response also stated that the respondent was not an employee of the appellant, but was employed by the council. The alleged part-time employment was irregular, unlawful, and questionable to the extent that it was carried out by council under sections 35, 36, and 40 of the *Universities Act*. The council appoints all members of staff, and all public monies paid to the respondent were irregular. These funds should be recovered, as the recruitment was irregular and unlawful.

11. In the counterclaim, the appellant asserted that it is a public university established under the *Universities Act*. As a public body, the governing body determines the methods of recruitment, appointment, and promotion for all its employees. The respondent was not recruited or appointed by the council, and the claim that he was an employee is irregular, null, and void. The appellant counterclaimed the following:

a. A declaration that the respondent was not an employee of the council.

b. Recovery of public monies irregularly paid from 18 January 2019 to May 2020.

c. Interests are 30%.

d. Costs of the suit.

12. The learned magistrate heard the parties and held that there was a valid employment contract between them, and that the burden of producing the employment contract lies with the employer under sections 9, 10, and 74 of the *Employment Act*. The appellant council did not denounce the letter of appointment issued to the respondent, nor did it seek to recall it or address any untoward conduct by the officer who issued it. Thus, the respondent was appointed correctly as an employee. His employment was unlawfully terminated without due process or payment of his terminal dues, including salary arrears. The counterclaim had no basis but a confirmation that the respondent had offered services in employment and was not paid as an employee.

13. The learned magistrate awarded the respondent the salary arrears of Ksh. 240,500 and general damages of Ksh. 60,000 is a nominal award for anguish.

14. On appeal, the appellant submitted that the legal accuracy and genuineness of the letter of appointment dated 18 January 2019 were challenged, yet the trial court relied on it. This was despite the respondent's contradictions about who employed him, even though only the council can employ within the appellant. The respondent admitted that he was aware of the council, but that he was neither interviewed nor issued with a signed copy of the letter of appointment by the council. In Ahmed Mohamed Noor v Abdi Aziz Osman [2019] eKLR, the court held that the burden of proof lies with the party alleging. The respondent in this case contends that he was properly employed without proof.

15. Under sections 35, 36, and 40 of the *Universities Act*, only the Council can employ. The findings that the appellant terminated employment unfairly were in error. The director who allegedly issued the letter dated 18 January 2019 had no authority from the council to act on its behalf. In China Wuyi & Co. Ltd v Samson K. Metto [2014] eKLR, the court held that he who alleges must prove.

16. The appellant submitted that the money paid to the respondent is counterclaimed. He should refund all public funds that were paid in error. As a public institution, the appellant is bound to account for all public funds paid to the employees. In this case, the counterclaim should be allowed.

17. The respondent submitted that he was properly employed by the appellant and rendered services as a part-time teacher. He produced the teaching timetable and units covered. The letter of appointment bore the appellant's letterhead, logo, and signatures. In any case, the counterclaim confirms that he was working and paid by the appellant. The appellant called its witness to testify that an irregular employment letter ought to have come from the council. These are internal processes for the appellant that should not involve the respondent, who was an ordinary job seeker. The witness, Harrison Akal, admitted that he was not a council member and had no authority to testify on behalf of the appellant. The policy the appellant sought to apply to the respondent was not being used by them either.

18. In Njoroge v Moi University, Cause E091 of 2022, the court held that the duty to file a work record lies on the employer under sections 10(6) and (7) of the *Employment Act*. The employer is the custodian of work records. The appellant's witness admitted that Prof. Christopher Gakuu is an employee of the appellant and that he signed the letter of appointment to the respondent. In Anne Wambui Ndiritu v Joseph Kiprono Ropko & another [2005] eKLR, the court held that the general preposition under section 107 of the *Evidence Act* is that the legal burden of proof lies with the person who alleges. In this case, the appellant did not prove that the letter of appointment was not issued by its officer.

19. The respondent submitted that the letter dated 18 January 2018 is genuine and issued by an officer of the appellant. The trial court assessed the facts and properly made the awards. The appeal should be dismissed with costs.

Determination

20. As a first appeal, the court's duty is to review the record, reassess the findings, and make a conclusion. However, keep in mind that the trial court had the opportunity to observe and hear the witnesses.

21. The appellant has challenged the letter of appointment issued to the respondent on 18 January 2019. The respondent asserts that he was employed by an officer of the appellant and worked diligently until May 2020, when the appellant failed to pay his salary arrears, which had accumulated to Ksh. 240,500.

22. Indeed, unlike other commercial disputes or matters relating to contract, in an employment relationship, the provisions of the *Employment Act* (the Act) apply. The employer has the duty to file work records under section 9, 10(6), and 74 of the Act. See Riro v Crest Security Services Limited (Appeal E130 of 2025)

23. [2025] KEELRC 3475 (KLR) and Glad Toto Apartment Limited v Mugasia [2025] KEELRC 3721 (KLR). The court has emphasised that the employer is the custodian of all work records. Once a suit is filed, the employer has a legal duty to produce.

24. In this regard, the respondent filed his claim and attached the letter of appointment dated 18 January 2019. The appellant contests that it is invalid and was not issued by the council. The author, Prof. Christopher Gakuu, had no authority to issue the letter of appointment. However, the employee who seeks employment and is issued a letter of appointment has no reason to doubt the letter as held in Eldoret Express Company Limited v Nandabelwa (Civil Appeal 120 of 2017) [2022] KEHC 3226 (KLR) (5 May 2022). Upon the production of the letter, where the appellant doubted the authenticity, such a matter should have been addressed first and not waited for the appeal. The officer who issued the letter is not challenged as not being in the service of the appellant, as the appellant is the head and Director of the ODEL Campus.

25. Further, the appellant called its witness Harisson Akala, who testified that the council did not approve the letter of appointment issued to the respondent. It was, however, written by a member of staff on the appellant's logo and letterhead.

26. Upon cross-examination, Mr Akala admitted that he, too, did not have a letter of authority from the council to attend court and testify. He further admitted that the timetable produced by the respondent was assigned by John Bosco Kisimbi, who was working at the Mombasa campus. It was thus a genuine document of the appellant. He testified that:

27. ... Prof. Gakuu still works with the university. ... he is not a council member. The stamp used is that of a university department.

28. An officer of the appellant issued the respondent a letter of appointment; he is still a serving employee and, hence, had the capacity to testify to the authenticity of the source of authority to issue such a letter. As a current employee of the appellant, no action was taken against him regarding the alleged issuance of a letter of appointment that was not authorised by the council, if at all necessary. The fact that he continued to serve within the appellant, as the director of the department under which the respondent was serving, binds the appellant. The letter of appointment is valid and imposes the duty to pay for work done.

29. The learned magistrate carefully analysed the facts and correctly applied the law.

30. Upon the respondent's claim that his employment rights were violated, he discharged his burden of proof under section 47(5) of the Act as held Rupra Construction Company Limited v Makomere [2025] KEELRC 1376 (KLR) and the case of Dungani v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 12 of 2023) (20241 KEELRC 172 (KLR), the court clarified that under Section 47(5) of the Act, the employee bears the initial burden of proof in claims of unfair termination. Upon discharging such duty, the burden shifts to the employer to justify the reasons leading to unfair termination of employment under section 43 of the Act.

31. By holding that the letter of appointment was not valid, which is discounted, the appellant, in essence, failed to address the procedural and substantive grounds leading to termination of employment.

32. This is aptly captured in Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) (20211 KECA 95 (KLR), the Court of Appeal held:

> That notwithstanding, even where an employee has committed gross acts of misconduct warranting summary dismissal, the law requires that, before such a sanction is imposed, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate." In this case, the Appellant showed that it was unable to reach the Respondent due to abscondment. This constituted an exceptional circumstance, exempting the Appellant from the obligation to hold a disciplinary hearing in absentia. Therefore, the trial court erred in its finding by imposing a legal burden on the Appellant to contact the absconded employee and to maintain a database of the employee's kin and home addresses. The trial court further erred by ignoring the binding principle of exceptional circumstances, resulting in an unjust conclusion. The appellant urged the court to set aside the decision of the trial court.

33. Upon offering his labour to the appellant, the respondent had a legitimate expectation of payment. He submitted his records as required under the letter of appointment.

34. In respect of the claim for salary arrears, section 18(4) of the Act requires the employer to pay for work done, regardless of the reasons for termination of employment. Even in a severe case of gross misconduct subject to section 44 of the Act, for work done, the employee has a right to the salary earned, as held in Komu & 2 others v RRR Kenya Limited [2025] KEELRC 975 (KLR).

    The award of Ksh. 240,500 is justified.

35. On the award of Ksh. 60,000 for mental anguish and the psychological suffering following up on the due payments, indeed, the respondent in his memorandum of claim pleaded for payment of general damages. The particulars and breach of his employment contract were outlined in the body of the Memorandum of Claim.

36. In his evidence, the respondent reinstated his claim and the breach of his employment contract. The need to follow up on his payments through his supervisor. He urged his case that:

37. ... followed up on the payment through my supervisor. Nothing was forthcoming.

38. Non-payment of salary for work done is a violation of section 44(3) of the Act. It amounts to a breach of the employment contract. It leaves the employee distressed and in anguish, not knowing the next step.

39. In the case of Jonathan Spangler v Centre for African Family Studies (CAFS) [2017]

KEELRC 1242 (KLR), the court held that;

> There is something that a salary does to a man. It gives him job satisfaction. Payment of a salary comes with the spring and a drive towards the office to accomplish tasks. The job, therefore, gives one a dignified self and a purpose to return each day to accomplish more.
>
> When a salary is not paid for work done, the opposite occurs. An employee
>
> becomes anxious; demoralised; each day comes with bills and distress; and eventually, with delays and no pay at all, panic comes in, and an employee is reduced to begging, scavenging from fellow workers, friends, and well-wishers.

40. Refusal to pay an employer for work done is a serious violation of section 44(3) of the Act, and the employee is justified in withdrawing labour. The employer is the one in breach of the law. That breach caused the respondent distress, and he enumerated it in his claim. He had to follow up with demands to his supervisor. Such a delay in payments is not justified. See Pathenol v Indian Ocean Forwarders and Logistics Company (K) Ltd [2023] KEELRC 3453 (KLR) and Transport Workers Union (K) v Lochab Brothers Limited [2019] KEELRC 1965 (KLR).

41. The non-payment of salary to the employee is a fundamental breach of the employment relationship. An employee who offers their labour and does not receive a salary is reduced to inhuman conditions. See Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others [2021] eKLR.

42. The learned magistrate assessed the claim for general damages, which is an available remedy under section 12 of the *Employment and Labour Relations Court Act*, and diligently applied with a very conservative award of Ksh. 60,000. This should suffice.

43. On the counterclaim, the gist of the letter of appointment dated 18 January 2019 addressed above is that there was an employment relationship, and the appellant failed to address procedural and substantive justice. To claim a refund of monies which should have been paid to the respondent for work done is a further violation of his right under section 44(3) of the Act.

44. The counterclaim has no legal basis or justification. In any event, there is no record or evidence that the appellant paid any monies to the respondent to justify the counterclaim.

45. The appeal is thus without merit and is hereby dismissed with costs to the respondent, including costs as awarded by the trial court.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 29TH DAY OF JANUARY 2026.

M. MBARŨ

JUDGE