



**Salihiya Company Limited v Ouma & another (Civil Appeal
425 of 2019) [2025] KECA 310 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 310 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 425 OF 2019
DK MUSINGA, K M'INOTI & FA OCHIENG, JJA
FEBRUARY 21, 2025**

BETWEEN

SALIHIA COMPANY LIMITED APPELLANT

AND

MARY ACHIENG OUMA 1ST RESPONDENT

JECINTA ADHIAMBO OUMA 2ND RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated 23rd September 2016) in ELRC Cause No. 1137 of 2014 Consolidated with ELRC Cause No. 1138 of 2014)

JUDGMENT

1. This appeal arises from the judgment, was delivered by the Employment and Labour Relations Court (ELRC) (Abuodha, J.) on 23rd September 2016. The said judgment was in respect of two separate claims which had been filed by Mary Achieng Ouma and Jecinta Adhiambo Ouma. The said claims were consolidated by the trial court on 4th May 2015.
2. The 1st respondent, Mary Achieng Ouma (hereinafter “Mary” had asserted that she had been employed by the appellant Salihiya Company Limited (hereinafter “The Company”) in March 2005.
3. It was her case that although she served the Company with diligent devotion and selfless dedication, the said Company terminated her employment “unlawfully, unreasonably, and without notice.”
4. It was her further case that the company never paid her the terminal benefits as required by law. The said entitlements were enumerated in paragraph 7 of the Claim as follows:

“a. 1-month notice Kshs.18,000.00



- b. 24 days salary for February 2014 Kshs.14,000.00
 - c. Leave from 2006-2014 Kshs.100,746.00
 - d. 1 year compensation – Kshs.18,000 X 12
Kshs.216,000.00
Total Kshs.349, 746.00”
5. In addition to the particularized claim above, Mary asked the court to order the Company to provide her with a Certificate of Service.
6. Meanwhile, Jecinta enumerated the same figures in her claim against the Company. However, whilst in the body of the Claim she quantified the claim at Kshs. 349,146.00, Jecinta prayed for judgment in the following terms:
- “ a. 1 month notice Kshs. 11,000.00
 - b. 24 days salary for February 2014 Kshs. 18,000.00
 - c. Leave from 2006-2014 Kshs. 32,746.00
 - d. 1 years compensation- Kshs.18,000 X 12
Kshs.132,000.00
Total Kshs.184 034.00”
7. The said claim was in respect of Jecinta’s terminal benefits, as required by law when Jecinta’s contract of employment was terminated in a manner which she deemed to be unlawful, unreasonable and without notice.
8. In answer to the claims, the appellant filed a Defence and a Counterclaim in respect to each of the claimants.
9. First, the appellant denied the contention that the claimants were employees of the Company.
10. In the Counterclaim, it was asserted that the respondents herein were employees of an entity called SALIHIYA CARGO & SHIPPING AGENCY.
11. According to the appellant, the respondents converted cheques from their employer, and that they converted the proceeds of the said cheques to their own benefit. The respondents’ actions were said to have caused the appellant to suffer loss and damage to the tune of Kshs.533,538/-.
12. The particulars of the eight cheques which were converted were set out in detail, at paragraph 10 of the Defence.
13. The appellant asserted that the proceeds of the eight cheques were credited to bank account No. 01245xxxxxxxx, which was domiciled at the National Bank of Kenya Limited, Eastleigh Branch, Nairobi.
14. When the appellant got wind of the activities of the respondents, they made a report at the Shauri Moyo Police Station Nairobi and following investigations conducted by the police, the respondents were arrested and thereafter charged in Makadara Criminal Case No. 1042 of 2014; Republic vs Mary Achieng Auma and Nancy Adhiambo Auma.



15. After the respondents were arrested and charged in court, they never returned to their place of work, said the appellant. In the circumstances, the appellant denied the allegation that they had terminated the respondents' contracts of employment. If anything, it was the view of the appellant, that it was the respondents who had deserted duty.
16. In conclusion, the appellant called upon the court to dismiss the claims, and to thereafter grant judgment in favour of the Agency, for Kshs.533,538/-.
17. At the trial, both respondents testified, and thereafter Abdirahman Siyad Hussein testified on behalf of the Agency.
18. The trial court gave due consideration to the evidence tendered, and delivered its judgment on 23rd September 2016. Ultimately, the learned trial Judge expressed himself thus:

“Considering the case herein as a whole, and the conduct of the parties in relation to the employment contract, the Court will convert the cessation of employment relationship between the parties herein and award the Claimant’s one month’s pay in lieu of notice of termination of employment. The Court further awards them three months’ salary on account of unfair termination of employment.”

19. The appellant was aggrieved with the judgment and lodged an appeal to this Court. In its memorandum of appeal, the appellant raised 9 grounds of appeal, as follows:
 - a) The learned Judge erred in failing to make a finding on whether the respondents were employed by the appellant as sued, or by Salihya Cargo Shipping Line Agency.
 - b. The learned Judge erred in failing to make a finding on the respondents' monthly salaries in view of the conflicting figures in the pleadings.
 - c. The learned Judge erred in holding that the appellant unlawfully terminated the respondents' employment even after they had conceded that they never went back to work after their arrests.
 - d. The learned Judge erred in failing to make a finding that the respondents had terminated or ceased their employment with the appellant by desertion.
 - e. The learned Judge erred in converting the cessation of the employment relationship without any legal or factual basis.
 - f. The learned Judge erred in awarding the respondents one- month pay in lieu of notice, and three-months salary for unfair termination.
 - g. The learned Judge erred in failing to consider and make any findings on the appellant’s counterclaim for Kshs. 533,538/-.
 - h. The learned Judge erred in failing to specify the figures and sums awarded to the respondents.
 - i. The learned Judge erred in awarding the costs of the suit to the respondents.”
20. Arising from the said grounds of appeal, the appellant asked this Court to set aside the judgment which was rendered by the trial court and to substitute it with an order dismissing the claims. The appellant also invited the Court to enter judgment in its favour for the amount of Kshs.533,538/-, as set out in



the counterclaim. Finally, the appellant asked the Court to award it the costs for both the appeal and the suit.

21. In accordance with the directions given by the learned Deputy Registrar of this Court during case management, both sides filed their respective written submissions. Thereafter, when the appeal came up for plenary hearing on 30th September 2024, the parties expounded upon their submissions, by way of oral highlights.
22. This is a first appeal. As such, we are enjoined to re-evaluate all the evidence presented before the trial court and to draw our own conclusions therefrom. However, while drawing our said conclusions from the evidence, we are required to bear in mind the fact that, unlike the trial court, we did not have the benefit of observing the demeanour of the witnesses when they were testifying. Accordingly, when a finding was made by the trial court on the strength of the conduct of the witness, when he or she was testifying, this Court would be very slow to find fault with such a finding.
23. In the case of *Kenya Ports Authority v Kuston(Kenya)Limited (2009) 2EA 212* this Court espoused that mandate or duty as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
24. Mary testified that she was employed by the Company in 2005 She said that she was arrested in February 2014, when some cheques were found in her name. Mary told the Court that she did not steal the cheques in issue. The cheques were given to her without the name of the payees, and that the Company instructed her to insert her name on the cheques, so as to avoid taxation.
25. Mary confirmed that she banked the cheques into her account.

Following her arrest and arraignment in Court, Mary never returned to her place of work. However, she felt that she was dismissed for no good reason.
26. Meanwhile, Jecinta testified that she was employed in 2009 as a tea girl and cleaner, and was later dismissed in February 2014, after she had been arrested by the police. Jecinta testified that she heard rumors about some cheques that were found in her name. Subsequently, they were arrested and taken for questioning and later charged in court. She denied that she had anything to do with the cheques and stated that she never went back to work thereafter.
27. After Jecinta’s testimony, the respondents closed their case.
28. Abdirahman Siyad Hussein was the sole witness for the appellant. He described himself as the Operations Manager in his business, which handled clearing and forwarding. He said that the respondents were his employees.
29. Abdirahman testified that when Mary was found in possession of a cheque in which she was cited as the payee of proceeds due from the client of the Agency, Mary sought forgiveness. However, Abdirahman reported the matter to the police, leading to the arrest of the respondents.
30. Abdirahman confirmed that after the respondents were arrested, they never went back to work. He emphasized that he never terminated the services of the respondents.



31. When the trial court had analyzed the evidence, it made the finding that a contract of employment cannot be terminated through assumption, as the employer has to take positive steps to terminate such a contract.
32. Based on those facts, the learned Judge expressed the view that due to the conduct of the parties in relation to the employment contract, the court would convert the cessation of employment relationship between the parties and award the respondents one-month pay in lieu of notice, three-months' salary for unfair termination, and costs of the suits.
33. We would then have expected the trial court to make reference to the specific steps that were taken by the employer, to terminate the relationship. Indeed, as both the respondents had expressly asserted that they had been dismissed from employment, there ought to have been proof of the action taken by the employer, to dismiss each of them.
34. Having re-evaluated the evidence tendered, we found no evidence of any action which was taken by the appellant, to dismiss the respondents from employment. We also found no evidence that the appellant terminated the employment of the respondents, as alluded to by the trial court.
35. When canvassing the respondents' appeal before us, Mr. Ojienda, learned Counsel, conceded that there was no formal termination of his clients' employment. He invited us to find that there had been constructive dismissal because the employer did not call the respondents to return to work.
36. In the light of the concession by the respondents, which we find to be pegged upon a proper appreciation of the case made out, we find that there is no basis upon which the judgment can be upheld. We also find that there is no foundation, in law, to warrant the suggestion by the respondents, that this was a case of constructive dismissal.
37. Accordingly, the appeal is allowed and we set aside the judgment of the trial court. We substitute the findings of the trial court with an order dismissing the respondents' suit.
38. Meanwhile, as regards the counterclaim, we find that it was mounted by a person other than the one against whom the suit had been instituted. Salihya Cargo and Shipping Line Agency was not a defendant. Pursuant to the provisions of Order 7 Rule 3 of the Civil Procedure Rules;

“A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”
39. The counterclaim herein was not mounted by the defendant in the original suit. Therefore, it could not be sustained as a counterclaim. In the result, the Court lacked jurisdiction to grant judgment in favour of the appellant, on the counterclaim. We therefore make no further orders with regard to the said counterclaim.
40. As costs follow the event, the costs of this appeal are awarded to the appellant.
41. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.



D. K. MUSINGA, (PRESIDENT.)

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

