

**IN THE COURT OF  
APPEAL AT  
MOMBASA**

**(CORAM: MUSINGA (P), MURGOR, JAMILA MOHAMMED, JJ.A.)**

**CIVIL APPEAL NO. E104 OF  
2023**

**BETWEEN**

**TOBIAS KATANA DZUYA.....APPELLANT**

**AND**

**GREGORY WINDELL.....RESPONDENT**

(Being an appeal from the judgment and decree of the Employment  
and Labour Relations Court of Kenya at Mombasa  
(M. Mbaru, J.) dated 18<sup>th</sup> May, 2023

in

**ELRC No. E066 of 2022**

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**JUDGMENT OF THE COURT**

**Introduction**

- 1) This is a second appeal arising from the judgment of the Employment and Labour Relations Court (ELRC) at Mombasa (**M. Mbaru, J.**) delivered on 18<sup>th</sup> May 2023 in ELRC Appeal No. E066 of 2022.
- 2) In that judgment, the learned Judge partly allowed an appeal from the decision of the trial court which had awarded the appellant the sum of Kshs.752,922 as terminal dues arising from his employment with the respondent.

- 3) Upon reconsideration of the evidence and the applicable Regulation of Wages Orders, the learned Judge reached a different conclusion regarding the appellant's job classification and consequently reduced the award to Kshs.268,754.35. The appellant, being dissatisfied with that determination, lodged the present appeal.
- 4) A brief background will help place the appeal in context. The appellant commenced proceedings before the trial court by filing a Memorandum of Claim dated 28<sup>th</sup> August 2019 seeking several remedies against the respondent including: compensation for underpayment; unpaid salaries for duties allegedly undertaken as a daytime watchman; unpaid salaries for services rendered as a personal assistant; and remittance of contributions to NHIF.
- 5) The appellant contended that he was orally employed by the respondent in 2002 and served continuously until July 2019. According to the appellant, he served as a caretaker responsible for gardening, tending to the respondent's pets, mowing the lawn and maintaining the compound. The appellant further alleged that the respondent failed to issue him with a written contract of employment, failed to issue pay slips, and subjected him to continuous underpayment contrary to the applicable Regulation of Wages Orders.
- 6) The respondent denied those allegations and maintained that the appellant was engaged merely as a gardener or general worker

responsible for

maintaining the compound. During trial it emerged that the respondent had other workers in addition to the appellant. Further, the appellant admitted signing a resignation letter, but maintained that he did not understand its contents.

- 7) Upon hearing the parties, the trial court dismissed the claim for unfair termination, but found that the appellant had been underpaid contrary to the applicable wage regulations. The trial court consequently awarded compensation for underpayment and service pay, but ordered that each party bear its own costs.
- 8) Dissatisfied with that decision, the respondent appealed to the ELRC. Upon reconsideration of the evidence, the learned Judge concluded that the appellant's duties were general in nature and not specialized and therefore classified him as a general worker rather than a caretaker. The learned Judge recalculated the appellant's dues using the wage rate applicable to a general worker and reduced the award accordingly.
- 9) The appellant now challenges that determination before this Court on the grounds, *inter alia*, that the ELRC erred in law by: disregarding the respondent's admission on the position held by the appellant; by misapplying the provisions of Section 10(7) of the Employment Act, 2007 as regards the appellant's employment; by assessing the appellant's pay, service pay and underpayment based on the wrong job description under

the various Regulation of Wages Orders; and that the ELRC exercised its discretion wrongly by denying the appellant costs of the claim.

10) The appellant prayed for orders that: the appeal be allowed; and that the judgment and decree of the ELRC dated 18<sup>th</sup> May 2023 in Employment Appeal No. E066 of 2022 be reviewed in part and substituted with orders that: the appellant was employed as a caretaker; the underpayments be enhanced to Kshs.1,602,522.60; service pay be restored to Kshs.147,861.63 as awarded by the trial court, and that the costs of this appeal, costs in the ELRC and the trial court be awarded to the appellant.

#### **Submissions by Counsel**

11) The appeal was disposed of by way of written submissions which were highlighted orally before this Court. Learned counsel **Mr. Muriithi** appeared for the appellant while **Mrs. Nyange** appeared for the respondent.

12) **Mr. Muriithi** submitted that the central issue concerned the appellant's correct job description. Counsel argued that the respondent admitted the duties pleaded by the appellant and that documentary evidence referred to the appellant as a caretaker.

13) Counsel further relied on section 10(7) of the Employment Act, submitting that where an employer fails to produce a written contract the burden of disproving alleged employment terms lies on the

employer.

- 14) Counsel therefore urged the Court to find that the appellant served as a caretaker and that the underpayment should be computed under the wage category applicable to a caretaker.
- 15) On costs, counsel submitted that the appellant had served the respondent for about seventeen years and had been compelled to seek judicial intervention and therefore deserved costs.
- 16) **Mrs. Nyange** opposed the appeal and relied on written submissions dated 17<sup>th</sup> February 2025. Counsel argued that the appellant's duties included gardening, watchman, and personal assistance, and that the learned Judge correctly classified the role as that of a general worker.
- 17) Counsel further submitted that costs were discretionary and that no basis had been established for appellate interference with the trial court's exercise of discretion.

### **Determination**

- 18) We have considered the record, the submissions by counsel, the authorities cited and the law. Before considering the merits of the appeal, it is necessary to restate the limits of this Court's jurisdiction on a second appeal. It is settled that a second appellate court is concerned only with matters of law. A second appellate court will not interfere with concurrent findings of fact unless it is shown that the courts below acted on no evidence or misapprehended the evidence.

**19)** This principle has been consistently affirmed in many decisions of this Court, including **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR**

**78** and **Abok James Odera t/a A.J. Odera & Associates v John Patrick**

**Machira t/a Machira & Co Advocates [2001] eKLR.**

20) We discern the issues for determination to be the following:

- a) Whether the learned Judge erred in the interpretation and application of section 10(7) of the Employment Act;
- b) Whether the learned Judge erred in classifying the appellant as a general worker rather than a caretaker under the applicable Regulation of Wages Orders; and
- c) Whether there is any basis for interfering with the exercise of discretion on costs by the courts below.

21) On the question of the interpretation of **Section 10** of the **Employment Act 2007**, the said provision requires employers to provide employees with written particulars of employment. **Section 10(7)** provides that where an employer fails to produce written employment particulars, the burden of disproving alleged employment terms lies on the employer.

22) Section 10 (7) and Section 74 of the Employment Act were enacted to ameliorate the evidential disadvantage to which an employee fails to keep or produce the statutory employment records required by law. Nevertheless, those provisions do not displace the ordinary rule that he who alleges must prove; an employee must still prove the foundational

facts of his claim on a balance of probabilities.

**23)** That position is consistent with the holding in **Jackson Muiruri Wathigo**

**t/a Murtown Supermarket v Lilian Mutune [2021] eKLR** where this

Court stated as follows regarding the evidential burden placed on an employer to produce written particulars and records required by sections 10(7) and 74 of the Employment Act:

***“20. In this regard, the learned Judge correctly appreciated that by virtue of Section 10(7) of the Employment Act the appellant was under a duty as the employer to produce written particulars of the respondent’s employment. His failure to do so placed the burden of proof upon him to establish his contention as well as disprove the respondent’s allegation. See Nanyuki Water & Sewage Company Limited vs Benson Mwiti Ntiritu & 4 others [2018] eKLR.***

***21. In our view, the appellant did not discharge the above burden. It was not enough for him to just state that the respondent was a casual employee. More was needed to support his position...***

***24...Similarly, by dint of Section 10(7) of the Employment Act the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the Employment Act.”***

**24)** In **Nanyuki Water & Sewerage Company Ltd v Benson Mwiti Ntiritu**

**& 4 others [2018] eKLR**, this Court held that where an employer fails to

produce written particulars of employment as required under section 10 of the Employment Act, the burden of proving or disproving the alleged terms shifts to the employer, and a mere denial will not suffice. That position has

since been clarified in **Ondieki v Comply Industries Ltd [2023] KECA**,

where the Court explained that section 10(7) imposes only an evidential burden on the employer to produce employment records and rebut the employee's assertions, while the legal burden of proof remains with the employee under sections 107 and 108 of the Evidence Act.

25) It follows that the absence of written records does not create an irrebuttable presumption in favour of the employee, and the court must evaluate the totality of the evidence, including the nature of the duties performed, in determining the true character of the relationship. Accordingly, once the trial court has directed itself on these principles, an appellate court will only interfere if it is shown that the decision was based on no evidence, a misapprehension of the evidence, or wrong principles. In the instant appeal, no such error has been demonstrated.

26) Regarding the classification of the appellant, the Employment Act does not define the term 'caretaker'. Guidance may however be drawn from other texts. **The Concise Oxford English Dictionary (12<sup>th</sup> Edition)** defines the word 'caretaker' as:

***“A person employed to look after a public building...a person employed to look after people or animals.”***

27) The defining characteristic of such a role is responsibility for oversight or management of property entrusted to the individual. It therefore entails more than the performance of routine manual gardening or

maintenance

tasks. The appellant asserted that he served as a caretaker for approximately seventeen years.

28) The duties described in the pleadings included gardening, mowing lawns, tending pets and maintaining the compound. These duties are essentially manual gardening and maintenance tasks. These duties do not demonstrate that the appellant exercised supervisory authority over the premises or was entrusted with managerial oversight of the respondent's property. Occasional errands such as paying utility bills during the respondent's absence cannot transform what were essentially manual duties into those of a caretaker.

29) Wage regulation in Kenya is governed by subsidiary legislation issued under the Labour Institutions Act, including the various Regulation of Wages Orders. These wage orders prescribe minimum wages for various occupational categories and are periodically revised.

30) In determining the appropriate classification, the court must examine the duties actually performed by the employee rather than the job title. A caretaker ordinarily occupies a role involving oversight or supervision of premises. By contrast, a general worker performs manual labour involving routine maintenance tasks without supervisory responsibility. The duties admitted by the appellant fall squarely within the latter category.

31) On the issue of costs, both the trial court and the ELRC directed that

each party bear its own costs. Costs are in the discretion of the court. The

applicable principle is settled. In **Mbogo & Another v Shah [1968] EA 93**,

the Court held that an appellate court will not interfere with the exercise of discretion unless it is shown that the judge misdirected himself, considered matters he ought not to have considered, failed to consider matters he ought to have considered, or was plainly wrong. In the circumstances of this case, there is no basis for disturbing the order on costs in the absence of demonstrated misdirection.

32) Having reconsidered the record of appeal, the submissions by counsel and the applicable law, we are satisfied that the ELRC properly directed itself on the law and correctly evaluated the evidence and did not err in finding as it did.

33) Accordingly, the appeal lacks merit and is dismissed with costs to the respondent.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of May, 2026.**

**D. MUSINGA (PRESIDENT)**

.....  
**JUDGE OF APPEAL**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**  
**JAMILA**  
**MOHAMMED**

.....  
**JUDGE OF APPEAL**

I certify that this is  
a True copy of the  
original Signed

**DEPUTY REGISTRAR**