



REPUBLIC OF KENYA



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**Oluoch v Sibed Transport Co Limited (Civil Appeal 291 of 2019)  
[2025] KECA 98 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 98 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 291 OF 2019  
DK MUSINGA, S OLE KANTAI & JW LESSIT, JJA  
JANUARY 24, 2025**

**BETWEEN**

**FREDRICK OTIENO OLUOCH ..... APPELLANT**

**AND**

**SIBED TRANSPORT CO LIMITED ..... RESPONDENT**

*(Being an appeal against the Judgment and Decree of the Employment  
and Labour Relations Court at Nairobi (Abuodha, J.N., J.)  
delivered on 7th December, 2018 in E.L.R.C Cause No. 612 of 2013)*

**JUDGMENT**

1. This is a first appeal from the judgment of the Employment and Labour Relations Court (ELRC) (Abuodha, J.) delivered on 7<sup>th</sup> December, 2018 where the appellant's claim was dismissed. Our mandate is to re-evaluate the evidence and reach our own conclusions of fact as was stated in the case of *Selle vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 as follows:

“...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”

2. The appellant, Fredrick Otieno Oluoch, claimed in his Memorandum of Claim that he was employed by the respondent, Sibed Transport Company Limited, as a Fleet Coordinator in Nakuru on 4<sup>th</sup> April, 2009 at a monthly salary of Kshs.25,000 which rose to Kshs.30,000 by the time he resigned on 30<sup>th</sup> January, 2012; that he served with dedication but was frustrated in his work, leading to his resignation;



that his salary was always paid late; he was not allowed to take annual leave; he worked overtime without pay; that he was not paid terminal benefits; and for all that he claimed balance of salary for September, 2011 being Kshs.20,000; salary for January, 2012 Kshs.30,000; annual leave for 2 years and 10 months Kshs.90,000; gratuity for 2 years and 10 months Kshs.45,000; overtime Kshs.784,615; house allowance Kshs.153,000 and transfer allowance to Nairobi Kshs.25,000.

3. The respondent delivered a response to the Memorandum of Claim where it denied that the appellant was its employee, stating that he was engaged on temporary and casual basis when need arose; it denied that he worked for the period he alleged to have worked; that by the time he left employment the appellant could not account for over Kshs.200,000 belonging to the respondent; it admitted that it had transferred the appellant to its Mombasa office from Nakuru but denied that it did not pay him for travel and maintenance in Mombasa. It was stated that the appellant had absconded duty on 31<sup>st</sup> August, 2011 while in Mombasa; that the appellant failed to account for money entrusted to him to pay the respondent's drivers; all the claims made by the appellant were denied, and it was alleged that the respondent had a legitimate claim against the appellant for Kshs.200,000 and a laptop computer entrusted to him by the respondent.
4. There was no counter-claim.  
The appellant, in his testimony before the trial Judge, repeated what we have already stated, and denied that he had taken away the respondent's laptop or money.
5. Kulmiz Abdulhalim Mohamed, the respondent's director, testified that his company did fuel transport business in Kenya and the region; that the appellant was their clerk based at Nakuru, who was transferred to Mombasa but then absconded work. He denied that the appellant worked overtime, claiming that he sent money to the appellant to pay fleet drivers but the appellant did not pay them. The appellant's wages were paid in cash, he added.
6. As we have seen, the appellant's claim was dismissed, leading to this appeal, where the appellant has raised seven grounds of appeal in the Memorandum of Appeal drawn for him by his M/s Ochieng Ochieng Advocates.
7. The Judge is faulted for not finding that the appellant's claim had been proved on a balance of probabilities; that the Judge erred in law when he held that the appellant had failed to prove unfair termination or wrongful dismissal; that the Judge erred in law by failing to consider and determine the issues in dispute between the parties arising from pleadings before the court; that the Judge misapprehended the evidence on the claim for travel and maintenance allowance; that the Judge reached findings that were unsupported by evidence; that the Judge erred in failing to make findings on issues pertaining to unpaid salaries owing to the appellant, payment for annual leave, gratuity, overtime and allowances payable to the appellant in terminal benefits. We were asked to allow the appeal, set aside judgment of the ELRC and enter judgment for the appellant as prayed in the Memorandum of Claim filed in that court.
8. When the appeal came up for hearing before us on 9<sup>th</sup> July, 2024, learned counsel Mr. Wauna Oluoch appeared for the appellant, but there was no appearance for the respondent who had been served with a hearing notice on 27<sup>th</sup> June, 2024. Counsel for the appellant adopted his written submissions dated 16<sup>th</sup> December, 2019 where the appellant submits that the case before the ELRC was proved to the required standard. It is submitted that the appellant tendered his resignation from employment with the respondent due to frustrations at work; that the trial court failed to make a finding on terms of employment of the appellant with the respondent. The appellant cites section 10(7) of the *Employment Act* which places the burden on an employer to produce a contract of employment and the terms thereof. It is submitted that the appellant was not issued with a letter of employment and the



Judge is faulted for not finding in favour of the appellant in the circumstances. It is further submitted that the Judge failed to consider the appellant's oral testimony that he had been transferred and travelled to Mombasa without being paid.

9. It is submitted that the appellant could not be a casual employee as stated in response to the Memorandum of Claim in view of the provisions of section 37(1)(a) of the *Employment Act*; that he was a permanent employee entitled to terminal benefits.
10. It is submitted that the respondent failed to pay the appellant's wages for the balance of September, 2011 and salary for January, 2012; that the appellant was entitled to be paid annual leave which he had not taken for the 2 years and 10 months that he had worked for the respondent; payment for overtime, house and travel allowance.
11. We have considered the record, submissions by the appellant and the law, and this is how we determine this appeal.
12. The appellant alleged that he was employed by the respondent as its Fleet Coordinator on 4<sup>th</sup> April, 2009, an allegation which was denied by the respondent in its response to the claim where it was alleged that the appellant was employed as a casual employee on a need basis.
13. There is a letter on record dated 25<sup>th</sup> May, 2009 by the respondent headed: "TO WHOM IT MAY CONCERN," where the respondent states that the appellant is its agent "... authorized to handle the loading of all the company's trucks." There is also the evidence of the respondent's witness, Kulmiz Abdulhalim Mohamed, who confirmed that the appellant was their employee who was based at Nakuru and was later transferred to Mombasa. Therefore, the respondent's position in the response to the claim cannot hold at all. The appellant was the respondent's employee on terms that it was the respondent's burden to show in terms of section 10(7) of the *Employment Act* which provides:

"If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."
14. In the circumstances of the case where the respondent did not furnish to the appellant a contract of employment or produce in court such contract in the proceedings, we hold that the appellant was employed by the respondent on 4<sup>th</sup> April, 2009 on permanent terms as required by the *Employment Act*, 2007. There is no doubt, and it is so stated by the appellant, that he resigned from employment with effect from 31<sup>st</sup> January, 2012. So, the issue of unfair termination does not arise and was not relevant to the proceedings before the Judge. What is relevant is what the appellant was entitled to when he resigned from employment.

#### **i. Balance of salary for September, 2011.**

15. The appellant claimed that upon being transferred to Mombasa from Nakuru he travelled to the respondent's headquarters in Nairobi to claim his wages that had not been paid. He stated that he was paid Kshs.10,000, leaving a balance of Kshs.20,000. It was the respondent's responsibility (section 10(7) *Employment Act*) to produce documents to show that it had paid that balance, a burden it did not disprove. The law required the respondent to prove that it had paid that balance without which the appellant had proved on a balance of probabilities that he was owed Kshs.20,000 being the balance of September, 2011 wages. We would allow that claim.



## **ii. Salary for January, 2012.**

16. The appellant tendered a resignation letter dated 13<sup>th</sup> January, 2012 where he gave notice to resign with effect from 31<sup>st</sup> January, 2012. He stated that he was not paid any salary for that month. Again, it was the respondent's responsibility to prove that it had paid the salary for January, 2012.

## **iii. Annual leave for 2 years and 10 months.**

17. The appellant stated that he worked for the respondent for 2 years 10 months without being allowed to proceed on annual leave. He claimed a sum of Kshs.90,000. The respondent did not produce any records to show that its employee, the appellant, had been allowed to take his annual leave as required in law. Section 28 of the [Employment Act](#) requires that an employer ought to allow an employee to proceed on annual leave of not less than 21 working days after every twelve months with full pay. The respondent did not grant the appellant annual leave for 2 years and 10 months that he worked. Thus, he is entitled to payment for the said period of 2 years and 10 months, which amounts to Kshs.85,000.

## **iv. Gratuity for 2 years and 10 months.**

18. This Court, in *Bamburi Cement Limited v William Kilonzi*[2016] eKLR, defined gratuity as:

“... gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment, the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment.”

19. Without a contract of employment entitling the appellant to gratuity, we are unable to find for the appellant in that respect.

## **v. Overtime.**

20. The appellant stated in his Memorandum of Claim that he used to report to work at 5 a.m. and leave at 7 p.m. In evidence before the Judge he contradicted this by stating:

“... I used to report at work at 7.00 a.m. and leave around 8.00 o'clock at times. I was never paid for overtime. ...”

21. There was no evidence led to support this claim and the appellant was not entitled to it.

## **vi. Housing allowance.**

22. Section 31 of the [Employment Act](#) provides:

“(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in



addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-
  - a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
  - b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

(2) The Minister may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employees shall be dealt with as shall be specified in the notice.”

23. The respondent did not provide the appellant with accommodation or pay him any house allowance as required.
24. One of the issues that arose for determination by this Court in Grain Pro Kenya Inc. Ltd vs. Andrew Waithaka Kiragu[2019] eKLR was how to calculate housing allowance where the contract of employment did not specifically provide for it.
25. The Court stated:

“To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent. ...”
26. We adopt that holding.

The appellant is entitled to 15% of the basic salary he earned for 2 years and 10 months (30,000 x 15% x 34 months = Kshs.153,000).

#### **v. Transfer allowance to Mombasa.**

27. It was not disputed that the appellant was transferred to Mombasa from Nakuru. This was confirmed by the respondent’s witness in evidence before the Judge. The appellant did not however place any material before the Judge to show that he was entitled to a transfer allowance and if so, the quantum thereof. He did not show that he had incurred any expenses, and if so, how much. It would have amounted to a special damage claim which required pleading and proof of the same. In the circumstances, the appellant was not entitled to this claim.
28. In sum therefore, we partially allow this appeal by setting aside the judgment of the ELRC delivered on 7<sup>th</sup> December, 2018.
29. We award the appellant the following claims:
  - i. Kshs.20,000 being balance of September, 2011 salary.
  - ii. Kshs.30,000 being salary January, 2012.
  - iii. Kshs.85,000 being annual leave entitlement for 2 years and 10 months.



- iv. Kshs.153,000 being housing allowance entitlement for 2 years 10 months.
30. The appeal having partially succeeded, the appellant will have half of the costs of the appeal and of the suit in the court below.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR.**

