



Pannju Agencies Co. Ltd v Mwai (Employment and Labour Relations Appeal E245 of 2023) [2025] KEELRC 404 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 404 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E245 OF 2023**

JW KELI, J

FEBRUARY 12, 2025

BETWEEN

PANNJU AGENCIES CO. LTD APPELLANT

AND

PAUL MAINA MWAI RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable C. K. CHEPTOO (PM) delivered at Nairobi on the 8th of November, 2023 in MCELRC No. E1272 of 2022)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable C. K. Cheptoo (PM) delivered at Nairobi on the 8th of November, 2023 in Nairobi MCELRC Cause No. E1272 of 2022 between the parties filed memorandum of appeal dated 27th day of November, 2023 seeking the following orders:-
 - a)) That the Honourable Court be pleased to set aside all of the Judgment of the lower court and proceed to dismiss the Respondent's claim dated the 15th of July, 2022 against the Appellant.
 - b) The costs of this Appeal and suit before the lower court be awarded to the Appellant.

Grounds of the Appeal

2. The Honourable Magistrate erred in Law and in Fact in finding that the Respondent herein was an Employee of the Appellant and not an Independent Contractor.
3. The Honourable Magistrate erred in Law and in fact in finding that the Employment of the Respondent herein was terminated unfairly and unlawfully.



4. The Honourable Magistrate erred in Law and in fact in failing to consider the evidence of the Appellant showing that the Respondent herein failed to produce an employment contract to prove employment and that the Appellant produced a hand-written record of payments of all its independent contractors for formality basis purposely to keep track of its internal records of payments remitted.
5. The Honourable Magistrate erred in Law and in fact by relying on the Respondent's NSSF statement as evidence of employment as opposed to a Contract of Employment.
6. The Honourable Magistrate erred in Law and in fact by awarding the Respondent 3 month's salary, one month's salary in lieu of notice, unpaid salary for 12 years and unpaid leave arrears for 3 years, similar to that of an Employee of the Appellant.

Cross-Appeal

7. The Respondent filed a cross-appeal dated 5th December 2023 seeking for the following Orders against the Appellant: -
 - A. Damages for unfair termination in the sum of Kshs. 367,529.40
 - B. Underpaid salary in the sum of Kshs. 810,324.00
 - C. Unspent and/ of unpaid leave in the sum of Kshs. 367,529.40
 - D. Overtime unpaid in the sum of Kshs. 2,724,876.00

Grounds Of Cross-Appeal

8. That the Honourable Trial Magistrate erred in law and in fact in availing the Respondent cross appellant three(3) months' salary for damages for unlawful termination of employment.
9. That the Honourable Trial Magistrate erred in law and in fact in awarding to the respondent underpaid salary in the sum of Kshs. 202,588.45.
10. That the Honourable Trial Magistrate erred in law and in fact awarding salary for unspent and/unpaid leave for three (3) years.
11. That the Honourable Trial Magistrate erred in law and in fact in failing to award payment of overtime worked and not paid.

Background to the Appeal and the Cross-Appeal

12. The Respondent filed claim against the appellant vide a memorandum of claim dated 15th July 2022 seeking the following orders:-
 - A. a declaration that the termination and /or dismissal of the claimant by the respondent was unfair and/ or unlawful.
 - B. An order compelling the respondent to pay the claimant terminal benefits and compensation for unfair termination with respect to notice pay, accrued leave arrears for 12 years, underpaid salary for 12 years, unremitted NSSF monthly contribution for 44 months, 1848 overtime days worked and damages of unfair termination all amounting to the total sum of Kshs. 3,597,519.10(pages 4 and 5 of ROA).
13. The respondent filed his verifying affidavit, his statement and list of documents all of even date together with the bundle of documents (see pages 6-18 of ROA).



14. The claim was opposed by the appellant who entered appearance and filed a response to the claim (pages 20-21 of ROA) Witness statement of Zinedine Kimamo Njogu dated 20th April 2023(pages 23-24 of ROA), and produced as its documents being payroll records July 2016 to December 2021(pages 25-91 of ROA).
15. The claimant's/Respondent's case was heard on the 10th of August 2023 where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the appellant Mr. Kori (pages 115-116 of ROA).
16. The appellant's case was heard on the same date where RW was Njogu Zinedine Kimamu who relied on filed witness statement and produced the appellant's documents. He was cross-examined by counsel for the claimant Mr. Modi(pages 117-118 of ROA)
17. The parties took directions on filing of written submissions after the hearing. The parties complied.
18. The Trial Magistrate Court delivered its judgment on the 8th November 2023 awarding the claimant a total sum of Kshs. 416,980.35 comprising of 3 months' salary compensation for unlawful termination, notice pay of one month, unpaid salary , and unpaid leave arrears. (judgment at pages 120 to 124 of ROA).

Determination

19. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Issues for determination

20. The appellant addressed the following issues in written submissions:-
 - a. Whether the respondent was truly an employee of the appellant.
 - b. Whether the Honourable Magistrate erred in law and fact in awarding the respondent 3 months salary in lieu of notice, unpaid salary for 12 years and unpaid leave arrears for 3 years similar to that of employee of the appellant.
21. The respondent addressed the merits of the appeal and the cross-appeal.
22. The court finds that the germane of the appeal and cross appeal were that the whether the respondent was an employee of the appellant and whether the remedies awarded were erroneous. Thus issues for determination in the appeal :-
 - a. Whether trial court erred in finding the respondent was employee of the appellant
 - b. Whether the Honourable Magistrate erred in law and fact in awarding the respondent 3 months' salary in lieu of notice, unpaid salary for 12 years, and unpaid leave arrears for 3 years similar to that of employee of the appellant.



Whether trial court erred in finding the respondent was employee of the appellant

23. The respondent stated he was an employee of the Appellant from 2009 as a driver and the employment was terminated by the Director of the respondent on the 10th January 2022 together with the services of his turn boys. In the witness statement adopted as evidence in court, he stated that he was employed in May 2009 by Pop Metal Fabricator and Company Ltd. In the year 2013, he was taken by the respondent as a driver of a lorry for transporting building materials Motor Vehicle Reg. No. KBQ 022U Isuzu FYZ. The Respondent contended that Metal Fabricator and Company Ltd was a sister company of the Appellant. He stated that his services were terminated verbally by one Rose Wangeci Kamau of the Appellant on the 10th of January 2022 without notice or hearing. The company was deducting NSSF which he stated they did not remit and NHIF. He produced his NHIF statement where the Appellant was indicated as the employer and his NSSF statement with the employer indicated as the appellant and registered in 2011.

Response before the trial court

24. In response dated 18th October 2022 the appellant denied the employment of the Respondent and stated the respondent was an independent contractor who was also allowed to bring his own turn boys to assist him in his work. In the witness statement of Njogu, a director of the appellant, he stated that the respondent was hired as an independent contractor to drive company vehicles to different locations designated by the company. The Respondent was allowed or hire his own turn boys, he started working for the appellant in the month of July 2016 and was paid by the company in cash. He stopped working for the appellant in January 2021. They kept payment records which were produced as evidence of the Respondent.

Decision

25. The appellant submitted that both the Court of Appeal and the Supreme Court Kenfreight(E.A) Limited v Benson K. Nguti (2019) e KLR appreciated the vital nature of an employment contract vis a vis the law while recognising the latter as proof of employment. The appellant relied on the control test in the determination of whether the respondent was on a contract of or for service as elaborated in Omusamia v Upperhill Springs Restaurant (2021)e KLR where Justice Ocharo Kebira observed:-
“The tests that courts have employed over years, include, the control test – assessing the presence or absence of control a manager or supervisor might or might not have over their worker, the fourfold test – control, ownership of the tools, chance of profit, risk of loss, lastly the integration test, developed in Stevenson Jordon and Harrison Limited v MCdonald and Evans (1952), the approach looks at whether the service being provided by the worker is an integral part of business done on behalf of the business but not integrated into the business.

49. In Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance clarified the factors to consider in determining whether one was an employee and therefore under a contract of service as where: -

- (i) The servant agrees to provide his own work and skill by providing services for this matter, in consideration of wages or other remuneration.
- (ii) The servant agrees that in the performance of that service they will be subject to the master’s control. Control includes the power of deciding the things to be done, the way in which it shall be done, the means to be employed and in doing it, the time and place where it shall be done.



- (iii) The contract of service complies with the terms of an employment agreement. This entails complying with the statutory requirements in the Employment Act including minimum wage, provision for leave and payment of income tax.” The appellant submitter that the respondent’s obligation was to ensure company assets are transported from one designation or another as instructed, that the respondent furnished the appellant with turn boys (his employees) who aided in carrying the appellant’s material from one designation to another as instructed. The appellant submitted, that based on the foregoing the Respondent was on contract for service as an independent contractor. The appellant further relied on the definition of independent contractor as held in *Kenya Hotel & Allied Workers Union v Alfajiri Villas (2014)e KLR* to submit that the respondent was never accorded an employment contract and was paid on a cash basis with no deductions as opposed to all employees of the respondent paid via bank only.

Respondent’s submissions

26. The respondent submitted that RW at cross-examination at page 117 lines 20 to 23(ROA) confirmed that the Respondent was employed to drive the appellant’s motor vehicle registration No. KBQ 022Q Isuzu FYZ. The Appellant produced its payroll which demonstrated they deducted tax, NSSF from the Respondent’s salary. There was no evidence produced of the Respondent being an independent contractor.

Decision on issue 1

27. The trial court relied on the NSSF and NHIF statements and payroll of the Respondent to hold the Respondent was an employee of the Respondent. The appellant relied on decision of the court in *Asakhulu v West Kenya Sugar Company limited (2024) e KLR* where the court held that the NSSF statement was not evidence of monthly salary or continuous employment.
28. The appellant case was there was no employment contract issued to the Respondent hence he was an independent contractor who was free to bring own turn boys for the lorry who were paid by the Appellant. The appellant submitted the turnboys were employees of the Respondent despite evidence at trial by RW that the Appellant paid the turnboys. The Respondent was paid monthly salary and in the payroll produced by the Appellant, he was deducted tax and NSSF dues (pages 25-91 of ROA).
29. Is an employment contract only proof of contract of service? That one is an employee and not independent contractor? The answer is no. Section 8 of the Employment Act recognises oral and written contracts of employment by stating:- “8. Oral and written contracts
The provisions of this Act shall apply to oral and written contracts.” In the *Kenfreight case(supra)* there was no decision that written contract was the only proof of employment.
30. The appellant relied on the control tests applicable in determination of whether one is a contract of service(employee) or contract for service (independent contractor) in *Omusamia v Upperhill Springs Restaurant (2021)e KLR* where Justice Ocharo Kebira observed:- “The tests that courts have employed over years, include, the control test – assessing the presence or absence of control a manager or supervisor might or might not have over their worker, the fourfold test – control, ownership of the tools, chance of profit, risk of loss, lastly the integration test, developed in *Stevenson Jordon and Harrison Limited v MCDonald and Evans (1952)*, the approach looks at whether the service being provided by the worker is an integral part of business done on behalf of the business but not integrated into the business.” The court upheld the decision to apply herein. The court having re-evaluated



the evidence before the trial court, the testimony of RW and the Payroll produced by the appellant found that the appellant admitted to have employment the respondent, paid his salary and that of the turnboys assisting him, directed him on where to drive the lorry, paid monthly salary and deducted tax and NSSF. The court applying the control test of assessing the presence or absence of control a manager or supervisor might or might not have over their worker, the fourfold test – control, ownership of the tools, the chance of profit, risk of loss, lastly the integration test, developed in *Stevenson Jordon and Harrison Limited v McDonald and Evans (1952)*(supra) held that the Respondent was an employee of the Appellant.

Whether the Honourable Magistrate erred in law and fact in awarding the respondent 3 months' salary in lieu of notice, unpaid salary for 12 years, and unpaid leave arrears for 3 years similar to that of employee of the appellant and failing to award claim of overtime.

31. The appellant raised the following grounds of appeal under this issue:-

The Honourable Magistrate erred in Law and in fact by awarding the Respondent 3 month's salary, one month's salary in lieu of notice, unpaid salary for 12 years, and unpaid leave arrears for 3 years, similar to that of an Employee of the Appellant.”

32. In cross-appeal the Respondent raised the following grounds under the issue:-

- a. That the Honourable Trial Magistrate erred in law and in fact in awarding the Respondent cross-appellant three(3) months' salary for damages for unlawful termination of employment.
- b. That the Honourable Trial Magistrate erred in law and in fact in awarding to the respondent underpaid salary in the sum of Kshs. 202,588.45.
- c. That the Honourable Trial Magistrate erred in law and in fact awarding salary for unspent and/ unpaid leave for three (3) years.
- d. That the Honourable Trial Magistrate erred in law and in fact in failing to award payment of overtime worked and not paid.

33. The challenge on the awards by the Appellant was based on the Respondent not being an employee(not on a contract of service). The court held the Respondent was an employee hence on contract of service. That being the only ground of the appeal challenging the award the appeal stands dispensed with in favour of the Respondent.

Decision on the cross–appeal

Award of Compensation for 3 months

34. The Respondent stated he was employed in 2009 by a sister company and in 2013 by the Appellant. The employer produced payroll from July 2016(pages 25-91 of ROA). As held in *Asakhuhku v West Kenya Sugar Company Limited (2024)* the KLR the NSSF statement with many gaps and different dates of registration was not sufficient proof of continuous employment. That evidence ought to be corroborated through other evidence. The Respondent produced an NSSF statement that indicated contributions started in 2010 and had gaps of several years. There was no other evidence by the claimant/Respondent. The employer/Appellant stated the Respondent started working in July 2016 and produced a payroll which the Respondent confirmed he signed. The court holds that the validity of the payroll was not challenged. The Payroll is a statutory requirement of the employer to keep employment records under section 74 of the *Employment Act* to wit:-“(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this



Act.” The Court held that the claimant was employed by the Appellant from 1st July 2016 to the end of December 2021 as per the Appellant’s payroll.

35. There was no valid reason adduced by the Appellant to justify the termination nor was the Appellant paid any terminal dues. The trial court never explained the basis of the award of 3 months’ salary compensation for the unlawful termination as is required of the court under section 50 of the Employment Act to wit:- “ In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Employment and Labour Relations Court shall be guided by the provisions of section 49.” Discretion on the remedy to award on finding unfair termination ought to be exercised as per Section 49 of the Employment Act. Section 49 Subsection 4 of the Act provides the factors to be considered in determining the remedy to award for unlawful and unfair termination thus:- ” (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
- (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement;
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee's length of service with the employer;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) the value of any severance payable by law;
 - (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - (j) any expenses reasonable incurred by the employee as a consequence of the termination;
 - (k) any conduct of the employee which to any extent caused or contributed to the termination;
 - (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”
36. The Court on appeal applied the criteria under section 49(4) of the Employment Act and held that taking into account the length of time of service (July 2016-December 2021), the unlawful and unprocedural termination, the conduct of the appellant of non-cooperation with labour office, the failure of the claimant to mitigate his loss by securing another job (the court believed that securing a driver’s job was not impossible), the three months award was on the lower side. Taking into consideration the foregoing, the Court allowed the cross-appeal, set aside the three months’ salary compensation, and substituted it with an award of the equivalent of 10 months’ gross salary.
37. On the applicable salary the appellant submitted that the trial court ignored their evidence and argument that the said Respondent was an independent contractor and in advertently applied the



Regulation of Wages (General)(Amendment)Order , 2018 stating that the Respondent should have been paid Kshs. 30,627.45 like an employee as opposed to the agreed amount of Kshs. 25,000 as an independent contractor. The court finds the only issue with the trial court decision with the decision was treating the Respondent as an employee and not as an independent contractor. Having upheld the finding of the trial court that the Respondent was an employee then the issue stands dispensed with. The Court held that the Regulations applied to the Respondent and the minimum statutory wages of Kshs. 30,627.45 of a Lorry driver applied by the trial court is upheld. The cross-appeal on the compensation is allowed and the award of the equivalent of three months' salary is substituted with an award of 10 months' salary applying minimum statutory wage of Kshs. 30,627.45 thus total sum award of Kshs. 306,270.45

Underpaid salary

38. On the issue of underpaid salary, this prayer falls under continuing injury, and the claims are renewed and due every month unpaid. The claim was filed within 12 months of termination in compliance with the provisions of section 89 of the *Employment Act* (Rev. 2024) to wit:- “Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” The Court held that the Respondent was entitled to the underpaid salary from July 2016 to December 2021. The trial court awarded him 3 years. The award is set aside and substituted with an award for underpaid salary for the period of employment (July 2016 to December 2021) thus 5 years and 6 months(5627.45 x 66 months) total award sum of Kshs. 371,411.70.

Untaken leave

39. The Appellant did not treat the Respondent as an employee hence he was never availed the statutory annual leave of 21 days during the entire period of employment. Section 28 provides for annual statutory leave as a minimum basic right of employee and states:- “(1) An employee shall be entitled—
- (a) after every twelve consecutive months of service with his employer to not less than twenty one working days of leave with full pay;
 - (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and threequarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.
- (2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under sub-section (1)(a) into different parts to be taken at different intervals.
- (3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.
- (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months



from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.

- (5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.”
40. The Court held that the untaken leave was a continuing injury under section 89 of the Employment Act(supra). The claim was filed within 12 months of termination. The court held that the Respondent was entitled to payment in lieu of the untaken annual leave for the entire period of employment. The provision of section 28(4) of the Employment Act was not applicable as the Respondent was not treated as an employee hence had no opportunity to apply the leave. The cross-appeal is upheld and the decision of the trial court limiting the award to three years is set aside and substituted with award of untaken annual leave for the period of employment of July 2016 to December 2021 thus 21/30 x 30627.45 x 5 years and 6 months total award on payment in lieu of untaken leave Kshs. 117,915.60
41. Overtime ought to be proved strictly. The trial court found the claim of having worked from Monday to Sunday was unrealistic and was not supported by evidence like a work ticket. The Cross-Appellant submitted it was unrealistic for the trial court to expect a work ticket. The court held that it was not unrealistic to expect a document of travel on a commercial motor vehicle. The Respondent had the burden to prove the overtime claim. He could have served the employer a notice to produce documents in support of his claim. The court found no basis to disturb the decision of the trial court on the overtime applying the provisions of section 109 of the Evidence Act to wit:- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Conclusion

42. Thus appeal is dismissed with costs to the Respondent.
43. The Cross -appeal is allowed partially. The Judgment and Orders of the Honourable C. K. Cheptoo (PM) delivered at Nairobi on the 8th of November, 2023 in Milimani MCELRC No. E1272 of 2022 is set aside and substituted as awarded as follows:-
- Judgment is entered for the claimant against the respondent in the claim dated July 15, 2022 as follows:-
- a. Compensation for unlawful termination for equivalent of 10 months salary total sum of Kshs.306,270.45
 - b. Underpayment for the sum of Kshs. 371,411.70.
 - c. Payment in lieu of untaken annual leave Kshs. 117,915.60
 - d. Cost of the claim and interest at court rates from the date of judgment.
44. Costs of appeal to the Respondent.
45. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

**J.W. KELI,
JUDGE.**



In the presence of:

Court Assistant: Otieno

Appellant – Ms Muriuki- We pray for a stay of 45 days.

Respondent: Ojuok h/b Modi

Court Order

A stay of 45 days is granted.

J.W. KELI,

JUDGE.

12TH FEBRUARY 2025

