Nderitu t/a Nairobi Millenium Fast Food v Kariuki (Civil Appeal 455 of 2019) [2026] KECA 407 (KLR) (27 February 2026) (Judgment)

Neutral citation: [2026] KECA 407 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 455 OF 2019

K M'INOTI, P NYAMWEYA & GV ODUNGA, JJA

FEBRUARY 27, 2026

BETWEEN

ROBERT NDERITU T/A NAIROBI MILLENIUM FAST FOOD ..... APPELLANT

AND

SAMUEL MWANGI KARIUKI ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (M. N. Nduma J.- as he then was) delivered by M. Onyango J on 2nd November 2018 in Nairobi ELRC Cause No. 1607 of 201)

JUDGMENT

1. Robert Nderitu T/A Nairobi Millenium Fast Food ("the appellant"), is aggrieved by a judgment dated 12th October 2018 by the Employment and Labour Relations Court at Nairobi (N. Nduma J.- as he then was) in favour of Samuel Mwangi Kariuki ("the respondent"), which was delivered by M. Onyango J. on 2nd November 2018 in Nairobi ELRC No. 1607 of 2014. The respondent was by dint of the said judgment, awarded 10 months' salary as compensation for unlawful and unfair dismissal, totalling to the amount of Kshs. 197,600/-

2. The respondent's claim in the ELRC was that he was employed as a chef in 2007, and paid a monthly salary of Kshs.13,000/- by Peter Irungu Macharia and Terry Wanjiru Irungu, who were operating as partners in a hotel business known as Nairobi Millennium Fast Food, situated along Moi Avenue. Further, that in November and December 2013, the ownership and management of the hotel changed hands and was taken over by the appellant, who continued to trade under the same name. However, that on 18th December 2013, the appellant terminated the services of the respondent without affording him an opportunity to be heard, and without any written document of termination.

3. The respondent claimed that he then went to the Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals Union and the, Ministry of Labour (Nairobi County) who wrote letters

dated 19th December 2013 and 21st January 2014 respectively, but no response was received. The respondent thereupon wrote a demand letter to the appellant on 17th April 2014, which was not responded to. The respondent, accordingly, sought a declaration that the appellant was in breach of contract and had violated provisions of the *Employment Act*, the common law and Articles 41 and 47 of *the Constitution* of Kenya; payment of service gratuity for the six years served calculated at 21 days salary per year of Kshs. 54,600/-; payment of one month's salary in lieu of notice of Kshs. 13,000/-; damages for unfair dismissal of Kshs. 39,000/-, which came to a total of Kshs .106,600/-. The respondent also sought any other relief that the court deemed it fit to grant, together with costs and interest.

4. The respondent reiterated these facts in his testimony in court, save to add that on 18th November 2013, they were called to a meeting in which the appellant was introduced as the new owner, and that on 19th November 2013, he was not allowed to enter the premise and he was not told the reason. He clarified that he was paid for the days he had worked, and that there is now a new hotel by the name Rodgers in the premises he used to work.

5. The appellant denied the respondent's assertions in his reply to the claim, and his testimony during trial, and specifically that he never entered into any agreement with either Peter Irungu Macharia or Terry Wanjiru Irungu over the purchase of a hotel; he never addressed any workers of any hotel; neither had he engaged the respondent at all. He stated that he was the director of Goldeneye Enterprises Limited which operates a hotel and on 4th November 2013, he entered into a lease for the premises known as shop 12 on the ground floor of Mithoo house on Moi Avenue. He testified that he ran the restaurant- Goldeneye Enterprises Limited, and did not trade under Millennium Fast Food Exhibition, which he denied knowing. He stated that he started his restaurant in November 2012, got a license in December 2013 and started his operations in January 2014. He also denied taking over the business in Moi Avenue and stated that he did not know Peter Irungu Macharia & Terry Wanjiru Irungu. In addition, he denied knowing the respondent or paying him any salary, and stated that he saw him for the first time in court.

6. Nduma J. (as he then was, and hereinafter "the trial Judge") considered the veracity and consistency of the contradictory versions given by the appellant and respondent and their credibility, and found that the appellant was operating a restaurant albeit under a different name on the exact location the respondent had worked from the year 2007, and that the new hotel was started on or about early December, 2013 , around the same time the respondent was apparently dismissed from employment by the new owner of the hotel. Further, that the respondent positively identified the appellant as the new owner. According to the trial Judge, the respondent had credible and consistent account of how the takeover of the hotel took place and how the new owner called them to a meeting, whereas the version by the appellant "was hollow and amounted to bare denial" and was not sufficient to rebut the credible set of facts placed before court by the respondent. Accordingly, the trial judge found that the respondent had proved his case on a balance of probabilities that he was unlawfully, and unfairly dismissed from employment by the appellant on 18th December, 2013 and was thereby entitled to compensation in terms of section 49 (1)(c)and 49(4) of the *Employment Act*, 2007.

7. The trial Judge, accordingly, made a total award of Kshs.197,600/= to the respondent made up of the following reliefs:-

    a. Kshs.13,000 in lieu of one month notice.

    b. Kshs. 54,600 service gratuity.

    c. Kshs.130,000 (equivalent of ten (10) months' salary) in compensation for the unlawful and unfair dismissal.

Also awarded was interest at court rates from the date of filing suit with respect to award (a) & (b) and with effect from the date of judgment in respect of relief (c) above till payment in full, and the appellant was condemned to pay the costs of the suit.

8. Being dissatisfied, the appellant filed an appeal in this Court, and has raised eight (8) grounds of Appeal in his Memorandum of Appeal dated 16th September 2019 on the issue of whether there was employer- employee relationship between the appellant and the respondent, whether the respondent was unlawfully and unfairly dismissed from employment by the appellant, and the award of compensation. We heard this Appeal on this Court's virtual platform on 21st May 2025, and learned counsel Ms. Rachel Mumbi was present appearing for the appellant, while learned counsel Ms. Lorraine Akinyi appeared for the respondent. The two counsel relied on their respective written submissions dated 5th August 2020 and 13th October 2020.

9. In commencing the determination of this Appeal, we are mindful that the duty of this Court as a first appeal Court, was reiterated and set out in the decision of Selle and another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123, as to reconsider the evidence, evaluate it, and draw our conclusion of facts and law, and we will only depart from the findings made by the trial Court if they were not based on evidence on record; if the court is shown to have acted on wrong principles of law as was held in Jabane vs Olenja (1986) KLR 661, or where the court's discretion was exercised injudiciously as held in Mbogo & another vs Shah (1968) EA 93.

10. Counsel for the appellant faulted the trial Court for making a finding that there existed an employer-employee relationship between the appellant and respondent, and placed reliance on section 2 of the *Employment Act* for the definition of an employee and an employer. It was her submission that the respondent had the evidentiary obligation under sections 107 and 109 of the *Evidence Act* to demonstrate the existence of an employment relationship and it is only after such demonstration that section 10 (7) of the *Employment Act* which obligated the employer to keep proper and accurate records and to document the employment relationship could be invoked. Reference was made to the holding to this effect in the case of Francis Mwaura Gitau vs Nyala Tea Estate Limited [2016] eKLR. Furthermore, while the respondent alleged to be an employee of an entity known as Nairobi Millennium Fast Food, the appellant had demonstrated in his testimony and pleadings that he had never been a proprietor of the Nairobi Millennium Fast Food; the demand dated 19th December 2013 from the Kenya Union of Domestic, Hotel, Educational Institutions and Hospital Workers (KUDHEIHA) made on behalf of the respondent was addressed to Peter Irungu as the employer not the appellant; the letter from the Ministry of Labour dated 21st January 2014 on the respondent's claim was addressed to the director of the Nairobi Millennium Fast Food Restaurant; and the appellant never entered into a contract for transfer of business with Peter Irungu Macharia or Terry Wanjiru and therefore the Transfer of Business Act was inapplicable.

11. On her part, counsel for the respondent submitted that under Sections 10 and 74 of the *Employment Act*, it is the responsibility of the employer to keep records of employment for all employees and to produce such records when required or when reasonably expected to be produced, and that the respondent gave oral evidence to the effect that he was employed by the appellant after the previous employers left, which oral testimony was valid evidence as provided in sections 62 and 63 of the *Evidence Act* and he discharged his burden of proof, and the evidentiary burden then shifted to the appellant. Further, that the judicial authority cited by the appellant, Francis Mwaura Gitau vs Nyala Tea Estate [supra] supported the respondent's case because the court held in that case that that proof of an employment relationship may be through oral testimony or documentary evidence.

12. Accordingly, that the respondent's uncontroverted oral testimony was that he had worked at the appellant's hotel from the year 2007, and when the appellant took over the business, the previous owners left him in charge of the business and the appellant continued operating the hotel under the same name even as at the time of filing suit. The appellant thus became responsible for all aspects of the business, including the liabilities associated with the employees, when he took over the business. The respondent stated clearly that it was the appellant who terminated his employment and not the previous employers. There was thus a valid employer-employee relationship between the appellant and the respondent as defined in section 2 of the *Employment Act* 2007.

13. We have considered the arguments made on behalf of the appellant and respondent by their counsel. Section 2 of the *Employment Act* defines an employer as any person who has entered into a contract of service to employ any individual. A contract of service is defined as any contract of employment for a period of time, whether oral, or in writing, express or implied or even a contract of apprenticeship and indentured learnership, all qualify as contracts of service. In addition, employment is governed by the general law of contract and therefore employment is as negotiated between the employee and the employer. The respondent indicated that he was employed as a chef for an unspecified period of time, initially by the previous owners of the hotel establishment where he worked, and later on by the appellant, when he took over the said establishment. In our view this was sufficient evidence to establish an employment relationship with the appellant. The appellant denied employing the respondent, but did not deny that he had a hotel establishment at the place where the respondent was employed, which business he commenced at the time of the termination of the respondent's employment. His evidence did not therefore controvert the respondent's evidence, and on the contrary corroborated the respondent's account of events in material respects. We therefore agree with the findings of the trial Judge that the respondent's evidence on the employment and the termination of the same by the appellant was more credible and consistent.

14. On the award of compensation, counsel for the appellant contended that the respondent prayed for damages for unfair dismissal in the sum of Kshs. 39,000/-in his statement of claim, however the learned Judge awarded Kshs 130,000/- which is an error in the judgment that warranted this Court's interference. Further, that the respondent was not entitled to damages at all, since there was no employer-employee relationship between him and the appellant, and thus the appellant did not owe any obligation as an employer and was not in breach of any provisions under the *Employment Act*.

15. In reply, counsel for the respondent argued that the amount of compensation for unfair termination awarded by the Employment Court was equivalent of ten (10) months' salary and did not exceed the twelve (12) months stipulated in section 49 the *Employment Act*, and the trial Judge properly awarded the amount within his jurisdiction. Counsel cited the decision by the Supreme Court of Kenya in Kenfreight (E.A) Limited vs Benson K. Nguti [2019] eKLR that it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder in section 49 of the Act once there is a finding of unlawful termination of employment. Therefore, since the power to award the remedies provided for under section 49 of the Act is discretionary, the Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice as held in Kenya Revenue Authority & 2 others vs Darasa Investments Limited [2018] eKLR.

16. Section 49 of the *Employment Act* permits a trial court to award compensation up to a maximum of twelve (12) months' salary as one of the remedies for unlawful or unfair termination of employment, and each case should be decided on its own facts in determining whether a trial court injudiciously or capriciously exercises its discretion in awarding compensatory damages. In Ol Pejeta Ranching Limited

vs. David Wanjau Muhoro [2017] eKLR, this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical. In the present appeal, it is the case that the respondent specifically claimed 39,000/= as damages for unlawful termination in his statement of claim. The trial Judge however found the respondent was entitled to the compensation on the following reasoning:

> "(iii) Compensation assessed according to the dictates of section 49(1)(c) and 49(4). In this regard, the Claimant, had served the Respondent and its precursor for a period of six years. The Respondent was bound in l aw and fact to take over the financial liabilities of the previous employer with regard to its employees but did not. The Respondent was not candid and was deceitful in denying ever having taken over the restaurant, ever having employed or seen the Claimant and ever having dismissed the Claimant from his employ. These are all aggravating circumstances. The Claimant did not contribute to the loss of employment. He was not compensated for the abrupt loss of job and means of livelihood. The Claimant desired to continue working as a chef and was punished for daring to ask pertinent questions to the new employer. The Claimant suffered loss and damage and the court finds this appropriate case to award the Claimant equivalent of ten
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> (10) months' salary in compensation for the unlawful and unfair dismissal."

17. It is evident the trial Judge found the appellant's conduct to be wanting, but the trial Judge misdirected himself in assessing the compensation and awarding over and above what the respondent had prayed for, since he had specifically pleaded that he was seeking compensation of Kshs. 39,000/= and did not amend his pleadings . In effect, the trial Judge ended up granting a remedy that was not sought by the respondent.

18. We therefore partially allow the appellant's appeal, only to the extent that we set aside the award by the trial Judge of Kshs.130,000/= as compensation for the unlawful and unfair dismissal and substitute therefor an award of Kshs. 39,000/= . The other awards made by the trial Judge in the judgment dated 12th October 2018 are upheld, with the result that the total award payable by the appellant to the respondent shall be Kshs 106,600/=, with interest from the date of this judgment until payment in full. The appellant shall meet the costs of the suit in the ELRC and of this appeal.

19. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2026.

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed Deputy Registrar.