

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAKURU

ELRC APPEAL NO. E016 OF 2023
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

MWAJUMA JUMA.....

APPELLANT

VERSUS

**JAMES K MWANGI T/A HUNTERS
LODGE & BUTCHERY AND
JAMKA LODGE**

RESPONDENT

***(Being an Appeal from the Judgment and Decree of
the Honourable Emmanuel S. Soita, Senior
Resident Magistrate, delivered on 23rd May 2023 in
Nakuru CM ELRC No. 79 of 2020)***

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, filed this appeal vide a Memorandum of Appeal dated 19th June 2023, on the following grounds that: -

1. The learned magistrate erred in law by not awarding compensation for unfair termination as per section 49(c) of the Employment Act after confirming that the termination was unfair.

2. *The learned magistrate erred in law and facts by not awarding or giving decision under prayers of unpaid leave and underpayment of the Appellant claims on memorandum of claim.*
 3. *The learned magistrate erred in facts by failing to take into account and to consider the evidence adduced on behalf of the Appellant.*
2. The Appellant prays that:
- i. The Appeal be allowed.*
 - ii. The Judgment be set aside and reviewed.*
 - iii. The Appellant be awarded cost of this appeal*
3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The Appellant submitted that the learned magistrate misapprehended the facts and failed to apply the correct legal principles, citing the case of *Butt v Khan* (1981) KLR 349, which held that an appellate court may interfere with damages if the award is inordinately high or low due to misapplication of principles or misapprehension of evidence. Reliance is also placed on ***Mary Njoki v John Kinyanjui***

Mutheru [1985] eKLR, which emphasized that an appellate court will intervene where the trial court plainly went wrong or failed to appreciate the weight of evidence.

5. Accordingly, the Appellant submitted that the appeal should be allowed, the judgment set aside, and appropriate compensation awarded.

Respondent's submissions

6. On appeal, the Respondent submitted that an appellate court generally avoids interfering with a trial court's findings of fact unless it is clearly shown that the trial court acted without evidence, misunderstood the evidence, or applied incorrect legal principles. As emphasized in ***Peters v Sunday Post Ltd [1958] EA 424***, appellate intervention is not justified merely because the appellate court might have reached a different conclusion. The burden lies with the Appellant to demonstrate a specific error, as mere dissatisfaction with the outcome does not constitute valid grounds for appeal.
7. The Appellant's claim for unpaid leave was dismissed because it was neither pleaded with specificity nor

supported by testimony, documents, or submissions, rendering it a bare and unsubstantiated prayer. Courts are bound by pleadings and cannot grant reliefs without proof, as affirmed in **Independent Electoral & Boundaries Commission v Stephen Mutinda Mule & 3 Others [2014] eKLR**. Under sections 107–109 of the Evidence Act, the burden of proof rests with the claimant, which the appellant failed to discharge. Furthermore, her attempt to shift responsibility to the court or respondent was rejected, since courts cannot construct a party’s case, as held in **Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] eKLR**. Consequently, the magistrate was correct in declining the relief, and the appellant cannot benefit from her failure to adduce evidence.

8. The Respondent submitted that the Appellant’s claims of underpayment and entitlement to terminal pay were dismissed because she failed to provide evidence of the applicable wage, period, or variance, as stated in the case of **CMC Aviation Ltd v Mohammed Noor [2015] eKLR**. The learned magistrate properly evaluated the evidence, noting that the appellant herself admitted resigning and even declined her final dues. On appeal, she attempted to introduce new

arguments to fill evidentiary gaps, but appeals are not forums for raising fresh issues, as established in the case of ***Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212***. Her testimony further confirmed she resigned with short notice and refused the offered Kshs.40,000/= terminal pay.

9. Ultimately, she failed to demonstrate any misdirection, misapprehension of evidence, or error of law, and her dissatisfaction with the compensation awarded was insufficient to overturn the magistrate's decision.
10. The Respondent urged the court to dismiss the appeal with costs.

Analysis and determination

11. Being the appellate court, it is the court's responsibility to re-evaluate and analyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court as set out in ***Selle Associates V Associated Motor Boat Company Ltd (1968) E.A. 123.***

12. Having considered the record of appeal, the memorandum of appeal, and the submission by both parties, the issues for determination are:-

(1) Whether the trial court held the Appellant was unlawfully terminated or she resigned voluntarily.

(2) The other issue is whether the Appellant is entitled to the Relief sought.

13. Looking at the record of appeal, there is no dispute that the Appellant was employed as a cleaner at the Respondent's lodge, earning Kshs.7,000/= per month. The learned trial Magistrate in delivering his judgement found that the Appellant voluntarily left work and so he proceeded to dismiss the claim.

14. In ***Joel v Tirgaga Tea Factory Company Limited. [2022] KECA 651 (KLR)*** the Court of Appeal held as follows:

“We find that the learned Judge was right in finding that the appellant voluntarily wrote the letter of resignation and that, although it was addressed to Kapkoros Tea Factory Co. Limited, the same was intended for the respondent, and was only received by the Factory Unit Manager of

Kapkoros Tea Factory Co. Limited as an agent. The appellant having voluntarily resigned from employment, his services were not terminated and the issue of unlawful or unfair termination does not arise.”

15. In ***Moses Kiplagat Changwony v Tana & Athi River Development Authority [2017] KECA 768 (KLR)*** the Court of Appeal held that the Appellant was found not to have been dismissed but instead to have voluntarily resigned from employment on 24th July 2006.
16. The Appellant in her evidence in the pleadings to wit her claim and submissions dated 14th April 2023 she admitted she issued a one month notice of resignation. She says instead of accepting her resignation she was terminated immediately by the Respondent.
17. The Appellants have alleged unfair termination contrary to the Provisions of ***Sections 45(2) of the Employment Act and Sections 41(1)*** of the same Act.

18. The Appellant confessed she tendered her resignation even though the court was not availed her resignation letter. **BUT** she has not shied from admitting she is the one who resigned from her employment.

19. None of the parties produced any letters of termination of employment or of summary dismissal. The court cannot make pronouncements in abstract that the Appellant was unfairly terminated without any evidence whatsoever of such unfair termination.

20. Rather the court finds the Appellant resigned from her employment. In **Section 36 of the Employment Act** it is provided: -

“Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”

21. In fact, the Appellant was not even entitled to salary in *lieu* of notice as she is the one who resigned. She

was however entitled to her salary for the notice month even if the Respondent opted to release her from service that month.

Indeed, the court would only award her salary for the notice month being Kshs.7,000/=.

22. The Appellant in the Memorandum of Appeal prays for terminal pay but has not substantiated what that entails. There is no letter or contract of employment in the courts records to assist the court to confirm if she had other entitlements. Once again, the court cannot grant prayers in abstract.

23. There is also no evidence of unremitted NSSF contribution, and NHIF contributions. There are no letters from these organization to confirm their dues were not remitted. The Appellant has not provided evidence to support her allegations and hence the court will not have any legal support to award the claimed unremitted NSSF contributions and NHIF dues.

The pleadings in the lower court the Appellant claimed there were NHIF and NSSF dues that were remitted to the respective institutions. The figures do not indicate what they represent or how they are accounted. So,

these prayers are unsupported and the court will not award them.

24. The court finds no support to award any unpaid leave and under payment and the court agrees with the decision of the trial court. The court cannot give awards on unproven claims. The only award this court can legally award is the one-month salary.

25. Otherwise the court finds the appeal is not merited. It is dismissed and the trial Magistrate's judgment is upheld though Appellant is awarded one-month salary.

26. Each party is to meet their respective costs of the lower court proceedings and of this appeal.

It is so ordered.

**Dated, Signed and Delivered virtually at Nakuru
this 13th Day of
March, 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.

ANNA NGIBUINI MWAURE

JUDGE

ORIGINAL