REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E053 OF 2024

ALEX OSORE MAGOTSI…….

…….....APPELLANT

VERSUS

MARYLEBONE PROPERTIES LIMITED

T/A VIRAJ MILLENIUM APARTMENTS.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. C.M. Njagi (PM) delivered on 22nd February 2024 in Nairobi MCELRC No. E2043 of 2021)

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the and Decree of the Hon. C.M. Njagi (PM) delivered on 22nd February 2024 in Nairobi MCELRC No. E2043 of 2021 between the parties filed a Memorandum of Appeal dated the 26th February 2024 seeking the following orders: -

   a) This Appeal be allowed with costs.

   b) The aforesaid decision be set aside.

c) The Claimant's Amended Statement of Claim dated 18th of October 2023 be allowed as prayed.

GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law in her judgment dated 22nd of February 2024 by dismissing the Claimant's suit.

3. The Honourable Magistrate erred in law and fact in her judgment dated 22nd of February 2024 by holding that during the formal proof hearing that the Claimant had failed to adduce evidence of Employment and Payment of his salary, yet the agreement was oral and salary was always paid in cash with no statutory remittances made.

BACKGROUND TO THE APPEAL

4. The Claimant/Appellant filed a claim against the Respondent vide an amended statement of claim dated the 18th of October 2023 seeking the following orders: -

a) That the Court do find the termination of the Claimant's employment contract without giving reasons was wrongful, malicious, un-procedural, illegal and unconstitutional.

b) That the Court do find the procedure for the termination of the Claimant's services was wrongful, malicious, un-procedural, illegal and unconstitutional.

c) That the Court do find that the Respondent's action of refusal and or neglecting to pay the Claimant his salary plus one month in lieu of notice was unlawful and untenable.

d) That the Court do find that the Respondent's action of refusal and or neglecting to pay the Claimant his accrued leave days unlawful and untenable.

e) That the Court do find that the Respondent's action of refusal and or neglecting to issue the Claimant with a certificate of service was illegal, malicious and unlawful.

f) That the Court do find that the Respondent's action of refusal and or neglecting to pay overtime and public holidays and Saturdays and Sundays worked was illegal, malicious and unlawful.

g) That the Court do find that the Respondent's action of refusal and or neglecting to remit statutory deductions was illegal, malicious and unlawful.

h) That as result this Court do hereby order that the Respondent to pay the Claimant all his terminal dues and other accrued unpaid dues as computed below:-

i. Underpayment inclusive of house allowance for 42 months Kes. 57,352.26

ii. Accrued leave days for 42 months Kes. 52,029.36

iii. Unpaid Overtime for 1,277.5 days X 4 hours X Kes. 61.94 X2 Kes.633,026.80

iv.Unpaid Holidays, Sundays, and Saturday afternoon totaling to 444 days X Kes. 495.51

Kes. 220,009.84

v. One-month salary in Lieu of Notice Kes. 14,865.53

vi. Salary for the 6 days worked in October 2021 Kes. 2,973.11

vii. Damages due to wrongful termination of contract current salary Kes. 14,865.53 X 12 Months Kes. 178,386.36

viii. General, Aggravated, Exemplary, and or Special damages.

ix. Remittance of all statutory dues

x. Issuance of a proper Certificate of Service

xi. Cost of this suit

xii. Interest on I, ii, iii, iv, vi, vii, and vii

xiii. Any other relief that this Honourable Court may deem fit and expedient to grant.

(pages ___ of Appellant's ROA dated 7th August 2025).

14. The Claimant filed his list of witnesses dated 30th November 2021 and undated witness statement.

15. The Respondent failed to enter appearance or file a defence and the matter proceeded by way of formal proof.

16. The Claimant/Appellant's case was heard on the 29th of November 2023 where the claimant testified in the case relying on his filed witness statement as his evidence in chief (pages 5-6 of ROA dated 17th July 2025).

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 22nd of February 2024 for lack of evidence, with an order that each party bears their own costs.

DETERMINATION

19. The appeal was canvassed through written submissions. Both parties filed.

Issues for determination

20. In his submissions dated 14th November 2025, the Appellant identified one issue for determination, namely, whether the learned magistrate erred in law and fact by dismissing the suit on the grounds that the Appellant had not demonstrated/proven an existing employment relationship.
21. The Respondent also identified one issue for determination in their submissions dated 22nd January 2026, namely, whether the trial court was justified in dismissing the Appellant's suit for lack of sufficient evidence.

22. The court on perusal of the grounds of appeal and upon reading the judgment was of the considered opinion that the issue for determination in the appeal are-

a. Whether the appeal was merited.

Appellant's submissions

23. Whether the learned magistrate erred in law and fact by dismissing the suit on the grounds that the Appellant had not demonstrated/proven an existing employment relationship – It is important at this Juncture to appreciate the fact that the matter proceeded undefended, it is further settle law that in instances where the Respondent fails to offer rebuttal to evidence and testimony adduced the same is considered as the gospel truth as it is uncontroverted see Shaneebal Limited v County Government of Machakos [2018] KEHC 5921 (KLR) where the Court stated as follows: - " What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear

Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, Lesiit, J citing the case of Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that: "Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counterclaim must fail". Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged. In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that: "The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon". In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that: "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the

witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence". Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. If one is still in doubt as to the legal position reference could be made to the case of Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff. Even if the defence of the Defendant was anything to go by, apart from the issue of whether or not interest was payable, the rest of the averments were simply bare denials. In this case the plaintiff has given evidence on oath supported by documentary evidence which go to prove its case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that there was indeed an agreement between the plaintiff and the defendant for the supply by the Plaintiff to the Defendant of the said mechanical equipments at an agreed price." This matter was set for formal proof hearing, the Court of Appeal in Karugi & another v Kabiya & 3 others (Civil Appeal 80 of 19821) [1983] KECA 38 (KLR) stated the following with regards to formal proof hearing: - "Then under Order IXB rule 3, when the plaintiff only has attended, the court may proceed "ex parte". The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. No

court will believe that the noon is actually the sun however unchallenged that statement may be." The Appellant herein, in the statement adopted as evidence in court, averred that he was hired by the Respondent on the 1st of May 2018 and worked faithfully until he was fired on the 6th day of October 2021, through a phone call, without a Notice to Show Cause, an opportunity to be heard nor a reason for his termination. Further he averred that he was not offered a written employment contract and he did not have any financial statements as he was not always paid in cash and the employer never made any statutory remittances. The Court in its Judgment whilst informed by the Claimant that the Respondent did not offer him a written contract and further only paid him in cash, the Court proceeds to dismiss the suit on the grounds that the Claimant did not have a written contract nor did it have proof of payment of salary, to that we do submit the Court erred in Law. It is settled law that in employment matters, the legal burden of proof lies with the Claimant and the evidentiary burden with the Respondent, upon an employee placing evidence that termination was unfair and didn't have any fair or valid reason, the legal burden shifts to the Employer to show that indeed termination was fair and with a valid reason see Mwende v Interstrat Limited t/a Big Square (Employment and Labour Relations Cause 616 of 2018) [2023] KEELRC 1153 (KLR) (23 February 2023) (Judgment) where the Court stated as below: "In a dispute relating to fairness and validity of termination of an employee's employment, section 47[5] of the Employment Act has placed specific legal burden on the employer and the employee, the combatants in the dispute. True, for a long time there has been confusion, and it has been challenging to many, as to what is actually contemplated under the provision, and how the employer and the employee are supposed to discharge their respective legal burdens thereunder and at what time. I think jurisprudence is now firm on this. In my view, and flowing from

decisions on this aspect, the employee is enjoined to prove that the termination was unfair or wrongful, before the employer's burden set out therein, sets in. In discharging the duty, the employee has to place before court prima facie evidence demonstrating that the employer didn't have any fair or valid reason as basis for the action of terminating his or her employment, and or that the procedure leading to the termination was not fair. It is upon the employee placing forth the evidence in the nature hereinabove stated, that the burden shifts to the employer, requiring him or her to demonstrate on a balance of probabilities that he or she had a valid and fair reason to terminate the employee's employment, and that fair procedure in consonance, with the prescripts of statute, tenets of natural justice, and the provisions of the Constitution more specifically on fair hearing where adhered to. On the provisions of the section, and how they should be approached, I find the decision in the cases of Kennedy Mirera v Barclays Bank of Kenya [2018] eKLR, and Galgalo Jarso Jillo [supra], cited by counsel for the Respondent and the Claimant respectively, helpful." With the evidence adduced by the Appellant not controverted, then the Court erred in demanding an employment Agreement entered into by the 2 parties from the Claimant. Further the Appellant had adduced evidence that he was paid only in cash, the evidence was not challenged, once again the Court erred in demanding that the Claimant adduce evidence that he was only paid in cash, yet he had testified under oath was never cross examined and or his testimony Courts have adjudicated on the matter of statements under oath where in rendering his ruling on an objection to attachment in Thunder Plumbing & Construction Ltd v Ravasam Development Company & another [2020] eKLR Mabeya J stated: - "…I have always known the law to be that once a statement is made on oath, the same is to be presumed to be the truth of the matter averred to unless denied or challenged on oath. It is only then

that the evidentiary burden shifts back to the deponent to prove the allegations in his statement of oath...” “… In my view, once a statement has been made on oath, it can only be challenged and or denied by way of an oath and not otherwise…” The Respondent was served with summons and had the chance to challenge the oath made by the Appellant herein and did not, we submit that after being served, the onus was upon it to controvert the evidence by filing its own response under oath.In the matter, the Appellant had made averments under oath to the effect that he had been unfairly terminated, without a Notice to Show Cause, a disciplinary hearing nor a reason for the termination. The Employment Act 2007 in section 41 provides that: - Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make. This Court in Mwende v Interstrat Limited t/a Big Square (Employment and Labour Relations Cause 616 of 2018) [2023] KEELRC 1153 (KLR)(23 February 2023) (Judgement) stated that: - In my view, and flowing from decisions on this aspect, the employee is enjoined to prove that the termination was unfair or wrongful, before the employer’s burden set out therein, sets in. In discharging the duty, the employee has to place before court prima facie evidence demonstrating that the employer didn’t have any

fair or valid reason as basis for the action of terminating his or her employment, and or that the procedure leading to the termination was not fair. It is upon the employee placing forth the evidence in the nature hereinabove stated, that the burden shifts to the employer, requiring him or her to demonstrate on a balance of probabilities that he or she had a valid and fair reason to terminate the employee's employment, and that fair procedure in consonance, with the prescripts of statute, tenets of natural justice, and the provisions of the Constitution more specifically on fair hearing where adhered to. From the foregoing, we submit that the appellant had dispelled their burden of proving that the termination was unfair as he brought before the Court evidence in his statement under oath. Having provided this evidence before the Court, the burden shifted on the Respondent to demonstrate that they had a valid and fair reason to terminate the Appellant, they did not appear before the Court therefore they did not dispel the burden. Further, we submit that the trial magistrate erred in law and fact for dismissing the claim on the grounds that he did not provide any payment vouchers despite having made statements under oath that he received his payment in cash and no statutory remittances were made. The Employment Act 2007 provides for oral contracts in Section 8 stating: - The provisions of this Act shall apply to oral and written contracts. The Court in Nyanumba v British Broadcasting Corporation (Cause 13 of 2017) [2023] KEELRC 1589 (KLR) holding this position also stated: - The Parties were working under an oral contract of employment, after September 30, 2016, which is a recognized form of contract of employment under Section 8 of the Employment Act. The provisions of the Employment Act apply to oral and written contracts of employment. It is settled law that oral contracts are recognized in this jurisdiction, therefore the trial magistrate erred in law and fact by using the failure to produce a contract as one of the limbs to dismiss the Claimant's matter, despite the

Appellant having stated in his sworn statement that he was employed via an oral agreement with the Respondent herein. In addition to the foregoing, the Employment Act 2007 in Section 9(1) states: - 10 A contract of service— (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or (b) which provides for the performance of any specified work which could not 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, shall be in writing. Further, it places the duty to ensure that a contract of service on the is in writing on the Employer in section 9(2) stating: - An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3). The Act essentially places a duty on the employer to ensure that a Contract of Service is in writing, the Respondent herein, failed to discharge said duty therefore the Appellant should not have been punished by having his claim dismissed. Further, the Act in Section 17(1)(a) recognized the payment of wages payable to an employee in the currency of Kenya in cash. As was stated by the Appellant, the payments were made to him in form of cash.

Respondent's submissions

24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that the trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. 8. In the case of Mbogo v Shah [1968] EA 93, the Court of Appeal held that an appellate court should not interfere with a trial

court's finding unless it is shown that the court misdirected itself in some matter and as a result arrived at a wrong decision, or that it is manifestly wrong. Whether the trial court was justified in dismissing the Appellant's suit for lack of sufficient evidence, it is the position of the Appellant that suit in the trial court proceeded undefended and where the Respondent failed to offer a rebuttal of the evidence adduced and as such the same is to be considered uncontroverted. He submits therefore that his evidence was sufficient and ought to be accepted as truthful and sufficient. We submit that the burden was on the Appellant to prove his case in the trial court. Sections 107 of the Evidence Act, Cap 80 Laws of Kenya, provides that: '107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." The Appellant pleaded in his Amended Statement of claim (page 49 of the Record of Appeal) as follows: "On or about the 1st of May 2018, the Respondent, Marylebone Properties Limited trading A Viraj Millemium Apartment, the Employer entered into a contract with the Claimant, Alex Osore Magotsi offering him a position of 2daytime security Guard to the main gates of Viraj Millennium Apartments, located along Githunguri Road, Kileleshwa." Save for his witness statement, the Appellant did not file any list of documents before the trial court and the matter proceeded for formal proof hearing. The trial court said as follows in its judgement and dismissed the Appellant's suit:- "The said contract or payment vouchers were not produced in this court. It is common law principal that he who alleges must prove. In the absence of such proof even if this matter proceed vide formal proof this matter must fail. As such this suit is dismissed. Each party will bear their own costs." We submit that the trial court was right in its judgement. The Appellant pleaded in the Amended Plaint that

the employer "entered into a contract with the Claimant..." The trial court was right in questioning why the Appellant failed to produce the contract or payment vouchers to prove the existence of the alleged employment relationship. The burden of proving the existence of an employment relationship rests squarely on the claimant. This burden does not shift merely because the respondent failed to enter appearance or call evidence and the matter proceeded by formal proof hearing. 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....." In the present matter, the Appellant's entire claim before the trial court hinged on the alleged existence of an employer-employee relationship between himself and the Respondent. This was a fact which the Appellant was required to strictly prove before the court could interrogate any alleged unfair termination or entitlement to remedies under the Employment Act. The Appellant has now alleged in his submissions that the contract was oral. He relies on section 8 of the Employment Act which provides that employment contracts may be oral. However, it is trite law that submissions are not evidence and may not be used to introduce matters that are not pleaded and that are not in witness statements. A claimant alleging an oral employment contract must in our view still demonstrate, through sufficient evidence, the existence of the essential elements of such a relationship which may include payment vouchers, payslips, NHIF/ NSSF remittance statements. He alleges that payments of his consolidated salary were made in cash but the same is not mentioned in his pleadings and no evidence has been tendered to support the statement. This was also correctly noted by the Trial Court in its judgment. The duty to prove even in formal proof was stated by J. B. Havelock in the case of Rosaline Mary Kahumbu v National

Bank of Kenya Ltd [2014] eKLR: - Can hearing, therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by the parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits." Formal proof does not relieve a claimant of the obligation to prove his case on a balance of probabilities. This was held by the Court of Appeal in Kirugi and another v Kabiya & 3 others [1987] KLR 347 where it was stated that, "Then under Order IXB rule 3, when the plaintiff only has attended, the court may proceed "ex parte". The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. ". Likewise in Gichinga Kibutha v Caroline Nduku [2018] eKLR the Court held that, "It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest." The learned Magistrate correctly appreciated that even where a suit proceeds by way of formal proof, the claimant is not relieved of the obligation to place before the court evidence in support of his claim. The absence of a defence does not automatically translate into a judgment in favour of the claimant. The Trial Court must still be satisfied,

on a balance of probabilities, that the claimant has proved his case. Further, the Appellant has placed reliance on his sworn witness statement, advancing the argument that once evidence is given on oath and remains uncontroverted, the court is bound to accept it as truthful and sufficient to prove 4the claim. In the case of Trust Bank Limited Vs Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001 the Court stated as follows that it is trite law "where a party fails to call evidence in support of it case the party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings." In the present matter, the Appellant's sworn statement merely asserts that he was employed by the Respondent, paid in cash, and later terminated by way of a phone call. The Appellant testified that his contract of employment was oral and that his salary was paid in cash without any remittances. However, beyond this mere statement, no evidence was tendered to demonstrate the existence of an employment relationship. There was no evidence of payment vouchers, attendance records, identification documents, witnesses, or any material capable of establishing that the Appellant worked for the Respondent. The same was noted by the Court in its judgment. 25. The learned Magistrate, having evaluated the evidence placed before him, found that the Appellant failed to discharge this burden. This finding was not on a misapprehension of the law or facts, it was based on the principle of evidence that he who alleges must prove. The Respondent respectfully submits that the trial court did not err in finding that the Appellant had failed to discharge its burden. On the contrary, the court correctly applied the law to the facts and arrived at a just and proper decision. We urge this Honourable Court to dismiss the appeal in its entirety and uphold the judgment of the trial court delivered on 22nd February 2024 and award costs of the appeal to the Respondent.

Decision

25. This being a first appeal, the court is mandated to re-evaluate the evidence that was presented before the trial court and make its own conclusion, but bearing in mind that it did not have the benefit of seeing and hearing the witnesses as the trial court did. The court should therefore make due allowance for that. See Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123. The court must also remind itself of the holding in Peters v . Sunday Post [1958] E.A. 424, that: "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses." This was undefended claim and it proceeded on formal proof. At the formal proof hearing the appellant adopted his witness statement and closed his case. The court noted no documents were produced before the trial court. The trial court found no proof of employment of the appellant by the respondent. The court's role as first appellate court is to re-evaluate the evidence before the trial court and reach own conclusion. The only evidence is the witness statement of the appellant. The burden of prove of employment claims is according to section 47(5) of the Employment Act to wit- '*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 for the termination of employment or wrongful dismissal shall rest on the employer.''* It was thus the appellant's burden to prove employment by the respondent and that there was an unlawful dismissal before the burden could pass to the respondent to justify the termination. Proof of employment is relevant to a claim of unfair dismissal. In the witness statement adopted without any

explanations or amendments at the hearing, as relates the employment the appellant stated in paragraph 3 as follows-‘ ..on *or about the.. 1st may 2018 the respondent , Viraj Millenium Apartments, offered me employment as a daytime security guard to the main gates of Viraj Millenium Apartments, located along Githunguri Road , Kileleshwa’’* The claimant’s witness statement was uncorroborated. Contrary to the written submissions there is no record of any evidence before the trial court that the employment was oral. Submissions are not pleadings and the averment by the Counsel amounts to evidence from the Bar. The court noted the alleged employer was a legal entity that is incapable of issuing an oral contract without human intervention. It was thus in order for the trial court to find no proof of the alleged contract. The court would have held otherwise if the appellant had stated the contract was by a chairman, director, or agent of the respondent, as those are capable of issuing an oral contract. The court upheld the decision cited by the respondent in Trust Bank Limited Vs Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001 the Court stated as follows that it is trite law "where a party fails to call evidence in support of it case the party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.’’ The Appellant had a burden to prove the existence of the employment and this was his sole burden as required under section 107 of the Evidence Act to wit-

> *‘ 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.’’* The burden of proof applied even in the

undefended claim as held by the Court of Appeal in Kirugi and another v Kabiya & 3 others [1987] KLR 347 where it was stated that, "*Then under Order IXB rule 3, when the plaintiff only has attended, the court may proceed "ex parte". The plaintiff has therefore to prove his case. To do so he calls evidence, such evidence before the court, the court may consider it unchallenged and proceed upon it, unless it is clear that it is intrinsically unreliable. ".* The appellant, in the absence of the alleged contract, could have called a witness familiar with his employment to corroborate his testimony. The claimant alleged his services were terminated vide a call but did not disclose the name and title of the caller. The entire claim was unsubstantiated. The Court on Appeal guided on principles to apply in appeals in Mbogo v Shah Mbogo V Shah [1968] EA Page 93 where De Lestang V.P (As He Then Was) Observed At Page 94: *"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.''* I find the decision of the trial court was consistent with the material before the lower court, being only the pleadings of the appellant. I find no basis to fault the trial court. The appeal is dismissed. The respondent did not defend the claim. I make no order as to costs in the appeal.

26. It is so Ordered

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant : Odipo

Respondent: Adongo