REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E112 OF 2023

(Before D. K. N. Marete)

JOYCE WANJOHI MAINA……. APPLICANT/APPELLANT

VS

VIEEW BROTHERS LTD……..…… RESPONDENT

JUDGMENT

This matter also originated by way of Memorandum of Appeal dated 23rd June, 2023. It is an appeal from the whole judgment of the trial court in Milimani CMELRC Cause No. 1606 of 2019 and comes out as follows;

1. *THAT the Learned Magistrate erred in fact and in law in finding that the Appellants did not proof that he was employed by the Respondent.*
2. *THAT the Learned Magistrate erred in law and fact in failing to take into consideration the Appellants documentary evidence availed in court.*
3. *THAT the Learned Magistrate erred in law and fact in failing to analyze and consider the submissions of the Appellants and dismissing the case.*
4. *THAT the Learned Magistrate erred in fact in law and in dismissing the Appellants suit against the weight of the evidence on record.*
5. *THAT the Learned Magistrate erred in fact and in Law in failing to assess the quantum of damages that would have been awarded to Appellants had the court found in his favour.*

WHEREFORE THE APPELLANT prays as follows**:-**

1. *The appeal be allowed and the judgment delivered on 8th June, 2023 by the trial Court be set aside in its entirety.*
2. *The Court awards the Appellant the prayers sought in his Claim.*
3. *The costs of this Appeal and that of the Lower Court be granted and awarded to the Appellant.*

The Appellant in their written submissions dated 11th December, 2024 opened by restating the place of a first appellate court as encapsulated in the authority of **John Teleiyo Ole Sawoyo vs David Omwenga Maobe (2013) eKLR** which observed thus:

"This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanor and should make allowance for the same."

Similarly in **Ephantus Mwangl & another-v-Duncan Mwangi Wambugu [1982-88] 1KAR** 278 at page 292, as follows:

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did." The Court went ahead and stated that:

"The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that the impression based on demeanor of material witnesses was inconsistent with evidence in the case generally."

It is their proposition and submissions that this court is under a duty to delve into the factual details and revisit the facts and evidence presented at the trial court. This is with a view to analyzing and evaluating this evidence with a view to arriving at its own independence conclusions. Cumulatively, the appellant submits that the trial court failed to appreciate the evidence placed before it and acted on wrong principles thereby leading to an erroneous determination and decision.

The Appellant's case and submission in reliance of the documents filed in court on 5th September, 2019 and now placed at pages 10 to 13 of the Record of Appeal prove that there existed employment relationship between the parties and indeed, the Respondent would pay statutory deductions as mandated by law. Besides, the Appellant pins his case on the basis of page 25 of the Record of Appeal at paragraph 4 of the Reply to Claimants Statement of Claim where the Respondent avers that the claimant's services were not prematurely terminated rather it was the claimant who resigned from active employment with the Respondent. This is also repeated at page 28 of the Record of Appeal. The trial court therefore failed to consider the material placed before it and therefore misguided itself by making reference to documents that were never filed or availed during trial by the Respondent.

This is escalated by the trial court's conclusion that the claimant/appellant was an independent contractor which line of defence came out in the defence during the *viva voce* evidence of the respondent's witness which in the Appellant's submissions was an afterthought as this was not supported in evidence or the Respondent's pleadings.

The Respondent on the other hand submits that this court has the capacity to hear and determine his appeal and supports this on the authority of **Anne Wambui Nderitu vs Joseph Kiprono Ropkoi and another (2004) eKLR** is to

"…re-evaluate such evidence and reach its own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate."

It is the Respondent's case that at the trial, she ably demonstrated that the Appellant was not an employee but instead, an independent contractor and therefore the protection offered to employees under the Employment Act, 2007 was not available to him. This is illustrated at pages 93, 94 and 95 of the Record of Appeal, this being RW1's examination in chief, cross-examination and re-examination.

Section 10(7) of the Employment Act, 2007 shifted the burden of proof to the Respondent to prove that the Appellant was indeed an independent contractor which burden was discharged by the Respondent by disapproving the Appellants contention that he was an employee or not as displayed at pages 76,77 and 78 of the Record of Appeal.

The Respondent disapproves the Appellant's position that the documents adduced at trial proved a case of employment. It is their submission that the letter of recommendation at PEXH 1 on

page 10 of the Record of Appeal is not evidence of an employer/employee relationship *inter partes.* It does not indicate in which position the Appellant worked for the Respondent but only that he worked for the Respondent as a driver. The actual relationship was qualified and quantified as that of an independent contractor through the oral testimony of the Respondent. These assertions stood firm throughout the Respondent's testimony in court.

The Respondent further submits that ordinarily, a recommendation letter is by its very nature a document of vouching for the skills, qualifications and characteristics of a person with the aim of getting the bearer favourable consideration in employment situations. It is not an indicator of the employment relationship between the author and the recommendee. Again, the Respondent vehemently denies involvement in the Appellant's registration with the NSSF or NHIF at page 95 line 1 of the Record of Appeal. These documents, PEXH 2 and PEXH 3 are merely an indicator of the Appellant's registration and would not support a case of employment by the Respondent. In any event, the Respondent never paid or made any contributions and was unaware of the registration particulars of the Appellant.

In finality, the Respondent submits that the trial court found against the Appellant because he was not able to propel a case in his favour. The issues raised by the Appellant on the trial court making a judgment based on documents not availed or even on *viva voce* evidence now rubbished as an afterthought and especially treated as the gospel truth are not sustainable. This is because the judgment of court considered the respective cases of the parties and found that the Appellant had failed to establish a case for employment by the Respondent.

Overall, this appeal is opportunistic and attempts to cling on flimsiness and trivialities in a bid to win the favour of this court. However, it all comes out clearly that the Appellant indeed failed to prove its case of employment on a balance of probabilities. He failed to satiate the evidential threshold brought out by the provisions of Section 47(5) of the Employment Act, 2007.

This court finds that the judgment of the trial court is solid and considered. The Appellant failed to establish a case of being an employee of the Respondent. He was not able to satiate the requirements of proof as provided for under section 47 (5) of the Employment Act, 2007.

I am therefore inclined to dismiss the appeal with orders that each party bears their costs of the same.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mrs. Kariuki instructed by Wanjugu – Waweru & Associates for the Appellant
2. Mwaniki instructed by Mwaniki Njuguna & Company Advocates for the Respondent