



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v All Time Security Ltd (Appeal E044 of 2023)  
[2025] KEELRC 521 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 521 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E044 OF 2023  
NJ ABUODHA, J  
FEBRUARY 24, 2025**

**BETWEEN**

**PETER MAINA MWANGI ..... APPELLANT**

**AND**

**ALL TIME SECURITY LTD ..... RESPONDENT**

*(Being an appeal from the Judgment of Honourable Lucy Njora (Mrs) C.M delivered on 8th March, 2023 in Nairobi Chief Magistrates Court CMEL Suit NO. E1207 of 2020)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 4<sup>th</sup> April, 2023, the Appellant appeals against the entire Judgment of Honourable Lucy Njora (Mrs) C.M delivered on 8<sup>th</sup> March, 2023.
2. The Appeal was based on the grounds that:
  - i. The Learned Trial Magistrate erred in fact and law in holding that the Appellant had not successfully proved that he was employed by the Respondent despite overwhelming evidence.
  - ii. The Learned Magistrate erred in both in law and fact by raising the standard of proof to be beyond reasonable doubt instead of on balance of probabilities on issue of employment and unfair termination.
  - iii. The Learned Magistrate erred in both law and fact in disregarding the Appellant evidence and the provision of *Employment Act* as to the question of whether the Appellant was an employee of the Respondent.
  - iv. The Learned Magistrate erred in law and in fact in failing to assess compensatory damages and other terminal dues.



3. The Appellant prayed that the appeal be allowed with costs; the decision of the Learned Honourable Magistrate delivered on 8<sup>th</sup> March,2023 be set aside; this Honourable Court to proceed to declare that the Appellant was an employee of the Respondent; his dismissal was wrong, unfair and unlawful and that he is entitled to payment of damages and other dues as pleaded in his claim in CMEL E1207 of 2020.
4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's advocates Mwaura Kamau & Co. Advocates filed written submissions dated 27<sup>th</sup> September 2024. On the issue of whether the Appellant had proved that he was an employee of the Respondent, Counsel submitted that in the lower court the Appellant informed the court that he was asked for his Identity Card when he was employed and he was never issued with any appointment letter nor signed any contract with the Respondent.
6. Counsel submitted that the Appellant further told the court that he had opened an account with the Co-operative bank where his salary would be paid which was produced as exhibit and had account description as salary/remittance A/C. That the statement that was presented before the court was for the period 18<sup>th</sup> June,2019 to 16<sup>th</sup> July,2019 where two cash deposits were made with the first being 5<sup>th</sup> July,2019 where Kshs 5,200/= was deposited and on 15<sup>th</sup> July,2019 a second deposit of Kshs 2,050/= made.
7. Counsel submitted that the name of the person making the cash deposit was not indicated though the Appellant did indicate to the court that that was his salary while working for the Respondent. That the Respondent did not call any witnesses and did not rebut the Appellant's evidence via viva voce evidence. Counsel relied on the case of Edward Muriga suing through *Stanley Muriga vs Nathaniel D. Schulter Civil Appeal No. 23 of 1997* on circumstances where a respondent does not adduce evidence, the Court to believe the Plaintiff's evidence as allegations in defence were not evidence.
8. Counsel further submitted that the Respondent filed a defence denying employment but did not call any witness to support the allegation. That the employer had burden of keeping written records of all employees as per section 74 of the *Employment Act*. That it was not for the Appellant to produce the employment register or the muster roll. That it was not enough for the Respondent to allege that the Appellant was not its employee in its defence and fail to call a witness in support or produce a register showing he was not part of its employees.
9. Counsel submitted that the lower court in dismissing the Appellant's suit invoked section 107 of the *Evidence Act* placing the burden of proving employment on the Appellant. That while appreciating this was his burden the court did not take into account the Appellant's evidence that he was not provided with any employment document hence requiring much from the Appellant who had already stated he had no document. That the Respondent did not rebut the Appellant's evidence that he was not issued with any document of employment.
10. Counsel further submitted that after the Appellant's termination he immediately reported the unfair termination to the subcounty labour office who wrote to the Respondent vide a letter dated 22<sup>nd</sup> August,20129 which was produced as exhibit at the lower court. That the Respondent did not respond to the letter by the Subcounty labour officer and did not deny receiving the same. That the Appellant had tried all means to have the grievance resolved through the labour officer and one wonders why the Respondent never responded to the letter if indeed it was not the Appellant's employer.



11. Counsel submitted that the trial court should have found that the Appellant was an employee of the Respondent based on evidence on record. That the trial court finding should be set aside.
12. On the issue of termination counsel submitted that the Appellant told the court that on 14<sup>th</sup> August,2019 he reported for duty as usual and thereafter he was summoned by the Respondent's operational manager who orally informed him that his services had been terminated for being absent on 13<sup>th</sup> August,2019 which he denied.
13. Counsel submitted that the Respondent after denying that the Appellant was not its employee it did not provide any reason or justification for terminating the Appellant's service. That the Appellant's termination was unfair for he was not given any notice or paid salary in lieu of notice. That he had not committed any breach or offence to warrant dismissal. That he was not issued with any warning verbal or written nor any notice to show cause or subjected to a disciplinary process hence unfair termination. That section 41-45 of the Employment Act was not followed before his termination including fair hearing.
14. Counsel submitted that the Appellant was orally terminated without giving him chance to explain himself or defend himself. Counsel relied on the case of Walter Anuro vs Teachers Service Commission [2013] eKLR and submitted that for a termination to pass the fairness test there must both substantive justification and procedural fairness. Counsel relied on section 43 and 45(2) of the Act to submit that the Respondent did not have a fair reason to terminate the Appellant.
15. Further counsel relied on the case of Rebecca Ann Maina & 2 Others vs Jomo Kenyatta University (2014) eKLR on requirement of employer giving the employee a clear charge to sufficiently prepare their defence as per section 41 on procedural fairness. That due procedure was not followed in this case as well as a fair reason hence unfair termination.
16. On the issue of whether the Appellant is entitled to compensatory damages as pleaded in the lower court, counsel submitted on the headings of salary of Kshs 7,200/= as per his bank statement, notice pay, underpayment as his salary remained same despite minimum wage over the years, unpaid leave and compensatory damages. That he was entitled to notice pay of Kshs 15,141/=, underpayment of Kshs 328,824/=; unpaid leave of Kshs 52,994/= and compensation for unfair termination of Kshs 181,692/=

### **Respondent's Submissions**

17. The Respondent's advocates Kiyondi Nyachae Advocates filed written submissions dated 31<sup>st</sup> October, 2024. Counsel reiterated their entire submissions before the trial court and submitted that the trial court rightfully found that the Appellant failed to prove he was employed by the Respondent. That the Appellant ought to prove the employer-employee relationship after the Respondent specifically pleaded in its defence that none existed notwithstanding that the Respondent did not call any witness to the stand.
18. Counsel submitted that the question of unfair termination does not arise where there was no employer-employee relationship. That the Appellant did not demonstrate that the trial court misdirected itself, acted on matters it should not have acted or failed to consider matters it should have considered thereby arriving at an erroneous conclusion in order to interfere with its findings.



## Determination

19. The Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424 observed that appropriate standard of review established in cases of appeal can be stated in three complementary principles:
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
20. The Judgment of the trial court was entered as against the Appellant on the basis that it was contended that the Appellant did not prove that he was an employee of the Respondent. His claim was dismissed with costs to the Respondent.
21. Having considered the appeal, the evidence on the Record of Appeal and the Submissions on record the court opines that the issues for determination are –
  - a. Whether the trial court erred in not finding that there was an employment relationship between the Appellant and the Respondent.
  - b. Whether the Appellant was entitled to reliefs sought.

### **Whether the trial court erred in not finding that there was an employment relationship between the Appellant and the Respondent.**

22. The Appellant testified that he was an employee of the Respondent employed as a night guard from February, 2014 to 14<sup>th</sup> August, 2019 when he was orally terminated. That his salary was paid to the Co-operative Bank account and he was not given any employment documents like the appointment letter, written contract or staff ID. That he only gave his ID upon employment. The Appellant produced as exhibit the bank statement for July 2019 showing two deposits of 5<sup>th</sup> July, 2019 of Kshs 5,200/= and 15<sup>th</sup> July, 2019 of Kshs 2,050/=. That his salary was Kshs 7,200/= at the time of termination. That from the statement it was not clearly stated if the deposits were made by the Respondent.
23. The Appellant also relied on the letter from the Sub-county labour officer after he made his complaint in October, 2019 which he states the Respondent did not respond to the said letter. The Respondent on the other hand denied the Appellant was its employee through its defence without calling any witness. The trial court after considering the claimant's testimony and evidence found that the documents produced did not sufficiently prove his employment by the respondent.
24. The Appellant alleged that the Respondent did not rebut his evidence that he did not have employment documents and that it was upon it to produce any master roll or register to prove that it was not its employee. That the Respondent did not rebut his evidence that it did not respond to the letter of the subcounty officer to illustrate that he was not its employee.



25. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
26. This was the position in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
- “As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”
27. The Appellant would like the court to believe that he was an employee of the Respondent. A closer look at the bank statement shows it was for the period between 21<sup>st</sup> July, 2014 to 31<sup>st</sup> July, 2019 with an account description Salary/Remittance account however, the only cash deposits were for one month of July, 2019 one on 5<sup>th</sup> July, 2019 of Kshs 5,200/= and another for 15<sup>th</sup> July, 2019 for Kshs 2,050/= . The deposits are indicated as cash deposits without linking the Respondent as the entity depositing the money as salary.
28. The Appellant alleged that he was paid via bank but did not attempt to produce even one-year statement for the 5 years showing how the payments were made despite the account being a salary account. A complaint to the labour office cannot also save him without first establishing employment relationship between him and the appellant. This burden is placed on the employee by section 47(5) of the *Employment Act* as was held by the trial court. It is upon the employee to prove he was unfairly terminated which includes first illustrating the employment relationship. The burden is exclusive to the employee and it matters not that the employer did not call any evidence in rebuttal to the allegation if the employee does not on his part sufficiently discharge this burden.
29. The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further.
30. The Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even in cases where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.
31. The burden of proof in Civil Cases is on a balance of probability. Lord Denning J. in *Miller vs Minister of Pensions* (1947) 2 ALL ER 372, discussing that burden of proof held that “that degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case.” This Court finds that on a balance of probabilities the Appellant failed to prove the existence of an employer-employee relationship with the Respondent.



32. Further in the case of *Transport Workers Union v Euro Petroleum Products & Another* [2019] eKLR, the court stated that –

The Respondents on their part did not produce any documents to prove that the grievants were neither their employees nor engaged on casual basis. However, the Claimant ought to have at the least established that there was an employment relationship between the grievants and the Respondent(s) before the respondent would be called upon to produce records.

33. From the foregoing, this court upholds the finding of the trial court that the appellant did not sufficiently prove to required standards that there was an employer-employee relationship between himself and the respondent. This ground of appeal therefore fails and is hereby dismissed.

**Whether the Appellant was entitled to reliefs sought.**

34. The Appellant herein having failed to establish the existence of employment relationship between himself and the respondent, the Court has no jurisdiction to delve on the issue of reliefs sought as a consequence.

35. In conclusion the Appeal fails for lack of merit and the same is hereby dismissed with costs.

36. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2025**

**DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2025**

**Abuodha Nelson Jorum**

**Presiding Judge-Appeals Division**

