



**China Road & Bridge Corporation (K) Ltd v David (Civil Appeal  
297 of 2019) [2024] KECA 1005 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 1005 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 297 OF 2019  
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA  
JULY 26, 2024**

**BETWEEN**

**CHINA ROAD & BRIDGE CORPORATION (K) LTD ..... APPELLANT**

**AND**

**JUSTIN MUTUNGA DAVID ..... RESPONDENT**

*(An appeal arising from the judgment and decree of the Employment  
and Labour Relations Court of Kenya at Nyeri (Nzioki wa Makau,  
J.) delivered on 19th November, 2018 in ELRC Cause No. 489 of 2017)*

**JUDGMENT**

1. The respondent instituted this suit against the appellant, before the Employment and Labour Relations Court (ELRC) at Nyeri, vide a statement of claim dated 4<sup>th</sup> November 2017. In the statement of claim, the respondent alleged that he was employed by the appellant in 2009, to work as a general labourer. He stated that he worked twelve hours a day, from 6.00 a.m. to 6.00 p.m., for seven days a week. He averred that the appellant did not avail him a written contract of employment, but acknowledged that he was issued with monthly pay slips, and that the appellant made monthly NSSF contributions on his behalf.
2. The respondent further averred that on 19<sup>th</sup> June 2016, he was summarily dismissed from employment, after complaining that he had been remunerated for only 9 hours, out of the 12 hours he worked on that day. He asserted that at the time of dismissal, he was earning a basic hourly wage of Kshs.64.05, which was below the statutory minimum payable wage of Kshs.97.90 per hour. The respondent further claimed unpaid monthly wages for the month of June 2012, leave allowance, and demanded the release of his certificate of service.
3. It was the respondent's case that he was unfairly dismissed from employment, as the appellant failed to follow the due process by: failing to issue him with a notice prior to his termination; terminating



- him without giving a valid reason; terminating him unfairly; failing to pay his terminal dues; failing to accord him a chance to be heard; and failing to issue him with a notice to show cause why he should not be dismissed.
4. The respondent prayed for a declaration that his dismissal was unfair and unlawful; he asked the court to award him terminal dues and compensatory damages amounting to Kshs.7,397,421.60; general damages for breach of employment contract; interest on stated sums; issuance of certificate of service; and costs of the suit.
  5. The appellant filed a response to the statement of claim dated 25<sup>th</sup> January 2018, where it denied the respondent's version of events. The appellant admitted that the respondent was its employee at the material time, but stated that his contract of employment ended after the completion of the Nairobi Southern By-pass Project, which formed the basis of his employment. The appellant averred that upon completion of the said project, he was paid all his terminal dues alongside all other employees, and was given his certificate of service. The appellant denied the particulars of unfair and wrongful termination enumerated in the respondent's statement of claim. The appellant urged the court to dismiss the respondent's suit with costs.
  6. The case was heard by way of *viva voce* evidence. It was the respondent's testimony that he worked for the appellant from the year 2003 to 2016, but that he only started receiving his monthly pay slips from the year 2009. He told the court that he worked as a chainman for the entire duration of his employment, and that he worked for seven days a week, twelve hours a day, earning a wage of Kshs. 64.05 per hour. He stated that in June 2016, he made a complaint concerning the working hours recorded on his job card, which complaint led to his dismissal. He stated that he did not receive any notice of dismissal, neither was he given a chance to defend himself. He contended that his terminal dues were not paid upon dismissal, and that he was not issued with a certificate of service. Upon cross-examination and re-exam, the appellant admitted that he was compensated for overtime hours worked, and that he was paid leave allowance for the four years he worked on the said Nairobi Southern Bypass project. He however denied that his dismissal was due to completion of the project.
  7. Delilah Wendi Amenilwa adduced evidence on behalf of the appellant. She stated that she worked as an Assistant Personnel Manager, and had been an employee of the appellant since the year 1996. It was her testimony that the respondent was first employed by the appellant, as part of the team that constructed the Nairobi Eastern and Northern By- pass. She stated that the project began in January 2009, and that the respondent was employed, initially as a labourer, in September 2009. He was later promoted to a chainman in May 2010. She explained how the appellant used the job card to calculate daily wages for an employee. She stated that the respondent was paid an hourly wage of Kshs.64.05, which was the rate provided by the Collective Bargaining Agreement (CBA) entered into between the appellant and the respondent's union.
  8. According to the appellant, after completion of the Northern and Eastern By-pass project in April 2012, most employees' contracts of employment came to an end. She recalled that all employees, including the respondent, were paid one month's salary in lieu of notice, as well as leave allowance. They were also issued with certificates of service. She testified that the respondent was paid all his terminal dues which he duly acknowledged.
  9. It was her further testimony that the appellant started a new road construction project in June 2012, and the respondent was hired the following month as a chainman. She stated that his employment contract ended in 2016, after completion of the project, and again he was paid all his terminal dues. She stated that the respondent later made a complaint that some two hours were not reflected in his



job card. He escalated the issue to the labour office. She stated that they came to an agreement at the labour office, after which the appellant was paid his all dues.

10. After hearing the parties, the learned Judge, at the conclusion of the trial, held that the respondent had failed to discharge the burden of proof that his termination was unlawful, as his contract ended when the road construction project was completed, and that the respondent could not anticipate working beyond the lifespan of the project. The learned Judge however found that the respondent was underpaid, as his hourly wage rate was lower than the statutory minimum sum provided in the Regulation of Wages (General) (Amendment) Order, 2015. The learned Judge found that all other terminal benefits were duly paid to the respondent upon termination of his employment contract. The learned Judge awarded the respondent Kshs. 335,664/= as underpayment for three years, as well as interest and costs of the suit.
11. Aggrieved by this decision, the appellant filed an appeal before this Court, which was founded upon five grounds of appeal. In a nutshell, the appellant faulted the learned Judge for finding that the appellant was underpaid, based on a statutory rate of Kshs.97.90 per hour, provided under the Regulation of Wages (General) (Amendment) Order 2015, whilst the respondent's employment was contractual, and not based on an hourly rate.
12. The appellant was aggrieved that the learned Judge determined that the respondent was paid an hourly rate of Kshs.52.13, yet the evidence on record showed the fact that he was paid using a daily rate, guided by the Collective Bargain Agreement between the appellant and the Kenya Building Construction Timber and Furniture Industries Employee Union, of which the respondent was a member. The appellant took issue with the fact that the learned Judge failed to consider that the respondent was paid a house allowance, which was in addition to his daily wage. The appellant urged us to allow the appeal, and set aside the decision of the ELRC with costs to the appellant.
13. The respondent filed a notice of cross appeal dated 10<sup>th</sup> January 2023. He proffered ten (10) grounds of appeal. The respondent faulted the learned Judge for making a decision contrary the provisions of Section 43 of the *Employment Act*, by failing to find that the appellant failed to sufficiently establish reasons for his termination from employment. The respondent was aggrieved that the learned Judge failed to acknowledge that Section 47(3) of the *Employment Act* grants the labour office and the Industrial Court concurrent jurisdiction in cases where the issue is unfair termination from employment. He took issue with the fact that the learned Judge affirmed the award of Kshs.65,000/=, as terminal dues granted to him by the labour officer, without scrutinizing the particulars used to arrive at the figure.
14. The respondent complained that the labour officer failed to apply the provisions of Section 49(1) of the *Employment Act* in tabulating his terminal dues. He was aggrieved that the learned Judge failed to find that no evidence was adduced to establish that he picked the alleged cheque settling his terminal dues from the labour office. He contended that his termination amounted to summary dismissal, as the evidence on record established that the road project was yet to be completed, and faulted the learned Judge for failing to award him compensation for unfair dismissal. He took issue with the fact that the learned Judge failed to apply the standards governing termination on account of redundancy, as provided under Section 40 of the *Employment Act*.
15. The respondent was aggrieved that the learned Judge erred by failing to apply the provisions of Section 46 (1) (h) of the *Employment Act*, which protects the respondent from termination arising out of the initiation of a complaint with respect to his terms of employment. The respondent faulted the learned Judge for failing to appreciate that he served the appellant for a continuous uninterrupted duration of six years, prior to his termination, hence his rights under Section 49 (4) (e) of the *Employment Act* were



- violated. The respondent urged us to dismiss the appeal, allow the cross- appeal, and vary the judgment of the ELRC by declaring that his termination was unfair and unlawful; and award him the terminal benefits as particularized in his pleadings.
16. The appeal was canvassed by way of written submissions which both parties duly filed prior to the plenary hearing. Ms. Mburu for the appellant stated that the respondent’s employment contract reflected terms of payment negotiated under the CBA, pursuant to Section 59 (3) of the *Labour Relations Act*, and that the respondent did not at any point during his employment challenge the said terms, or claim underpayment. She submitted that the respondent’s monthly salary was calculated as per a daily rate, and not an hourly rate, and that the learned Judge, in awarding underpayment, undermined the terms of the CBA. Counsel asserted that the respondent’s contention that he was paid an hourly rate of Kshs.64.05 was not substantiated by the pay slips he availed, and that his daily rate changed over the course of the three years, as it was subject to the different CBAs entered into during the course of that period. She urged that the award of underpayment by the ELRC was unjustified.
  17. With respect to the cross appeal, it was counsel’s submission that the same was incompetent as it was lodged out of time, in violation of Rule 93 (2) of the rules of this Court. Counsel explained that the cross appeal did not raise any triable issues, as the appellant sufficiently established that the respondent’s termination was a result of completion of the construction project, and not a summary dismissal as he alleges. She stated that the Labour officer, in computing the respondent’s terminal dues, took into account the length of time served by the respondent, as well as his daily payment rates, as reflected in the different CBAs. Learned counsel invited us to allow the appeal as prayed, and strike out the cross appeal as it was filed out of time.
  18. In response, counsel for the Respondent, Mr. Kagunda, submitted that the pay slips availed by the respondent indicated his hourly pay rate, which was Kshs.52.13, and not a daily rate as stated by the appellant. It was his submission that the appellant did not avail any evidence to indicate that the appellant was paid using a daily rate. He asserted that the respondent’s employment contract, as well as the CBA referred to by the appellant, did not indicate that the respondent was to be paid a daily wage. He urged that the house allowance did not constitute the respondent’s basic pay, and was therefore not relevant in computing the claim that the respondent was underpaid. Learned counsel urged us to find that the appeal lacks merit and ought to be dismissed.
  19. As for the cross-appeal, counsel submitted that the same was filed before any directions on the appeal were issued by this Court, and that it was properly before this Court. Counsel faulted the learned Judge for finding that the respondent’s termination was a result of completion of the construction project, in the absence of any evidence to that effect. He urged that the ELRC had a duty to scrutinize the terminal dues awarded by the labour office, against the provisions of Section 49 (4) of the *Employment Act*, before upholding the same. Counsel maintained that the respondent’s termination was unfair, as he was not subjected to any dismissal or redundancy due process, as encapsulated in Sections 40 and 49 (4) (e) of the *Employment Act*. Learned counsel urged us to allow the cross-appeal as prayed.
  20. This being a first appeal, the role of the first appellate court was well settled in the case *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR where this Court stated that:

“An appeal to this Court from a trial by the High 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 allowances in this respect.”



21. Having evaluated the record of appeal as well as submissions by parties to the appeal, we find that the issues arising for determination by this Court are:
  - i. Whether the respondent was entitled to paid damages on account of underpayment;
  - ii. whether the cross-appeal is properly before this Court; and if answered in the affirmative,
    - a. Whether the Respondent's termination was unlawful;
    - b. Whether the respondent was paid his terminal dues upon termination of his employment contract.
22. The appellant's appeal, in a nutshell, challenged the award of damages on account of underpayment, amounting to Kshs.335,664/=, that was assessed by the ELRC in favour of the respondent. The learned Judge determined that the respondent's wage was pegged on an hourly rate of Kshs.52.13, which was lower than the statutory minimum wage of Kshs. 97.90 per hour, provided by the Regulation of Wages (General) (Amendment) Order, 2015. We understood the appellant to say that the respondent's salary was not based on an hourly rate, but rather on a daily rate, as per the CBA negotiated between the appellant and the Kenya Building Construction Timber and Furniture Industries Employee Union, to which the respondent was a member at the material time.
23. We note that the respondent's contract of employment, which was availed by the appellant, did not specify the respondent's remuneration, nor did it make reference to the CBA alluded to by the appellant. Although the appellant claimed the respondent was paid a daily wage which was not pegged on an hourly rate, the documentary evidence on record told a different story. The respondent's pay slips evidenced that his pay was based on an hourly rate. Similarly, the payroll which formed part of the appellant's bundle of documents, clearly showed that the respondent's monthly pay was calculated by the hourly rate, multiplied by the number of hours worked, less the statutory deductions. Therefore, the appellant's claim that the respondent's wage was not based on an hourly rate is without basis.
24. The appellant further contended that the respondent's wage was based on the terms of the CBA, and that the learned Judge undermined the terms of the CBA in awarding damages on account of underpayment. We find that the respondent's hourly wage rate was below the statutory minimum hourly wage rate of Kshs. 97.90, provided under The Regulation of Wages (General) (Amendment) Order 2015. The terms contained in a CBA ought to be in tandem, (and in some cases are usually more favourable), than the minimum terms and conditions of employment set out by the *Employment Act* or the Wages Order. The benchmark ought to be the statutory minimum wage provided by the Wages Order. From the foregoing, we find no reason to fault the learned Judge's finding on underpayment.
25. The next issue for determination is whether the cross-appeal was filed out of time. Rule 95 of the *Court of Appeal Rules 2022* provides thus:

95. Notice of cross- appeal

1. A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of the contention and nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.
2. A notice under sub-rule (1) shall state the names and addresses of the persons intended to be served with copies of the notice and lodged in four copies in the appropriate registry not more



than thirty days after service on the respondent of the memorandum of appeal and record of appeal, or not less than thirty days before the hearing of the appeal, whichever is the later.

3. A notice of cross-appeal shall be substantially in Form G as set out in the First Schedule and signed by or on behalf of the respondent.
26. In this case, the notice of cross-appeal was lodged on 10<sup>th</sup> January 2023, which was approximately three and a half years after the record of appeal had been lodged and served upon him. In addition, the respondent did not challenge the appellant's assertion, that he served the notice of cross- appeal upon the appellant, on 9<sup>th</sup> June 2023, approximately six months after filing the said notice. This was in gross violation of the provisions of Rule 97, which directs that a notice of cross-appeal shall be served upon the appellant, before or within seven days, after lodging the said notice. It is therefore clear to us that the notice of cross-appeal as filed is incompetent. The decision relied on by the respondent related to cross-appeals filed before the High Court, and governed by the timelines stipulated under the [Civil Procedure Rules](#), which timelines are not applicable to this Court. It is our finding that the notice of cross-appeal is rendered incompetent. We therefore need not determine the questions raised therein.
27. From our findings above, we make the following orders:
  - a. The appellant's appeal is dismissed.
  - b. The respondent's notice of cross- appeal is hereby struck out.
  - c. We make no orders as to costs.
26. Orders accordingly.

**DATED AND DELIVERED AT NYERI THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

