

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
ELDORET**

ELRC APPEAL NO. E029 OF 2024

(Before Hon. Lady Justice Maureen Onyango)

RAJAB WASWA NABWAYA

APPELLANT

VERSUS

WESTERN STEEL MILLS LIMITED 1ST

RESPONDENT

LABOUR PLANNET LIMITED 2ND

RESPONDENT

(Being an appeal against the Judgment and Decree of the Honourable Mukabi Kimani (Principal Magistrate) dated 14th June 2024 in Eldoret CMELRC No. 80 of 2021: Rajab Waswa Nabwaya v Western Steel Mills Ltd & another)

JUDGMENT

1. By a Statement of Claim dated 24th June 2021, the Appellant (Claimant in the trial court) alleged that he was unlawfully dismissed from employment by the Respondent on 31st October, 2020 and was not paid his terminal dues as itemized below:

- a. Unpaid House Allowance from

February 2017 to October 2020

20% x Monthly Salary x 45 Months worked

20% of 15,736.00 = 3,147.20 monthly allowance)

3,147.20 x 45 months = 141,624.00

b. Service benefits (15 Days x years

worked x monthly salary Divide by 30)

15 x 4 x 15,736.00/30 =

31,472.00

c. One month salary in lieu of notice

(One month salary =15,736 + 3,147.20)=

.....18,883.20

d. Compensation for unfair termination

(Gross Pay (Basic Salary plus House Allowance) x 12)

18,883.20 x 12 = 226,598.40

e. Defaulted National Social Security Fund

remittance for 132 months worked

(400 x 45 months less remitted) 18,000.00

f. National Hospital Insurance Fund

remittance for the 60 months worked.

500.00 x 45 = 22,500.00

TOTAL CLAIM FOR UNFAIR DISMISSAL 459,077.60

g. Loss of future earnings (permanent employment)

For the next 17 years

(15,736.00 x 12 x 17=

3,210,144.00

TOTAL GRANT CLAIM

3,669,221.00

2. The Claimant prayed for the following reliefs:

- a) A declaration that the summary dismissal of the Claimant from permanent employment, by the Respondent was malicious, unlawful, unfair, unprocedural and fundamentally violated the Rights of the Claimant.
- b) A declaration that the Claimant was entitled to House Allowance.
- c) A declaration that the Claimant is entitled to one month salary in lieu of annual leave.
- d) A declaration that the Claimant is entitled to National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF), for the period worked.

- e) A declaration that the Claimant is entitled to his dues, compensation, damages, and benefits as a result of wrongful dismissal from the employment as calculated herein.
- f) A maximum compensation of 12 months as per Section 49 (c) of the Employment Act, Cap 226 Laws of Kenya (Act No 11 of 2007) and Section 12 of the Employment and Labour Relations Court Act, Cap 234 B, Laws of Kenya. (Act No 20 of 2011.
- g) Damages and terminal dues as per the calculations under paragraph 8.
- h) Loss of Earning of salary for a period of 17 years that the claimant would have worked until the statutory retirement age of 60 years.
- i) A Certificate of Service as per section 51 of the Employment Act;
- j) Costs of this suit from the date of filling until its full determination.
- k) The claim is allowed in entirety.
- l) Any other and/or further relief as the court deems fit and just to grant.

3. The 1st Respondent entered appearance and filed a Response to the Statement of Claim dated 19th May 2023. In the Response the 1st Respondent denied that the Appellant was its employee and asserted that the 2nd Respondent was the employer of the Appellant. It further stated that it had entered into a Labour Supply contract with the 2nd Respondent and that the Appellant was working at the 1st Respondent's premises under the said labour contract. According to the 1st Respondent, it was a stranger to the averments in the Statement of Claim.
4. The 2nd Respondent did not file any pleadings or participate in the proceedings in the trial court.
5. The suit proceeded to full hearing and thereafter the trial court delivered its judgment on 14th June 2024. There is a copy of judgment filed in the Supplementary Record of Appeal dated 2nd March, 2026. The same is however not certified. There is further no copy of decree in the court record.
6. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 8th July 2024 on the following grounds of appeal:

- a) The learned Magistrate erred in law and fact and rendered a decision that allowed the Appellant's Claim Against the Interested Party, Labour Planet Ltd but declined the Appellant's Claim against the Respondent, Western Steel Mill Ltd.
- b) The learned Magistrate erred in law and fact and failed to hold both the Respondent and the Interested Party jointly and severally liable for unfair dismissal of the Claimant/Appellant from employment.
- c) The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly appreciate the facts of this case and the employment law as envisaged under section 2 of the Employment Act, Cap 226 laws of Kenya which defines an employer to include but not limited to 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.
- d) The learned Magistrate erred in law and fact by misapprehending the evidence on record and applying

the wrong principles of law and rendered a decision that is incompetent and not supported by evidence and law.

- e) The learned Magistrate erred in law and fact by misapplying the provisions of the employment law and / or procedural law as envisaged under the provisions of Order 1 Rule 7 of the Civil Procedure Rules 2010 whereby the Claimant/Appellant is entitled to enjoin two or more defendants and rendered a decision that is incompetent and not supported by law.
- f) The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly appreciate the fact that the claimant was jointly and severally employed by both the Respondent and the Interested Party.
- g) The learned Magistrate erred in law and fact in dismissing the Claimant's/Appellant's claim against the Respondent in total disregard of the provisions of the Constitution; the Statutory Law, the Employment Law, the Case Law and the submissions tendered therein.

7. The Appellant prays for the following orders:

- a. That the Respondent, Western Steel Mills Ltd and the Interested Party, Labour Planet Ltd be held jointly and severally liable for unfair dismissal of the Claimant/Appellant from the employment.
 - b. The Respondent be condemned to pay the costs of the instant appeal.
8. The appeal was disposed of by way of written submissions. The 1st Respondent's submissions are dated 27th June, 2025. The Appellant did not file any submissions.

The 1st Respondent's Submissions

9. The 1st Respondent identified the only issue for determination to be whether the appeal has merit.
10. The Respondent submitted that in the Appellant refers to Labour Planet Ltd as an Interested Party in the memorandum of appeal while in the Record of Appeal dated 12th February 2025 Labour Planet Ltd is referred to as the 2nd Respondent.
11. On the issue whether the appeal has merit the 1st Respondent refers to the decision in **Madara & 2 others v Chite & another (Civil Appeal 111 of 2022) [2022] KEHC 24270**

(KLR) (24 October 2023) (Judgement) where the court set out the duty of the first appellate court.

12. The 1st Respondent further referred to the definition of *joint and several* liability in Blacks Law Dictionary 10th Edition as follows:

“liability that may be apportioned among two or more Parties or to only one or a few select members of the group at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity form non-paying parties”

13. It is submitted that the Appellant produced his NSSF Statement (Claimant’s Exhibit 1) which clearly indicates that the 2nd Respondent was the Appellant’s employer.
14. Relying on section 107 of the Evidence Act the 1st Respondent submitted that the agency relationship alluded to by the Appellant with reference to section 2 of the Employment Act was not supported by any evidence. For emphasis the 1st Respondent relied on the decision in **Nyane v Western Steel Mills Ltd & another (Employment and Labour Relations Court Cause 156 of 2017) [2024] KEE 13396**

KLR (11December 2024) (Judgment) where this court stated that employment claims must be premised on a relationship capable of enforcement. The 1st Respondent submits that it was the onus of the Appellant to prove to the lower court that the 1st Respondent was jointly liable as an employer of the Appellant, which burden the Appellant failed to discharge.

15. The 1st Respondent further relied on the decision in **Board of Governors St. Mary's School v Boli Festus Andrew Sio [2020] KECA 952 (KLR)** where the court discussed the liability of employers and their agents.
16. The 1st Respondent submits that there is no agency relationship between it and the 2nd Respondent who was an independent contractor. That the breaches of the 2nd Respondent should not be visited upon it.
17. The 1st Respondent urged that the appeal be dismissed with costs.

Analysis and Determination

18. This being a first appeal, this court is obliged to re-assess, re-evaluate and re-examine the evidence adduced before the

trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving allowance for the same. [**See *Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 12***].

19. Before I delve into the substantive determination of the appeal, there is a preliminary point that the court needs to determine. This is whether the appeal is competently before this court.
20. From a perusal of the Record of Appeal, I have noted that there is no certified copy of the judgment of the trial court on record. I have further noted that no copy of the decree was filed by the Appellant. This omission is fundamental.
21. Rules 14 and 15 of the Employment and Labour Relations Court (Procedure) Rules, 2024 provides for what constitutes an appeal as follows: -

14. A memorandum of appeal shall be in Form 1 as set out in the First Schedule with necessary modification.

15. (1) A memorandum of appeal shall be accompanied by a record of appeal comprising a certified copy of pleadings, the proceedings, any documentary evidence relied on, and

the judgment, ruling, decision, order, decree or award appealed against.

(2) *Where the record of appeal is not filed together with the memorandum of appeal, the appellant shall file the Record within sixty days from the date of delivery of the judgment, ruling, decision, order, decree or award appealed against*

(3) *Unless the nature of the document renders it impracticable, each document prepared for the record of appeal shall—*

(a) contain a table of contents of the record of appeal;

(b) be on foolscap paper of durable quality;

(c) printed on only one side of the paper;

(d) have a margin of not less than one and a half inches left on the left side of the sheet; and

(e) be paginated consecutively.

(4) *The Court may, in addition to or in lieu of a record of appeal, call and rely on the court file or material for the proceedings appealed against in disposal of the appeal.*

16. *The appellant may, with the leave of the Court, file and serve a supplementary memorandum of appeal or a supplementary record of appeal.*

22. The use of the word “shall” denotes a mandatory requirement and imposes an obligation that must be strictly complied with, and failure to do so renders the appeal fatally defective.
23. In the instant appeal the Appellant was granted leave to file a supplementary record of appeal which he did. The same is dated 2nd March, 2026. The copy of judgment therein is however not certified and does not appear to have been the final copy as it has endorsements by hand by a person that is not identified and did not countersign against the endorsements.
24. The decree against which the appeal is lodged was not filed.
25. In **Imathiu v Mukiira (Civil Appeal E156 of 2022) [2023] KEHC 27211 (KLR) (19 December 2023) (Judgment)** **Neutral citation: [2023] KEHC 27211 (KLR)**, Muriithi J had the opportunity to consider the consequences of not filing a decree in the record of appeal. After considering several decisions on the subject he concluded that the failure by the Appellant to include a decree from the trial court in the record of appeal was fatal and rendered the appeal incompetent.
26. The Supreme Court of Kenya, while discussing the record of appeal in the case of **Bwana Mohamed Bwana v Silvano**

Buko Bonaya & 2 others [2015] eKLR held as follows at paragraph 41:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

27. In the earlier case of in **Chege v Suleiman [1988] eKLR**, the Court of Appeal observed that the issue of failure to attach a copy of the decree in the record of appeal is a jurisdictional point, and stated as follows:

“But we concur positively in the submission of Mr. Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from “decrees and orders

of the High Court”. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.” ...

28. In **Paul Karenyi Leshuel v Ephantus Kariithi Mwangi & Another (2015) eKLR**, the court emphasized the essence of a decree as part of the record of appeal by stating as follows:

*“... the Court of Appeal In **Civil Appeal No. 7 of 1998, Municipal Council Of Kitale - versus- Fedha (1983) eKLR** held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent.....One may ask why so much importance is attached to this document: the answer appears to me that an appellate court can only uphold or overturn what has been demonstrated to exist much as this requirement is contained in the rules, it is not, in my humble view, a requirement that can merely be dismissed as a procedural technicality that maybe swept under the carpet; the question whether or not there is indeed an appeal which calls for the appellate court to exercise its jurisdiction in*

that respect goes to the root of the appeal itself for without an appeal, properly so called, any attempt to invoke and exercise that jurisdiction would be in vain.”

Guided by the holding of the Supreme Court and the Court of Appeal cited above, I find

29. It is the duty of the Appellant to ensure that a complete and proper record of appeal is filed. In this case the counsel for the Appellant did not take the issue of filing a complete record seriously. The copy of judgment filed is not certified. There is no copy of decree that the appeal seeks to overturn. There is no mention of the decree by counsel.
30. Further, as observed earlier herein above, there are no submissions filed on behalf of the Appellant.
31. In the circumstances, this court finds that the instant appeal is incompetent for want of a complete record of appeal, in particular, the absence of a certified copy of judgment and a certified copy of decree.
32. Consequently, the appeal is hereby struck out with an order that the 1st Respondent shall have the costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON
THIS 30TH DAY OF APRIL, 2026**

**MAUREEN ONYANGO
JUDGE**