



REPUBLIC OF KENYA



Mwangi Kenyanya v Great Rift Express Shuttle Services (Employment and Labour Relations Appeal E010 of 2021) [2025] KEELRC 433 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 433 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2021
MA ONYANGO, J
FEBRUARY 13, 2025**

BETWEEN

MWANGI KENYANYA APPELLANT

AND

GREAT RIFT EXPRESS SHUTTLE SERVICES RESPONDENT

(Being an appeal from the Judgment of Honourable Christine Menya, Senior Resident Magistrate's Court at ELDORET delivered on 27th August, 2021 in Eldoret CMELRC No. 30 of 2019)

JUDGMENT

1. The Appellant herein was the Claimant in Eldoret CMELRC No. 30 of 2019 where he had sued the Respondent vide a Memorandum of Claim dated 28th January 2019 seeking terminal dues for alleged unfair and unlawful termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 27th August 2021 dismissing the Claimant's claim against the Respondent.
3. The Appellant being dissatisfied with the said Judgment filed the instant appeal vide the Memorandum of Appeal dated 31st August, 2021 in which he raises the following grounds of appeal:
 - a. That learned magistrate erred in arriving at a decision that was not supported by the evidence on record.
 - b. That the learned magistrate erred in law and fact in failing to evaluate the evidence and submissions of the Appellant in support of the Appellant's claim in arriving at her decision, applying the wrong principles of law in arriving at her judgment.



- c. That the learned magistrate erred in law and in fact in failing to find that the Appellant's submissions indeed raised satisfactory claim against the Respondent.
 - d. That the learned magistrate erred in law and in fact in finding that the Appellant was not an employee of the Respondent and in particular holding that the Appellant was an independent contractor without any evidence to that effect.
 - e. That the learned magistrate erred in law and in fact in shifting burden of proof to the Appellant and failing to appreciate the fact that employees records are always in the custody of the employer.
 - f. That the learned magistrate erred in law and in fact in considering issues that were neither raised, neither pleaded nor submitted upon by the Respondent while making her decision.
 - g. That the learned magistrate erred in law and fact in failing to hold that that the Appellant was entitled to reliefs sought in his claim for wrongful termination of employment having been employed from 2014 which employment was terminated on 12.07.2018.
 - h. That the learned magistrate erred in fact and law in her assessment of the submissions and evidence before the court and the applicable law and thus arrived at an erroneous finding.
 - i. That the learned magistrate erred in law and fact in predisposing her mind to a position favorable to the Respondent against the Appellant and thereby arrived at a wrong decision given that there is no records and/or evidence that was produced by the Respondent to confirm that the Appellant was an independent contractor.
4. The Appellant has in his Memorandum of Appeal prayed for the following reliefs:
- a. This Appeal be allowed.
 - b. The Judgment and Decree of the Honorable Christine Menya be set aside and;
 - c. The costs of this Appeal be paid by the Respondent.
5. On 16th October 2023, the court directed for the appeal to be disposed of by way of written submissions. The Appellant's submissions were filed on 6th February 2024 while the Respondent's submissions were filed 6th December 2023.

Analysis

6. This being a first appeal, I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. In his Memorandum of Claim, the Appellant herein sought the following orders against the Respondent:
- a. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the Claimant is entitled to compensation of his terminal dues
 - b. The sum of Kshs. 1,122,240 set out as follows:
 - i. Sum of Kshs. 60,000 being the leave allowance on pro rata basis
 - ii. Sum of Kshs 38,640 being payments of wages or work done during public holidays



- iii. Sum of Kshs. 104,000 being overtime dues for 20 hours per week accrued for 52 weeks
 - iv. Unpaid housing allowance.....Kshs 108,000
 - v. Severance pay.....Kshs 60,000
 - vi. Coalesced, exemplary and aggravated damages for unfair termination.....Kshs 500,000
 - vii. One month pay in lieu of notice.....Kshs. 15,000
 - viii. Rest days.....Kshs 41,600
 - ix. Paternity leave.....Kshs 15,000
 - x. Compensation at 12 months gross salary....Kshs 180,000
- c. Certificate of service
 - d. Cost of this suit and Interests at court rates
 - e. Any other further relief the court may deem fit and just to grant.
8. The Appellant in his Memorandum of Claim stated that he was employed by the Respondent in June 2014 as a Car Cleaner earning a monthly salary of Kshs. 15,000. He averred that he served the Respondent with loyalty and diligence until 12th July 2018 when his services were terminated unlawfully and unfairly.
 9. The Claimant contended that his dismissal was illegal, unfair and unlawful as it violated the provisions of sections 36, 41(1), 44(4), 45(2) and 43 of the *Employment Act*.
 10. In reply, the Respondent filed its Response to the Statement of Claim dated 13th March 2019 and filed on 18th March 2019. The Respondent denied that the Claimant was its employee and asserted that the Claimant was engaged as an independent contractor under a contract for services. According to the Respondent, the Claimant would wash the Respondent's clients' vehicles once in a while and was paid on the basis of the work done. It was contended that all the Claimant was entitled to was a commission at the end of the day and that as such, he was not an integral part of the Respondent's business.
 11. The Respondent contended that owing to the nature of engagement between itself and the Claimant, it had no control over the Claimant and there would be no basis for terminating his employment since no employer-employee relationship which was none existent.
 12. It was therefore the Respondent's case that the Claimant is not entitled to any of the reliefs sought. The Respondent urged the trial court to dismiss the Claimant's claim with costs.

The Evidence adduced

13. At trial the Appellant testified as PW1 and adopted his witness statement as his evidence in chief. He stated that he was terminated from employment by the Respondent without any reason and that he was not paid his terminal dues. He asked the court to grant him the reliefs he sought in his Memorandum of Claim.
14. On being cross examined by Counsel for the Respondent, the Claimant admitted that he had not tendered any proof in court to confirm that the Respondent owed him leave allowance, rest days dues, overtime and paternity leave dues.



15. The Respondents called Mr Simon Ndungu Nyaga who testified as DW1. He adopted his witness statement recorded on 13th March 2019 as his evidence in chief. In brief, the Respondent's witness maintained that the Claimant was not an employee of the Respondent as he was paid a commission for the work done on a daily basis.
16. Under cross examination DW1 stated that the Claimant was an independent contractor who was paid a commission for work done.

The Appeal

The Appellant's Submissions

17. In his submissions dated 15th February 2024, the Appellant identified the issues for determination in this appeal to be:
 - i. Whether the Appellant was an independent contractor or an employee
 - ii. Whether the Claimant was a casual employee
 - iii. Whether the Claimant was unfairly terminated from employment
 - iv. Whether reliefs sought by the Appellant were available to him
18. On the first issue, the Appellant submitted that he adduced evidence before the trial court that he was employed by the Respondent as a car cleaner as exhibited by the Employment Card he produced as PXB1 which is sufficient proof of existence of an employment relationship between the Claimant and the Respondent. In addition, the Appellant submitted that in his testimony he stated that he used to sign a register at the gate when reporting to work.
19. The Appellant further submits that although RW1 in his evidence testified that the Claimant worked at the Respondent's car wash as an independent contractor earning a daily wage, this assertion was not backed by documents. According to the Appellant, the Respondent did not produce any agreement from which the relationship of independent contractor could be discerned and neither did it produce any document(s) demonstrating the work or skills that the Claimant rendered, a payment or payments made that in character were not wages or salary, a document inviting the Claimant for the work and a form of register to demonstrate when and how the work was done. The Appellant therefore submitted that he had discharged the burden of establishing that he was an employee of the Respondent in his evidence and there existed an employee-employer relationship between him and the Respondent.
20. On the second issue on whether the Claimant was a casual employee, the Appellant submitted that he worked for the Respondent from June 2014 until 12th July 2018 and by virtue of section 37 of the *Employment Act*, his employment converted to contract of service by operation of the law. In support of this position, the Appellant cited the case of *Krystalline Salt Limited v Kwekwe vs. Benson Mwiti NTIRITU & 4 Others* (2018) eKLR
21. On the third issue, the Appellant while citing section 41 and 45 of the *Employment Act*, averred that he was dismissed on 12th July 2018 without any just cause and without being accorded a chance to defend himself. He stated that his dismissal was without prior notice and that the Respondent did not adduce any evidence to prove that a fair procedure was followed. The Appellant further submitted that RW-1 admitted that no warning letter nor notice of termination was sent to the Appellant and also, that the Appellant was never subjected to any disciplinary proceedings. It is therefore the Appellant's submission that the failure by the Respondent to ensure substantive and procedural fairness in terminating the Appellant's employment rendered the termination unfair and unlawful.



22. Lastly, as to whether the reliefs sought by the Appellant were available to him, he submitted that in his pleadings and evidence before the trial court, he proved that he was summarily dismissed from employment without any notice as required by the law and was therefore entitled to the grant of the reliefs he sought in his Memorandum of Claim. In this regard, the Appellant submitted that the trial court erred in fact and law in its assessment of the submissions and evidence and the applicable law and thus arrived at an erroneous finding.
23. The Appellant thus urged this court to find that the appeal is merited and proceed to uphold it with costs in the appeal and the lower court.

The Respondent's submissions

24. The Respondent on its part crystallised the grounds in the Memorandum of Appeal into the following three issues:
 - a. Whether there was an employment relationship between the Appellant and the Respondent capable of enforcement by court?
 - b. Whether the Appellant proved a case of unlawful and unfair termination?
 - c. Whether the Appellant was entitled to any relief?
25. On the issue whether there was an employment relationship between the Appellant and the Respondent capable of enforcement by court, the Respondent submitted that the jurisdiction of employment court is pegged on existence of employment relationship which must be proved first. While placing reliance on the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR, the Respondent submitted that the burden to prove the existence of such a relationship is always on the employee and that in the instant case the Appellant just adopted his statement that lacks in particulars and produced a garage gate pass as exhibit. The Respondent submitted that its witness, RW1 in his testimony stated that Appellant was engaged at its car wash on a daily wage pay and was therefore not an employee. It was further contended that RW1 stated that the Respondent issues contract forms and serialized identity cards to its employees and disputed that the gate pass produced by the Claimant emanated from the Respondent.
26. In support of the position that the Appellant did not place any material before the trial court to aid his case, the Respondent relied on the case of *George Kamau Ndiritu & another v Intercontinental Hotel* [2015]eKLR and submitted that the trial court rightly observed that from the conduct of the parties, there is no evidence to prove employer employee relationship and a gate pass is not proof of employment relationship.
27. It is the Respondent's submission that based on evidence on record, the trial court came to the correct finding on the nature of relationship as there was no employment relationship between the Appellant and the Respondent capable of enforcement by court.
28. On the second issue, the Respondent submitted that in view of the finding that the Appellant was an independent contractor, the contention of unlawful and unfair termination was misplaced and unfounded as the trial magistrate rightly observed that independent contractors are not entitled to benefits available to employees. To buttress this position, the case of *Ongola v And Beyond Kenya Ltd (Civil Appeal E308 of 2021) [2023] KECA 93 (KLR) (3 February 2023)(Judgment)* was cited.
29. On the last issue as to whether the Appellant was entitled to any relief, it is the Respondent's submission that the Appellant did not prove the existence of an employment relationship between



himself and the Respondent and is therefore not entitled to grant of any relief. In the end, the Respondent prayed that the appeal be dismissed with costs.

Determination

30. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that present themselves for determination are as follows:
- i. Whether the Appellant was engaged by the Respondent under a contract of service or as an independent contractor
 - ii. Whether the Appellant's contract of employment was unfairly terminated;
 - iii. Whether the Appellant is entitled to the reliefs he is seeking.

Was the Appellant an employee or an independent contractor

31. The Appellant in his pleadings and oral testimony before the trial court asserted that he was employed by the Respondent as a car cleaner. In support of his case, the Claimant produced a gate pass as proof that he was indeed an employee of the Respondent. The Respondent on the other hand contended that the Appellant was engaged as an independent contractor and averred that the gate pass produced by the Claimant was not authentic and was not issued by the Respondent.
32. Section 2 of the *Employment Act* defines an employee as "person employed for wages or a salary and includes an apprentice and indentured learner;"
33. A contract of service is defined as "an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;"
34. In the case of *Maurice Oduor Okech v Chegquered Flag Limited* [2013] eKLR, the court observed as follows on a similar issue as the instant case;
- "In determining the existence of an employment relationship, the court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the *Employment Act* 2007 actually exists."
35. Further, the Supreme Court of Nigeria in *Shena Security Co Ltd v Afropak (Nig.) Ltd & 2 Others* [2008] 18 NWLR laid down the factors that should guide courts in determining the nature of engagements between parties in disputes of this nature. It observed as follows:
- "If payments are made by way of "wages" or "salaries" this is indicative that the contract is one of service. If it is a contract for service, the independent contractor gets his payment by way of "fees". In like manner, where payment is by way of commission only or on the completion of the job, that indicates that the contract is for service."
36. The Respondent's witness in his testimony before the trial court stated that the Respondent had engaged the Appellant on a daily basis and that he would be paid a commission on a daily basis for the work done. This is therefore indicative that the Respondent was indeed an employee within the meaning of section 2 of the *Employment Act*.



Whether the Appellant's contract of employment was unfairly terminated;

37. From the record, the Appellant did not explain the circumstances under which his employment was terminated. He did not state who terminated his employment or how the termination occurred. He merely asserted that his employment was terminated. The Respondent on the other hand insisted that the Claimant just vanished, that his employment was not terminated.
38. Under section 47(5) of the *Employment Act* it is the burden of the employee to prove that an unfair termination or wrongful dismissal occurred, and it is only once this is proved that the burden would shift to the employer to justify the grounds for termination and proof of fair procedure. It is my finding that the Appellant did not prove that his employment was unfairly terminated by the Respondent.

Whether the Appellant is entitled to the prayers sought in the Statement of Claim

39. In his Memorandum of Claim, the Appellant sought a declaration that his services were unprocedurally, unlawfully and unfairly terminated as well as terminal benefits as enumerated in paragraph 7 of this judgment. The reliefs are addressed in separate heads hereunder:

- i. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated

Having found that the Appellant did not prove that his employment was unfairly terminated by the employment, he is not entitled to the declaration.

- ii. Leave allowance pro rate

No evidence was tendered by the Respondent to prove that the Appellant proceeded on leave during the course of his employment with the Respondent. The Appellant is entitled to pay in lieu of annual leave for the years worked being 4 years. At 21 days per year the Appellant is entitled to $(21 \times 4) = 84$ days. This works out to Kshs. 48,461.50 which I award him.

- iii. Dues for work done during public holidays

The Appellant did not tender any evidence to show that he worked during public holidays. This prayer is declined.

- iv. Overtime

This prayer is declined as the Appellant did not specify the number of hours he was entitled to as overtime to enable the court ascertain what his overtime dues are. As such, the Appellant did not prove his case for payment of overtime on a balance of probabilities.

- v. Unpaid housing allowance

The Appellant's employment having been oral and presumed by operation of the law, his salary can only be pegged on the statutory minimum rates for purposes of assessing underpayments.

The Appellant testified that he was paid Kshs. 15,000 per month throughout the period he worked for the Respondent. In 2014 when he started working for the Respondent the minimum wage was Kshs. 9024.15. With 15% house allowance the Appellant was entitled to Kshs. 10,377.8. He was thus paid more than the consolidated wage, that is, basic salary inclusive of house allowance.

In 2018 the minimum wage was Kshs. 12,552.70. Inclusive of 15% house allowance the Claimant would be entitled to Kshs. 14,436 which is below the Kshs. 15,000 that he was paid.



I therefore find that the Appellant was paid salary inclusive of house allowance and is not therefore entitled to payment under the is head.

vi. Severance pay

Severance pay is not applicable since this is a case of unlawful termination and not termination on account of redundancy.

vii. Coalesced, exemplary and aggravated damages for unfair termination

I decline to make any awards under this head as the circumstances under which the Appellant's employment was terminated do not qualify for an award pf aggravated damages.

viii. One month pay in lieu of notice

Having found that the Appellant did not prove that the termination of his employment was unfair, he is not entitled to pay in lieu of notice. The prayer under this head is declined.

ix. Rest days

The Appellant did not lead evidence to prove that he did not go for off days. This prayer is therefore declined for lack of proof.

x. Paternity leave

The Appellant did not tender any evidence to demonstrate that he was entitled to paternity leave. This prayer is declined.

xi. Compensation at 12 months' gross salary

Having found that the Appellant did not prove that the termination of his employment was unfair, he is not entitled to compensation.

40. In conclusion, the appeal succeeds only in terms stated above. The Judgment of the Trial Court is set aside in its entirety and substituted with the following:

i. A declaration that the Appellant was an employee of the Respondent.

ii. Leave dues.....Kshs. 48,461.5

iii. The Respondent is directed to issue the Appellant with a Certificate of Service.

41. The Respondent shall bear 50% of the Appellant's costs of the Appeal. He did not pray for costs in the lower court in his Memorandum of Appeal.

42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF FEBRUARY 2025

MAUREEN ONYANGO

JUDGE

