

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E057 OF 2023

STANSLAUS LUYEKU MAINA.....APPELLANT

-VERSUS-

MAIDA COMPANY.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. G.M. Gitonga (PM)
delivered on 14th April 2023 in Nairobi MCELRC No. E2051 of 2021)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. G.M. Gitonga (PM) delivered on 14th April 2023 in Nairobi MCELRC No. E2051 of 2021 between the parties filed a Memorandum of Appeal dated the 26th April 2023 seeking the following orders: -
 - a) This Appeal be allowed, the decision of the learned Magistrate be set aside, overturned and or reversed and this Honourable Court be pleased to substitute with an Order that the Appellants suit in the Lower Court be allowed for the prayers of;

- i. The Honourable Court's decision of dismissing the entire claim was erroneous and unjust and was arrived at without proper assessment, scrutiny and analysis of the entire evidence tendered by the Appellant.
- ii. The Honourable Court finds that the Appellant was an employee of the Respondent.
- iii. The Honourable Court awards the Appellant Ksh. 13,572.90 being October 2021 unpaid salary.
- iv. The Honourable Court awards the Appellant Ksh. 13,572.90 being one month pay in lieu of notice.
- v. The Honourable Court awards the Appellant Ksh. 308,624.4 being accumulated salary underpayments as at the time of termination of employment.
- vi. The Honourable Court awards the Appellant Ksh. 162,874.20 being compensation equivalent to 12 months' salary for wrongful dismissal.
- vii. The Honourable Court awards the Appellant Ksh. 56,380 being accumulated service gratuity for 6 years worked.
- viii. The Honourable Court awards the Appellant Ksh. 40,718.70 being compensation for unpaid amount for leave not granted.
- ix. The Honourable Court awards the Appellant Ksh. 2,550 being compensation for unpaid amount for leave travelling allowance.
- x. The Honourable Court awards the Appellant Ksh. 30,403.30 being compensation for unpaid overtime worked.
- xi. The Honourable Court awards the Appellant Ksh. 113,536.80 being compensation for unpaid public holidays worked.
- xii. The Honourable Court awards the Appellant Ksh. 235,807.20 being compensation for unpaid rest days worked.

- xiii. The Honourable Court awards the Appellant Ksh. 73,293.66 being accumulated 12 months housing allowance.
- xiv. The Honourable Court awards the Appellant a Certificate of service.
- xv. The Honourable Court awards the Appellant interest on the total.
- xvi. The Honourable Court awards the Appellant cost in the Lower Court and on this Appeal to be borne by the Respondent.

GROUNDINGS OF THE APPEAL

- 2. The Honourable Magistrate erred both in law and in fact in holding that the Appellant was not an employee of the Respondent.
- 3. The Honourable Magistrate erred in law by failing to consider section 74 of the Employment Act on the responsibility of the Employer to provide Employment records.
- 4. The Honourable Magistrate erred both in law and in fact by failing to consider the Appellant received his salary both in cash and via Mpesa.
- 5. The Honourable Magistrate erred both in law and in fact in relying on the Appellants' Mpesa statement at reaching the conclusion that the Appellant was most probable a piece meal employee and not an employee of the Respondent.
- 6. The Honourable Magistrate erred both in law and in fact by failing to critically assess all the Mpesa transactions filed by the Appellant thus arriving at a wrong conclusion i.e

transaction Number PH44743GMW of Ksh. 5,000 dated 4/8/2021 at page 11 of the Appellant Mpesa statement.

7. The Honourable Magistrate erred both in law and in fact in placing a higher burden of proof upon the Appellant as such reaching the conclusion that the Appellant had not proved his case on balance of probability.
8. The Honourable Magistrate erred both in law and in fact in holding that the Appellant had the burden of producing letters of employment, NHIF, NSSF and other employment records to prove he was an employee of the Respondent.
9. The Honourable Magistrate erred in law and fact by failing to appreciate the obligation placed upon the Respondent to produce records of piece meal employees.
10. The Honourable Magistrate erred in law and fact by failing to place a burden upon the Respondent to prove the piece meal services and payments made to the Appellant as alleged.
11. The Honourable Magistrate erred both in law and fact by failing to arrive to a conclusion that the Appellant's monthly salary of Ksh. 5,000 which was payable both in cash and through Mpesa was below the stipulated statutory minimum salary.

12. The Honourable Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for the sum of Ksh. 308,624.4 ostensibly on account of underpayments, the Appellant having worked for the Respondent for 6 years and 10 months.
13. The Honourable Magistrate erred both in law and fact by failing to make a gratuitous award in favour of the Appellant for the sum of Ksh. 162,874.8 ostensibly on account of compensation equivalent to 12 months' salary for unfair and /or wrongful dismissal or unlawful termination.
14. The Honourable Magistrate erred both in law and fact by failing to make an award in favour of the Appellant for the sum of Ksh. 13,572.9 ostensibly on account of one month pay in lieu of Notice for unfair and /or wrongful dismissal or unlawful termination.
15. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh. 56,380 on account of service gratuity which the Appellant was in Law entitled.
16. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh. 40,718.7 on account of leave pay for the last 3 years worked and Ksh. 2,550 on account of leave travelling allowance by the Appellant which the Appellant was in law entitled.
17. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh. 30,403.30 on account of overtime hours worked.

18. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh. 113,536.8 on account of unpaid public holidays worked despite the overwhelming evidence adduced by the appellant.
19. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh. 235,807.2 on account of unpaid rest days worked despite the overwhelming evidence adduced by the appellant.
20. The Honourable Magistrate erred both in law and fact in failing to make an award in favour of the Appellant for the sum of Ksh. 73,293.66 on account of housing allowance which the Appellant was in Law entitled.
21. The Honourable Magistrate erred both in law and fact by dismissing the Appellant's claim with costs without properly addressing the evidence produced before court.
22. The Honourable Magistrate erred both in law and fact in failing to award a Certificate of Service which the Appellant was in law entitled to.
23. The Honourable Magistrate erred in law in failing to appreciate the correct evidence adduced and tendered in Court.
24. The Honourable Magistrate misdirected herself in her analysis, evaluation, interpretation and assessment of the entire evidence tendered by the appellant and thus arriving at a wrong, erroneous and unjust conclusion and judgment.

25. The Honourable Magistrate erred in law in basing her decision on extraneous factors.

26. The entire decision is contrary to law and a misapprehension of the law.

BACKGROUND TO THE APPEAL

27. The Claimant/Appellant filed a claim against the Respondent vide a memorandum of claim dated the 26th of November 2021 seeking the following orders: -

a) A declaration that the dismissal of the Claimant by the Respondents was unlawful, malicious, and contrary to legal procedure.

b) A declaration that the Respondents unfairly dismissed the Claimant.

c) A declaration that the Claimant right to fair labour practices have been breached.

d) Maximum compensation for wrongful dismissal.

e) Special damages

i. Unpaid Salary (October 2021)	KSH.13,572.90
ii. One month pay in lieu of Notice	KSH.13,572.90
iii. Underpayments	KSH.308,624.40
iv. Damages for wrongful dismissal	KSH.162,874.80
v. Service gratuity	KSH.56,380
vi. Unpaid amount for leave not taken	KSH. 40,718.70
vii. Leave Travelling allowance	KSH. 2550
viii. Overtime	KSH.30,403.30
ix. Unpaid Public Holidays	KSH.113,536.80
x. Rest days	KSH.235,807.20
xi. Housing allowance	KSH.73,293.66

Total Claim

KSH.1,051,334.66

(pages 13-19 of Appellant's ROA dated 24th July 2025)

14. The Claimant filed his list of witnesses dated 26th November 2021; witness statement of even date; and list of documents of even date with the bundle of documents attached (pages 22-38 of ROA).
15. The Respondent entered appearance and filed a response to claim dated 19th October 2022. In support of their response, the Respondent also filed a list of witnesses dated 19th November 2022; witness statements of LIBAN IBRAHIM MOHAMED and VICTOR ODHIAMBO of even date; and list of documents of even date with the bundle of documents attached (pages 39-57 of ROA).
16. By consent the matter was heard through written submissions, with the court giving directions on filing of the same, and both parties complying (proceedings on pages 81-82 of ROA).
17. The Trial Magistrate Court delivered its judgment on the 14th of April 2023 dismissing the Claimant's case for lack of evidence, with costs (judgment on pages 73-78 of ROA).

DETERMINATION

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

Issues for determination

19. In his submissions dated 21st November 2025, the Appellant identified the following issues for determination:

- i. Whether there existed an employer-employee relationship.
- ii. Was the Appellant's termination unlawful.
- iii. Whether the Appellant is entitled to the prayers sought.
- iv. Costs.

20. On their part, the Respondent identified the following issues for determination in their submissions dated 23rd January 2026, namely:

- i. Whether the Appellant was a general labourer or a casual labourer.
- ii. Whether the Appellant was terminated unfairly.
- iii. Whether the Appellant is entitled to reliefs sought.

21. The court discerned the issues for determination in the appeal to be-

- i. Whether the trial court erred in fact and law in finding the appellant as not employed as a general labourer by the respondent
- ii. Whether there was unfair termination
- iii. Whether the appellant was entitled to sought.

Whether the trial court erred in fact and law in finding the appellant was not employed as a general labourer by the respondent

Appellant's submissions

22. Whether there existed an employer- employee relationship- The Appellant attached Mpesa statements shows a connection between the Appellant and the Respondent that could constitute an employment relationship. His salary was also paid in cash. His salary was paid by the Respondent or his accountants, Mr. Muhamed Muhamud or Gedi Mahamud. This transaction proves the existence of an employer-employee relationship. The evidence supports the Appellants case of existence of an employment relationship. Among the payments were made by the Respondent on 4th August 2021, 10th August 2021, 21stAugust 2021, 3rd September 2021, 29th September 2021, 7th October 2021, 8th October 2021 for Kshs. 5,000/=, Kshs. 9700/=, Kshs. 1,000/=, Kshs. 200/=, Kshs. 300/=, Kshs. 200/= and Kshs. 700/=. A sample of payments effected by the accountants were made on 9th August 2021, 10th August 2021, 27th August 2021, 30th August 2021, 6th September 2021, 14th September 2021, 17th September 2021, for Kshs. 250, Kshs. 100/=, Kshs. 500/=, Kshs. 300/=, Kshs. 250/=, Kshs. 500/=, and Kshs. 220/=. The Respondent on his part aver that the Appellant was engaged on a casual basis and only when need arose. Section 2 of the employment Act defines a “casual employee” to mean a person the terms of whose engagement provides for his payment at the end of each day and which is not engaged for a longer period than twenty-four hours at a time. The Respondent never adduced any employment record in support of his case that the Appellant used to stand outside the business premises and could be given work to deliver furniture after purchase. The law does not exempt an employer from keeping records of delivery persons or any casual employee. The Appellants Mpesa payment point to the fact that there was a varying payment. The cash payment records were never adduced in court. The Respondents also never disputed to the fact that payments was made both in cash and through Mpesa. Section 74(1) of the Employment Act puts an obligation on an employer to maintain employment

records. He has to adduce the work records in court to contradict an employee's claim. Justice Mbaru in the case of John Maina Kariuki & Anor-versus Babs Security Services Limited [2019] eKLR he stated at page 3 as follows: [.....Without the required work records to confirm employment, hours of work, days of work, payment statements and reasons leading to termination of employment, the court must believe the employee as the respondent has failed in its legal duty to file the required work records as the custodian of the same. This omission is serious and a violation which should receive a sanction as failure to file work records has the import of the respondent not filing the statutory returns for the employees has serious implications and a matter the Labour Officer should address and prosecute. The Respondent failed in his duty to avail work records that will have disputed the claim. The burden of proof that the terms were different from what the Appellant stated lies squarely in the hands of the Respondent. We urge this Honourable court to find that there existed an employer-employee relationship between the appellant and respondent.

Respondent's submissions

23. It is not in contention that the Appellant and the Respondent were well acquainted, however, the relationship between them is what should clearly determined. The Appellant contends that he was as employed by the Respondent as a general worker earning KES.5,000.00 per month, he adduced M-Pesa statements in support of his claim. The Respondent contended the Appellant assertions and gave evidence that the Appellant was not its employee. The Respondent's witness averred that the Claimant operated a cart which he stationed at the front of the Respondents premises. It was the Respondent's witness evidence that where the Appellant's delivery services were required he would be issued and paid per delivery made. It was the Respondent's witness further evidence that the Appellant

would be given such delivery jobs by other business owners neighboring the Respondents business premises. The Employment Act under section 2 defines the term employee as:- "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;" Further it defines an employer as :- "employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company; An employment relationship is discernible from the two definitions as a contract of service which under the Employment Act defines as:- "an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time..." Clearly, for an employment relationship to come into existence, there must be a meeting of the minds, demonstrated not merely by assertions but by conduct, remuneration structure, and the degree of control exercised. The Appellant produced M-Pesa statements as evidence in support of his claim, my lady in the statement adduced as evidence do not signify any employment relationship, the appellant's claim was that he was employed by the Respondent and that his remuneration was KES.5,000.00 per month, it is evident that the statements adduced and in the Appellants submissions none of which contain a remuneration structure of an employee. In Everret Aviation Limited Vs the Kenya Revenue Authority [2013] eKLR, the court held that;- "in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical." That from the M-pesa statement adduced

it is clear that the payments made to the Appellant were sporadic and the same did not amount to KES.5,000.00. The same do not support the assertions of employment as claimed, as the mode of payment was not consistent, however the same supports the Respondent's evidence that the Appellant was not an employee and that he was paid per delivery made, as and when there was need for his services from the Respondent's customers. An employment relationship is codified by duties to which one is assigned to, my Lady, the Appellant failed to demonstrate or adduce evidence of his job description but only claimed to be a general labourer. It is trite law that he who alleges must prove, the Appellant failed to adduce evidence that the Respondent was his employer. In *Casmir Nyankuru Nyaberi v Mwakikar Agencies Ltd* [2016] eKLR and *Joseph Munene Murage V Salome Ndung'u* [2019] eKLR the court held that:- "This court is well aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice." In the evidence produced the Appellant produced statements which do not contain payments between January 2015 to June 2021, clearly showing that the Appellant was not an employee of the Respondent. The standard of proof in employment disputes is on a preponderance of probabilities. The court must be satisfied that the allegations made are more probable than improbable. It is the Respondent's submission that the Appellant did not issue a notice to produce, being well aware that there were no documents capable of

supporting his alleged claim of employment, as he was never at any time employed by the Respondent.

Decision

24. The appellant claimed he was employed starting January 3, 2015, as a general laborer earning Kshs. 5,000 per month, with his employment ending on October 15, 2021. The respondent denied this, stating that the appellant had a cart and operated outside the respondent's premises, providing transportation services on a customer-need basis. The parties proceeded based on documents before the trial court. The evidence presented in court was not tested through cross-examination; instead, the parties submitted written arguments. The proof of employment claims aligns with section 47(5) of the Employment Act, which states- *'5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that such an unfair termination or wrongful dismissal occurred shall rest on the employee, while the burden of justifying the grounds for the termination shall rest on the employer.'* The existence of employment is relevant to a claim of unfair termination. To support his claim of employment as a general laborer, the appellant relied on his MPESA statement for August to October 2021. He stated he was on a monthly salary of Kshs. 5,000. The trial court, after analyzing the MPESA statement, found no proof of payment of Kshs. 5,000 per month, but only sporadic payments made by respondents' agents, which aligned with the respondent's position that the appellant was engaged on a piece-work basis, depending on customer needs for his cart, operated outside the respondent's premises. The statement covered only three months, while the appellant claimed six years of employment. The court confirmed that the trial court correctly found that the payments to the appellant were inconsistent with a claim of a monthly salary,

instead indicating varied payments typical of piecework. The appellant provided no other evidence. The burden of proving employment lies with the employee, and the burden of proving the reason for termination does not arise where there is no proof of employment, as per section 47(5) of the Employment Act. Additionally, it was the appellant's responsibility to prove the existence of employment as a general laborer, per section 107 of the Evidence Act, which states- '*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.*' There was no evidence before the court to establish employment of the appellant as a general laborer, which would have shifted the burden to the respondent to produce documents regarding the relationship. I find the decision of the trial court was based on the evidence placed before the court and no basis to interfere (Mbogo v Shah).

25. The court, having upheld the finding of the trial court that there was no proof of employment as pleaded, finds that it has no basis to make a finding of whether or not there was unfair termination or the relief sought. The appeal is dismissed for lack of merit, with costs to the respondent.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MARCH, 2026.

J.W. KELI,
JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – absent

Respondent - Nyoroku