



Shree Sairam General Hardware v Omao (Employment and Labour Relations Appeal E005 of 2023) [2026] KEELRC 432 (KLR) (20 February 2026) (Judgment)

Neutral citation: [2026] KEELRC 432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2023
AN MWAURE, J
FEBRUARY 20, 2026**

BETWEEN

SHREE SAIRAM GENERAL HARDWARE APPELLANT

AND

JOEL OMAO RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable F. N Nyakundi, Principal Magistrate, delivered on 25th October 2023 in Kericho MCELRC No. E015 OF 2022)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of Principal Magistrate F. N Nyakundi, filed this appeal vide a Memorandum of Appeal dated 15th November 2023, on the following grounds that:
 1. The Honourable Magistrate erred in law and fact in finding that there existed any form of contract of employment between the Appellant and the Respondent without such evidence of employment being adduced by the Respondent.
 - a. There was no evidence adduced as to the extent to which the Respondent was an employee who used to be sent as a watchman to pick up parcels without such evidence and or documentary evidence to prove such duties, if any, assigned to him.
 - b. The Respondent used to work 7 days a week without any evidence adduced of the daily work schedule to support such claim by the Respondent.
 2. The Honourable Magistrate erred in law and fact in finding that the onus of proof was on the Appellant to prove that the Respondent was an employee.



3. The Honourable Magistrate erred in law and fact in finding that the Appellant bore the legal obligation to prove how the personal documents of the Appellant were in the Respondent's possession.
 4. The Honourable Magistrate erred in law and fact in finding that being in possession of the Appellant's personal documents was evidence enough to prove employment.
 5. The Honourable Magistrate erred in law and fact in finding that the Respondent had proved his case on the required standards despite noting that there was no such contract of employment adduced as evidence.
 6. The Honourable Magistrate erred in law and fact in finding that the Respondent was unlawfully and verbally dismissed without there being evidence of such dismissal adduced by the Respondent.
 7. The Honourable Magistrate erred in law and fact in finding that the circumstances of the alleged termination of the Respondent from an alleged employment contract of service without evidence to that effect.
 8. The Honourable Magistrate erred in law and in fact in relying on the averments and or allegations made by the Respondent that he was terminated, devoid of evidence of such termination, let alone evidence of employment with the Appellant.
 9. The Honourable Magistrate erred in law and fact in holding that the onus to prove the lawfulness and fairness of such termination lied on the Appellant and not the Respondent.
 10. The Honourable Magistrate erred in law and fact in failing to establish by way of evidence the manner of termination, if any, by the Appellant.
 11. The Honourable Magistrate erred in law and fact in giving superficial or no consideration at all to the evidence tendered in favour of the Appellant's case, while giving undue and disproportionate weight and significance to the evidence tendered by the Respondent, if any.
 12. The Honourable Magistrate abused his discretion, acted whimsically and in bad faith in finding when it proceeded to grant orders of House allowance, unpaid working off days, overtime, rest days, holidays and unpaid overtime without evidence, whereas the same was not pleaded by the Respondent.
 13. The Honourable Magistrate erred in law and fact in allowing the Respondent's claim as it lacks merit.
2. Parties canvassed the appeal by way of written submissions.

Appellant's written submissions

3. Being the first appeal, the Appellant submitted that the court must independently reassess the entire record of evidence and reach fresh conclusions without being bound by the trial court's findings. The Appellant emphasized that the appellate court is entitled to depart from the lower court's decision if material facts were overlooked or if the conclusions conflict with the evidence, while recognizing that, unlike the trial court, it has not had the benefit of observing the witnesses directly. The Appellant relied



on the case of Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2001] KECA 21 (KLR), where the Court of Appeal stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

4. The Appellant submitted that proving the existence of an employer-employee relationship is fundamental to any employment claim. To lay the foundation, the Appellant distinguishes between an employee and an employer under section 2 of the *Employment Act*, which defines an employee as a person engaged for wages or salary, including apprentices and indentured learners, while an employer is any person, firm, corporation, or public body that has entered into a contract of service to employ another. Having clarified this distinction, the Appellant stresses that it is essential to establish the ingredients of an employment relationship before any claim can succeed. In the case of Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] KEELRC 2546 (KLR), the court stated as follows:

“A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee’s conduct (this is what gives the test the nom de guerre – control test).” (Emphasis ours)

5. In Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] KEELRC 244 (KLR), the court stated as follows:

“In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:

The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.

0. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business, and his or her work is primarily part of the business.
0. The test of economic or business reality, which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
 1. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is an absence of mutual promises



for stable future performance, the worker thereby ceases to be classified as an employee, as may be the case for casual workers.”

6. The Appellant argued that the trial magistrate wrongly inferred the existence of an employment contract without any oral or written agreement. The Respondent had claimed he worked as a watchman from 2020 to 2022, earning between Kshs.5,000/= and 6,000/=, and relied on possession of the Appellant’s director’s passport as proof of employment, alongside vague assertions of collecting parcels. However, no wage records, contracts, delivery notes, or corroborative testimony were produced. The Appellant submitted that in the modern era, easily photocopied documents cannot suffice as proof, and the court should have demanded primary evidence such as contracts or wage records. The Appellant submitted that *Ongoya v Shivling Supermarket Ltd* [2022] KEELRC 72 (KLR), where Radido J held that in the absence of primary documents, employees may rely on secondary evidence like NSSF or NHIF records. Since the Respondent failed to provide either primary or secondary evidence, or call witnesses to confirm his employment status, the Appellant contends the magistrate erred in law and fact by basing his finding solely on possession of personal documents. The Appellant urge the appellate court to overturn the judgment and hold that no employment relationship existed.
7. The Appellant submitted that the trial court erred by shifting the burden of proof to the employer, contrary to section 107 of the *Evidence Act*, with support from the cases of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi* [2005] EA 334 and *Kenya Union of Commercial Food and Allied Workers V Mwana Black Smith Limited* [2013] KEELRC 502 (KLR), which emphasize that the Claimant must prove employment. The Appellant submitted that while employers are expected to provide employment records such as contracts and pay slips, the legal duty to prove the existence of an employment relationship rests with the employee. The Respondent merely alleged he worked as a watchman from 2020 to 2022, and claimed unfair dismissal, underpayment, and denial of benefits, but failed to produce any substantive evidence or corroborative testimony to support these assertions. The Appellant submits that these bare allegations did not meet the evidentiary threshold required to establish an employer–employee relationship, and therefore the magistrate’s findings were a misdirection that should be overturned.
8. The Appellant submitted that the awards granted by the trial court were whimsical, unproven, or unpleaded. The Appellant relied on the case of *Jared Aimba v Fina Bank Limited* [2016] KECA 452 (KLR), in which the Court of Appeal held that a termination claim requires proof of employment. In *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] KECA 563 (KLR), the Court of Appeal stated that house allowance depends on contract terms. In *Rigera & another v BOM Munithu Girls Secondary School* [2024] KEELRC 2136 (KLR) and *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] KEELRC 810 (KLR), the courts stated that statutory benefits only apply where employment is proven. In *Charles Nguma Maina v Riley Services Limited* [2018] KEELRC 2446 (KLR) and *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] KECA 198 (KLR), the courts held that the employee must prove overtime and holiday work. In *Independent Electoral and Boundaries Commission & another v Mule & 3 others* [2014] KECA 890 (KLR), the Court of Appeal held that a court cannot award unpleaded reliefs.
9. In conclusion, the Appellant urged the court to allow the appeal by setting aside the judgment as the trial magistrate misdirected himself by inferring employment, wrongly shifting the burden of proof, and awarding unsubstantiated claims.



Respondent's written submission

10. The Respondent submitted that the appeal is incompetent because the Appellant failed to file a complete record of appeal, omitting crucial primary documents such as witness statements and submissions, which under Order 42 Rule 13(4) of the Civil Procedure Rules renders the appeal defective. The Respondent relied on the case of *Abdalaa v Ewins* [2024] KEHC 133 and *Ready Consultancy Co. Ltd v Samson Menza Charo* [2024] KEELRC 166, where the courts held that incomplete records led to dismissal of appeals.
11. The Respondent submitted that the employment relationship was proved through possession of the Appellant's director's passport and receipt books, explained as part of his duties as a watchman collecting parcels, and relied on the cases of *Joseph Korir v Race Guards Limited* [2018] KEELRC 1092 (KLR) and *Rolox Ochieng Owuor v Equator Bottlers Limited* [2022] KEELRC 799 (KLR) to stress the employer's duty to keep employment records and issue contracts. The Respondent maintain that the Appellant failed to provide statutory records or pay slips, and an adverse inference should be drawn against him.
12. On reliefs, the Respondent submitted that the award of Kshs. 718,145.91/= was based on evidence of unfair termination, underpayment below the minimum wage, lack of rest days, and overtime, and that any errors in listing prayers were clerical and not grounds for appeal.
13. The Respondent urge the Court to dismiss the appeal as incompetent and uphold the trial court's judgment with costs.

Analysis and determination

14. Being the first appeal, the court must re-evaluate the evidence and come to a conclusion since it was not present when the evidence was adduced or see the witnesses as set out in *Abok James Odera T/ A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates(supra) and Selle Associates V Associated Motor Boat Company Ltd* (1968) E.A. 123.
15. The court considered the record of appeal, memorandum of appeal and the rival submissions by both parties. The issues for determination are –
 1. Did the trial Magistrate err in law and fact in finding there was an employment contract between the Respondent and the Appellant.
 2. Secondly, did the trial court err in finding the onus of proof of employment was on the Appellant.
16. The court has not found any tangible evidence that the Respondent was an employee of the Appellant. The Respondent averred that he was unfairly dismissed by the Respondent without proper justification. The Appellant argued that there was no existence of an employer-employee relationship. In the judgment, the trial learned magistrate held that there was no evidence of the reasons for terminating the Respondent, or that due process was followed in terminating, finding that the Respondent was unfairly dismissed, awarding the Respondent Kshs.718, 145.91/= for the relief sought.

Similarly, there was absolutely no evidence of any termination of the Respondent and of course there was no evidence of employment contract either.



17. Section 47(5) of the *Employment Act* provides as follows:

“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.”

18. In *Bramuel Dibondo Musundi v Kenya Revenue Authority* [2018] KECA 582 (KLR), the Court of Appeal held as follows:

“The applicable standard of proof for an alleged breach of a contractual obligation is one of “on a balance of probability.” This principle is enshrined in sections 107, 108, 109 and 112 of the *Evidence Act* Cap 80 Laws of Kenya. Under section 107, it is the duty of the party who asserts the existence of facts upon which he desires the court to give judgment in his /her favour as to any legal right or liability, to prove the existence of those facts. Under section 108, the burden of proof in a civil suit lies on the party who would fail if no evidence at all were given by either party. See *Toyota Kenya) Limited versus Express Kenya Limited* [2013] eKLR. Under section 109, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Under section 112, when the fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

19. In this instant appeal, the Respondent claimed he had worked for the Appellant from the year 2020 to 2022, and the trial learned magistrate held that indeed the Respondent was employed by the Appellant and was unfairly dismissed. As earlier observed by this court there is no evidence that the Respondent was an employee of the Appellant. In the case of *Samuel Wambugu Ndirangu -vs- 2nk Sacco Society Limited* (2019) eKLR the court held:

“A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee’s conduct (this is what gives the test the *nom de guerre* – control test.” Emphasis ours.

20. Further, the court also considered the case of *Ongoya -vs- Shivling Supermarket Ltd* (2022) eKLR where court stated: -

“Where primary documents to show an employment relationship do not exist, the employee may rely on secondary documentary evidence such as records from the National Social Security Fund or National Hospital Insurance Fund.”

21. It is trite that the Claimant must provide proof of the existence of employer-employee relationship such as bank statements, or contract documents to support claims of unfair termination or even call a witness to confirm he worked for the Appellant. In the absence of either documentary evidence or evidence from a witness, the court finds it an assumption that the Respondent was the Appellant’s employee simply by his unsupported evidence. Even in oral contracts the employee must provide evidence of documentary or verbal to prove terms of engagement.



22. The case of Protus Wanjala Murike -vs- Anglo African Properties (2021) eKLR highlighted the Claimant’s responsibility to provide evidence. In the case of MUTASHI V. ENTERPRISES (2023) KEELRC illustrates that lack of evidence such as proof of payment, appointment letters or working hours can result in failure to prove employment even in undefended cases.
23. In this instant case, the Respondent has not established on a balance of probability that he was the Appellant’s employee.
24. It is trite law that he who alleges must prove as provided in Section 107-109 of the *Evidence Act*. In Anne Wambui Nderitu -vs- Joseph Kiprono Ropkoi & Another (2005) EA the Court of Appeal held:
- “As a general proposition under Section 107(1) of the *Evidence Act* Cap 80 the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Section 109 and 112 of the Act.”
25. The court therefore finds the Respondent has given no evidence to prove he was an employee of the Appellant. That being the case, the court holds that the Appeal is merited and it is allowed and the award thereto is set aside being an award of Kshs.718,145/01 which was based on an erroneous averment that the Respondent was an employee of the Appellant.
- The Appeal is merited and is allowed.
26. The parties will meet their respective costs of both the lower court proceedings and of this appeal.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 20TH DAY OF FEBRUARY, 2026.

ANNA NGIBUINI MWAURE

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.

A signed copy will be availed to each party upon payment of Court fees.

