

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**APPEAL NO. E195 OF 2025**

**VIPIN        SHAH        .....**

**APPELLANT**

**VERSUS**

**WINFREDA AKINYI WAFULA ..... RESPONDENT**

**[Being an appeal from the ruling of hon. G. Sogomo delivered on 3 September 2025 in relation to Mombasa CMELRC No. E789 of 2023]**

**JUDGMENT**

The appeal herein relates to the ruling delivered on 3 September 2025 in relation to Mombasa CMELRC No. E789 of 2023. The appeal is that the ruling of the learned magistrate should be set aside on the basis that the court determines the issue and allows the appellant’s summoned witness to testify.

There are 8 grounds of appeal, which, in essence, relate to a case where the learned magistrate erred in law and fact by declining to hear the witness served with a court summons by the appellant. This was despite the appellant filing a witness statement and applying the Civil Procedure Rules to decline the summoned witness's testimony, rather than applying the Employment and Labour Relations Court (Procedure) Rules.

The appeal is that the trial court failed to appreciate the rationale for the court’s power to summon witnesses, and that the witness summons had been served and was not in dispute.

The background to the appeal relates to a claim filed by the respondent against the appellant. The claim is that there was employment as a housekeeper from 2 February 1995 to December 2007 and later from 2009 to 23 November 2023. The appellant filed response on the basis that there was periodic employment until 8 January 2008, when the respondent absconded duty. She was later employed until 23 November 2023.

However, the appellant contends that the respondent was employed by an NGO, Food for Education Foundation in 2023, contrary to allegations that she was their employee. The appellant approached the NGO to confirm the duration of employment of the respondent, but the NGO declined to disclose the period of such employment or write a witness statement, citing data protection and privacy law restrictions.

The appellant was left with no choice but to apply for witness summons as stipulated in the list of witnesses. The registrar issued witness summons on 26 August 2025, which were served on the NGO, upon which they complied and availed a witness in court on 3 September 2025 to testify. However, an objection was raised by the respondent's advocate, and the court declined to hear the witness.

On the ruling of the learned magistrate, the court held that under Order 3 rule 219 of the Civil Procedure Rules, only expert witnesses are excluded from the hard and fast requirement that a witness statement signed by the witness be filed alongside pleadings to a suit. The court should not be seen to aid a party by dragging a witness in court to give evidence on its behalf.

On the appeal, the appellant submitted that it was in error for the court to decline the witness summoned to testify. The validity of the summons taken out by the appellant was not in question. Rule 58 of the Court Rules is not in contestation. The respondent's objections in opposing the witness to testify is that there was no service of the witness statement, yet the witness was involuntary and uncooperative, hence the summons through the court process.

The learned magistrate failed to appreciate the power of the court to summon witnesses found necessary in the case. The court has the jurisdiction to summon any witness found necessary for the effectual determination of a dispute. The application of the Civil Procedure Rules instead of the Court Rules was not applied appropriately. Rule 37 of the Court Rules allows for witness summons through the court process, as held in **Bukenya & another v Uganda [1972] EA**. In this regard, the appeal should be allowed, and the appellant allowed to call the summoned witness.

The respondent submitted that, upon filing the claim on 8 December 2023 seeking payment of terminal dues, the respondent filed a reply and called one witness in evidence. Upon cross-examination, the appellant sought an adjournment to call one more witness. This ought to have been for the remaining witness. However, on 3 September 2025, the appellant stated that there were two witnesses and thus sought to call a third witness from the NGO. This witness had not filed a witness statement; accordingly, the respondent opposed the witness.

Orders 11 and 40 of the Civil Procedure Rules, the court had the right to decline the call of an additional witness, which is contrary to Rule 40 of the Court Rules, as held in **Interactive Gaming and Lotteries Limited v Flint East Africa Limited & 2 others [2013] eKLR**. The appellant failed to comply with Order 11 of the Civil Procedure Rules or the Rules of the Court and therefore should not be allowed to introduce new evidence without justification.

### **Determination**

Indeed, as submitted by the appellant, the proceedings concerning employment disputes are governed by the Court Rules. The Civil Procedure Act and the rules thereto should only be applied where there is a lacuna or for a comparative analysis. Where the Court Rules are sufficient, they should be religiously applied to facilitate employment disputes.

On whether witness summons should be issued and whether the court should allow new witnesses without a witness statement is largely addressed under Rule 7 and 29 of the Court Rules. When filing a claim and a response, each party should file the records and witness statements to be relied upon during the hearing. Unlike the disputes, employment claims require that all evidence to be relied upon during the hearing be filed in advance.

Indeed, under Rule 35 of the Court Rules, where a party finds it necessary to file a witness statement once pleadings have closed or before proceedings with the hearing.

***35. (1) A party shall notify the Court when submitting a statement of claim, or a response to a statement of claim, of any witnesses it proposes to call in support of its submissions, file witness statements, file list, and copies of documents to be relied upon, and shall at the same time, notify the other party.***

Further, under Rule 35(2) of the Court Rules:

***(2) A party may, with the leave of the Court, file a further witness statement or a further list and copies of documents to be relied upon.***

However, in exceptional case, Rule 36 of the Court Rules allow for expert witnesses to be summoned. A witness statement must be filed.

On the other hand, Rule 37 of the Court Rules allows a party to seek a witness summons for the attendance of a necessary witness.

***37. Any party who requires a witness to attend any proceedings to give evidence on his behalf may upon order by the Court have summons issued by the Registrar for that purpose.***

The court order in this regard is discretionary. It must be issued on a good basis. Each case must be reviewed on its merits.

In this case, the claimant testified and closed her case. The respondent called its witness and, midway, opted to call another witness. Instead, witness summons were obtained for the third witness. No witness statement had been filed. The reasons are that this was an involuntary witness and had to be summoned through the court process. Hence, the call of the witness was necessary to prove that the respondent had been employed by an NGO while claiming to have been employed by the appellant.

In employment and claims, section 10(6) and 74 of the Employment Act requires the employer to keep records. A case where the respondent was employed by the appellant and that employment terminated without payment of terminal dues left the burden on the respondent to prove such facts under the provisions of Section 47(5) of the Act, while the burden of proving the reasons for termination of employment rests on the appellant as the employer under Section 43 of the Act. It cannot, therefore, be a case that another alleged employer, the NGO, should be called to confirm employment. The appellant, as the alleged employer, should have the basis of the employment particulars and not make it the basis of a third party.

In this regard, the objections by the respondent on the call of a third witness without adherence to the Court Rules were correct. The learned magistrate addressed the objections in the ruling delivered on 3 September 2025 correctly and thus declined the call of a witness that was not necessary in the proceedings.

Unlike criminal proceedings where a witness is compelled to testify, the need for Rule 37 of the Court Rules is strictly to assist the court in the effectual determination of a claim and not to aid a single party. To apply for a witness summons at the tail end of proceedings after the

respondent had closed the case would be an abuse of the court process. Such procedure was properly declined by the learned magistrate.

The basis of the appeal is lost.

Parties shall revert to the trial court for the conclusion of the hearing based on the witness statements filed when pleadings closed. The witness summons by the appellant was unnecessary.

**The appeal is without merit and is hereby dismissed. Costs to the respondent. Proceedings in Mombasa CMELRC No. E789 of 2023 to proceed based on the witness statements filed by the close of pleadings.**

Delivered in open court at Mombasa, this 19th day of February 2026.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Omar

..... and .....