

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

ELRCA CAUSE NO. E241 OF 2024

BETWEEN

BRITKEN HAULIERS LIMITED

AHMED SOUD T/A HASHAR STOREAPPELLANT

AND

EVANS MAHERI KEVOGORESPONDENT

*(Being an appeal from the judgment of the Learned Hon. Nabibya SRM
delivered on 17th October 2024 in CMELRC 483 of 2021)*

JUDGMENT

Background

1. By the Statement of Claim dated 19th July, 2021, the Respondent sued the Appellant in the above-mentioned suit before the lower court and sought the following remedies;

a) A declaration that the Respondent's employment was unfairly, unjustly, and wrongfully terminated by the Respondent;

b) That the Appellant be ordered to pay the Claimant his terminal and contractual dues amounting to Kshs 554,061.30/-

c) Interest in (b) above;

d) The Respondent be issued with a Certificate of Service;

e) Costs of this claim, and interest from the date of filing the Claim till full payment and;

f) Any other relief that the Honourable court would deem just and expedient to grant.

2. The Appellants opposed the Respondent's claim through their Response to the Memorandum of Claim dated 7th September 2021, contending that the Respondent was fairly and lawfully dismissed from employment, and that he was not entitled to the reliefs he had sought.

3. After hearing the parties on their respective cases, the trial Court entered judgment for the Respondent. It is the judgment that the Appellant assails, through the instant appeal.

Respondent's case in the lower court

4. It was the Respondent's case that he was employed by the Appellants as a Truck Driver and Salesman from 18th July 2019, earning a gross monthly salary of Kshs. 20,000, which he argued was below the statutory minimum wage for his role.
5. He served the Appellants diligently and loyally, performing his duties without complaint, and claimed that he was not allowed to take any leave during his period of employment.
6. On 14 September 2019, he was reporting to work as usual when the 2nd Appellant summoned him, informed him that his services were no longer required, and ordered him to vacate the workplace immediately, without prior notice or explanation.

7. He questioned the reasons for his dismissal, but the Appellants allegedly refused to provide any justification or offer him a fair hearing.
8. Following the dismissal, he reported the matter to the Mombasa Labour Office and attended a conciliation meeting on 23rd September 2019, where the Appellants were given a tabulation of payment of dues on 3rd October 2019, which they failed to settle.
9. The Appellants failed to pay statutory contributions to the relevant Authorities, did not issue a certificate of service, and ignored repeated requests for the payment of the terminal dues.

Appellants' case in the trial court

10. The Appellants, through their three witnesses, stated that the Respondent was engaged as a Salesman from 18th July 2019 to 14th September 2019, to promote and sell Brava Food Products in Mombasa, with remuneration of KShs. 300

per day plus commission for each case of the product sold.
The payments were made through petty cash vouchers.

11. The Appellants' first witness, Taufiq Abaad, stated that the Respondent repeatedly absented himself from work without permission on 12th and 13th August 2019. He further alleged that on 27th August and 13th September 2019, the Respondent drove a company motor vehicle without authorisation, causing accidents, clamping, and engaging in fuel fraud.

12. Following reports from the Operations Manager and the driver, a Notice to Show Cause was issued on 13th September 2019, requiring the Respondent to appear for a disciplinary meeting on 14th September 2019. However, the Respondent allegedly failed to attend the meeting, leading to his summary dismissal. The witness stated that all relevant documents were later submitted to the County Labour Officer. Due process was upheld in summarily dismissing the Respondent.

13. The second witness, Abed Mohamed Salim, reinforced the first witness's evidence that the Respondent's unauthorised absences on 12th and 13th August 2019, the incidents of vehicle damage and fuel overcharging on 13th September 2019, and the issuance of the Notice to Show Cause. He further stated that he attended the Labour Office meeting on 23rd September 2019 on behalf of the Appellants and informed the office that the Respondent owed the company Kshs. 12,602 and other dues.

14. The third witness, Almasi Salim Hamisi, confirmed the vehicle incidents of 27th August and 13th September 2019, stating that the Respondent moved the vehicle without authorisation, which caused damage, obstruction, and penalties. He agreed with the other witnesses that the Respondent's conduct justified disciplinary action.

Judgment of the lower court

15. After considering the parties' respective cases and submissions by their Counsel, the learned trial Magistrate found that the Respondent's employment was terminated by

the Appellant unfairly, awarded him unpaid salary for 28 days (Kshs. 20,000), one month's salary in lieu of notice (Kshs. 20,000), compensation for the underpaid salary for the two, KShs. 21,254, and an unpaid house allowance, KShs. 9198.

The Appeal

16. Dissatisfied with the Judgment of the lower Court, the Appellants lodged this appeal, outlining the following grounds;

- 1) The Learned Magistrate erred in law and in fact in failing to appreciate and properly evaluate the Appellant's pleadings and evidence adduced and thereby rendering a judgment that is unsound in principle and not a reflection of the evidence on record.
- 2) The Learned Trial Magistrate erred in law and fact in failing to frame distinct points/issues for determination according to the Appellant's pleadings and evidence adduced to make a decision thereon, thereby reaching wrong conclusions.

- 3) The Learned Trial Magistrate erred in law and fact in failing to appreciate and consider all the points/issues for determination as raised in the Appellant's/ submissions and to make decisions thereon.
- 4) The Learned Trial Magistrate erred in law and fact by failing to find and hold that the Respondent/Claimant had a burden of proving his case even where employment contract was oral in nature by adducing evidence, was employed as a Truck driver which the Appellant had denied and suit before trial court was not proven in law and thereof Learned Trial Magistrate failed to dismiss that suit for failure to prove.
- 5) The Learned Trial Magistrate erred in law and fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case.
- 6) That the judgment of the Learned Trial Magistrate is against the law and weight of the evidence on record and against the doctrine of stare decisis.

- 7) The Learned Trial Magistrate erred in failing to evaluate and consider the Appellant's witness evidence that, the Respondent was employed on 18th July 2019, and absconded duty on 12th,13th and 14th August 2019 and Respondent employment terminated on 14h September 2019, and awarding the Claimant salaries for two months without taking into consideration Appellant evidence and pleading was a mistrial.
- 8) The Learned Trial Magistrate erred and contravened the General Wages Order in awarding the Respondent two months' Housing Allowance of Kshs.9,198.00 while the Respondent had worked for one full month.
- 9) The Learned Trial Magistrate erred by awarding the Respondent underpayment as a Truck Driver for the sum of Kshs. 21,254.00, yet there is no evidence adduced by the Respondent to support the claim that he was a Truck driver.
- 10) The Learned Trial Magistrate erred by assessing and awarding the Respondent a salary of Kshs. 30,000.00,

and no evidence was adduced by the Respondent to corroborate that he was a Truck driver.

11) The Learned Trial Magistrate erred in arriving at contradictory findings by failing to take into consideration Appellants evidence that Notice to Show Cause was served upon Respondent on 13th September 2019 and was to appear on 14th September 2019, and the Appellant called him twice but failed to pick calls thus ultimately arriving at a wrong conclusion that the Respondent was unfairly terminated from employment by the Appellant.

Appellant's submissions

17. The Appellant argued that this Court, as a first Appellate Court, can interfere with trial court findings; however, within the well-established principles, particularly when such findings are based on no evidence, a misinterpretation of evidence, or when the trial court has acted on incorrect principles. To support this stance, they referenced **Sheldon**

Shadora v Stanley S. Shadora, Civil Appeal No. 210 of 1995, where the Court of Appeal stated;

“Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial Court had the advantage of hearing and seeing the witnesses testify before him....A Court of Appeal will not normally interfere with the findings of fact by the trial Court unless they are based on no evidence, on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.An Appellate Court will be slow to interfere with a Judge’s findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him.”

18. The Appellants submitted that the instant appeal would be adequately disposed of by three central questions being answered. Thus, whether the learned Trial Magistrate erred in failing to render a decision that the Respondent had not

proved that he was employed as a truck driver between 18 July 2019 and 14 September 2019 was unsound in principle and law; whether failure by the trial Magistrate to render a decision that the Appellant had proved the Respondent was a salesman with a working relationship with the Appellant rendered her judgement unsound in principle and law; and whether the reliefs sought and awarded to the Respondent by the trial Court were deserved.

19. The Appellants argued that, undoubtedly, the nature of the relationship between them and the Respondent was one of those central issues, that emerged from the pleadings of the parties, and which the learned trial Magistrate ought to have identified for determination, a thing she failed to, ultimately leading to erroneous findings in respect of other issues that arose for instance, the issue of salary underpayments.

20. It was further argued that while the Respondent contended that he was employed as a truck driver, the Appellants explicitly denied the allegation and contended that the

Respondent was engaged as a Salesman who was being paid on a commission basis on the rates agreed between them.

21. The Appellants also argued that the burden of proof lay with the Respondent to establish the alleged employment relationship and his role as a truck driver. They contended that the Respondent failed to produce documentary or corroborative evidence, such as a driving licence or employment records, to support his assertion. To support the principle that a claimant must still prove the existence of an employment relationship even when the contract is oral, reliance was placed on **Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR.**

22. The Appellants further argued that the evidence on record showed that the Respondent only had a working relationship with the Appellants as a salesman paid on a daily allowance and commission basis. They contended that this arrangement was supported by evidence, including petty cash vouchers and sales tabulations produced during the trial. As such, the relationship could not entitle the

Respondent to the rights, benefits and protections contemplated under the Employment Act. In support of this argument that casual or commission-based arrangements may not entitle workers to the employment benefits claimed, the Appellants cited **West Kenya Sugar Company Limited v Chilande (Employment and Labour Relations Appeal E009 of 2023) [2024] KEELRC 2119 (KLR)**.

23. Regarding the remedies granted by the trial court, the Appellants argued that the Respondent failed to prove the existence of an employment relationship and therefore was not entitled to the remedies awarded for unfair dismissal. They maintained that the onus of establishing employment was on the Respondent and that mere allegations were inadequate. As supporting authority, they cited **Korir v Mosonik (Employment and Labour Relations Cause 006 of 2023) [2024] KEELRC 2051 (KLR) (31 July 2024) (Judgment)**.

Respondent's submissions

24. The Respondent submitted that the appeal lacks merit and that the trial court correctly found that the termination of his employment was unlawful and unfair. He argued that the Appellants' allegation that he absconded from duty was contradictory and not supported by evidence, noting that the Appellants themselves admitted he was present at the workplace on the same day they allegedly served him with a notice to show cause.
25. The Respondent further argued that abscondment or desertion requires evidence that the employee left work without the intention to return, and that the employer must demonstrate efforts made to contact the employee prior to termination. Support for this argument was based on **Javan Kiso Mulwa v S.A.A Interstate Traders (K) Ltd [2018] eKLR** and **Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR**.
26. The Respondent further submitted that the Appellants failed to prove desertion and did not demonstrate that any reasonable steps were taken to trace him or invite him back

to work. It was argued that the evidence instead showed that he was summarily dismissed without a valid reason or proper process. The Respondent also relied on **Judith Atieno Owuor v Sameer Agriculture and Livestock Limited [2020] eKLR** to emphasise that allegations of desertion must be proved and that an employer must show efforts made to contact the employee.

27. Regarding procedural fairness, the Respondent argued that the termination breached the mandatory requirements of section 41 of the Employment Act because he was not given a fair hearing, sufficient notice, or an opportunity to be accompanied by a colleague or union representative. To buttress this submission, reliance was placed on **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, and **Mwangi Odhiambo Duncan v Crest Security Services Limited [2019] eKLR**.

28. The reliefs awarded by the trial, including salary in lieu of notice, unpaid salary, house allowance, underpayment, and compensation, were correctly awarded. To support the

position that the award of house allowance was deserved, and support was placed on **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2017] eKLR.**

Analysis and Determination

29. I have carefully examined the grounds outlined in the Appellant's Memorandum of Appeal, the record, and submissions by the parties' Counsel, and I hold that the current appeal can be fairly, properly, and clearly resolved by focusing on three essential issues;

- a) What was the nature of the relationship between the Appellant and the Respondent at all material times?
- b) If that of an employer-employee relationship, was it fairly and lawfully terminated?
- c) Was the Respondent entitled to the reliefs that the trial Court awarded?

30. Before I proceed further with the issues identified above, I find it essential to emphasise that the role of a first Appellate Court, which in this case is this Court, is to review,

reconsider, and reanalyse the material from the lower court and to form its own findings without being bound by those of the trial Court. However, it should give an allowance for the fact that it neither saw nor heard the witnesses testify.

31. The tone of the Appellants' submissions is explicit. The relationship between the parties was not that of employer and employee. It was an engagement in which the Respondent earned a commission on the goods sold. Further, in the arrangement, the Respondent was strictly a salesperson.
32. A careful analysis of the material placed before the trial Court, including the Appellant's own documents, reveals a position that clearly is not aligned with the Appellant's position and more particularly on the relationship.
33. The Appellant's letter dated 16th September 2019, addressed to the Ministry of Labour & Social Protection, read in part;

“ In respect to your letter Ref..... The above-mentioned person is not an employee of Hashal Store but was on probation with Britken Limited, where he was liable for Kshs. 20,000 per month without commission and not yet confirmed.....”

Without it being viewed from a constrained angle and not founded on any known legal principle, as the Appellant has done, it is not difficult to state that any person who is under a probationary contract at a salary is an employee within the contemplation of the Employment Act, 2007. The Respondent was an employee of the Respondent.

34. However, I would agree with the Appellants that there was no evidence put before the trial Court by the Respondent from which it can be sufficiently discerned by the Court that indeed the Respondent assumed a further role of Truck driver. The Appellant's witness's evidence to the effect that he was a Salesman only was not in any manner discounted.

35. Having held as I have hereinabove, that there existed an employer-employee relationship between the Appellant and the Respondent, and seeing that the Appellant's attack on the learned trial Magistrate's finding that the termination of the Respondent's employment was only predicated upon the narrow view that no such relationship existed, to legally enable filling of a claim for unfair termination, I have no reason to interfere with the finding.
36. The reliefs for house allowance and underpayments were both anchored on the Respondent's assertion that at all material times, he was employed as a Truck Driver, and was not remunerated as such per the relevant Wage Orders. Having found that he was not at any time employed in that role, I find no difficulty in concluding that the award by the learned trial Magistrate under the heads, "underpayments" - Kshs. 21,000, and "Unpaid house allowance"-Kshs. 9198 is hereby set aside.
37. Section 49[1][c] of the Employment Act, 2007, bestows upon the Courts the authority to award a compensatory award in

situations where, in a litigation, the employee has successfully challenged their employer's decision to unfairly terminate their employment. However, it is essential to note that the authority is discretionary and exercised on a case-by-case basis.

38. I note the learned trial Magistrate awarded compensation for unfair termination, one month's gross salary, KShs. 30,000. The salary of KShs. 30,000 was erroneously informed by her finding that the Respondent was a Truck Driver. Having found that he wasn't, I must disturb the award and reduce it to KShs. 20,000, the contractual gross salary the Respondent was earning.

39. In the upshot, the appeal is allowed in the terms hereinabove. As the success is partial, each party shall bear its own costs.

Read Signed and Delivered this 12th Day of March 2026.

OCHARO KEBIRA

JUDGE

ORIGINAL