



REPUBLIC OF KENYA



Kensalrise Limited v Orenge (Employment and Labour Relations Appeal E008 of 2023) [2025] KEELRC 1251 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1251 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2023**

MA ONYANGO, J

APRIL 4, 2025

BETWEEN

KENSALRISE LIMITED APPELLANT

AND

PETER LIHASI ORENGE RESPONDENT

(Being an appeal against the Judgment and Decree of Honourable Christine Menya (SRM) delivered on 9th September 2022 in Chief Magistrates Court at Eldoret ELRC No. 125 of 2020)

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 125 of 2020 wherein the Respondent had sued the Appellant vide a Statement of Claim dated 11th August 2020 seeking compensation and terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties the trial court delivered its judgment on 9th September 2022 in favour of the Claimant awarding him Kshs 18,399.70 as one month's pay in lieu of notice and Kshs. 220,796 as 12 months compensation for unfair termination. The Claimant was also awarded costs of the suit and interest at court rates.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 23rd May 2023 on the following grounds of appeal:
 - i. The learned magistrate erred in law and in fact by holding that the Claimant was an employee of the Respondent and awarding him compensation of Kshs. 239,195
 - ii. The learned magistrate erred in fact and in law by failing to take into account that there was no employment contract between the Claimant and the Respondent



- iii. The learned magistrate erred in law and in fact by disregarding the agreement between Kensalrise Limited and Saipo ventures, who was an independent contractor providing manpower services to the Appellant Company
 - iv. The learned magistrate erred in law and in fact by disregarding the evidence in court showing that the Notice to show cause letter dated 18th June 2020, minutes of the disciplinary meeting held on 29th June 2020 and the subsequent termination letter dated 2nd July 2020 was issued by Saipo ventures and not the Respondent.
 - v. The learned magistrate erred in law and in fact by disregarding the evidence in court showing that NSSF contributions remitted in favour of the Respondent were paid by Saipo ventures who was the employer and not the Respondent
 - vi. The learned magistrate erred in law and in fact by disregarding the Statement of the Respondent's witness that they had no control over the Claimant and that the Respondent paid all monies for services provided to who would in turn pay its employees
 - vii. The learned magistrate erred in law by relying on Order 1 Rule 15 of the Civil Procedure Rules and finding that the Respondent should have taken out a 3rd party notice yet they had no claim against Saipo ventures.
 - viii. The learned magistrate erred in law and in fact by disregarding the evidence tendered in court by the Appellant relating to the relationship with the Respondent.
4. The Appellant prayed for orders that:
- a. This appeal be allowed
 - b. The judgment and orders of the trial court be set aside in its entirety and the Appellant's appeal be allowed.
 - c. The costs in the Appeal and the trial court be borne by the Respondent.
5. The appeal was disposed of by way of written submissions. Both parties filed their submissions. The Appellant's submissions are dated 21st March 2024 while the Respondent's submissions are dated 28th April 2024.

Analysis

6. This being a first appeal, this court is guided by the principles espoused in several decisions among them, *Selle & Another v Associated Motor Boat Co. Ltd & Another* [1968] EA 123, to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified.
7. vide his Statement of Claim dated 11th August 2020, the Claimant (now the Respondent) averred that he was employed by the Appellant as a medium size driver with effect from 17th February 2018. That at the time of termination of his employment he was earning a gross salary of Kshs 24,351.
8. The Claimant averred that he served the Respondent with loyalty, diligence and commitment until 2nd July 2020 when the Respondent wrongfully, orally and unlawfully terminated his employment and refused to pay his terminal benefits. He stated that he was terminated on account that he was suspected of carrying unauthorized goods in the Respondent's motor vehicle, suspicion which was unfounded.



9. It was the Claimant's case that the Respondent terminated his employment without following the right procedure laid down in the *Employment Act*.
10. The Claimant contended that owing to the alleged unfair termination of his employment, he was entitled to terminal benefits which he itemized as follows:
 - i. One month pay in lieu of notice Kshs. 21,175
 - ii. Severance Pay Kshs. 21,175
 - iii. Overtime dues Kshs. 396,778
 - iv. Underpayment of wages Kshs. 92,075
 - v. Unpaid house allowance Kshs 92,104
 - vi. Unpaid salary of 3 days Kshs 2,117
 - vii. Unpaid leave for 2 years Kshs 42,350
 - viii. 12 months compensation for unfair termination Kshs 292,212
 - Total Kshs. 959,986
11. The Respondent prayed for the following reliefs:
 - i. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair and in the circumstances the Claimant is entitled to compensation as prayed
 - ii. The sum of Kshs. 959, 958 as set out in paragraph 10 above.
 - iii. Certificate of service
 - iv. Costs of this suit and interests at court rates from time of filing suit until payment in full
 - v. Any other, further and better relief the honourable court may deem just and fit to grant
12. The Appellant (Respondent in the trial court) on its part filed a Response to the Statement of Claim dated 28th December 2020. In its defence the Appellant maintained that at no time was the Claimant employed by the Appellant as he was in fact an employee of Saipo ventures Limited. It was the Appellant's contention that Saipo ventures Limited was responsible for employment of manpower and control of the same as the Appellant was not liable whatsoever for the employees of the said company as clearly indicted in business venture contract between Kensalrise Limited and Saipo ventures Limited.
13. The Respondent prayed that the Claimant's claim be dismissed with costs.

The Evidence adduced

14. At trial the Respondent testified as CW1 and adopted his witness statement recorded on 11th August 2020 as his evidence in chief. In his testimony, CW1 stated that he was employed by the Appellant on 17th February 2018 as a driver as evidenced by his staff card which he produced as Exb-1. He stated that he was terminated on allegations that he had carried unauthorized goods on the Appellant's vehicle. He stated that he was invited to a disciplinary hearing at Saipo offices and thereafter issued with a dismissal letter from Saipo ventures.
15. On cross examination, the Claimant maintained that he was employed by the Respondent. He admitted that the staff card did not indicate who the employer was. It was his statement that NSSF was



- paid by Saipo ventures. He stated that he was issued with a show cause letter by Saipo and invited to a disciplinary meeting by Saipo ventures.
16. On re-examination, CW1 stated that he was dismissed by the Respondent and that the disciplinary meeting was not properly conducted.
 17. I have perused the Record of Appeal and did not find proceedings relating to the hearing of the Appellant's case at trial.
 18. From the record, the trial court delivered its judgment on 9th September 2022 in favor of the Respondent in the following terms:
 - i. One month's pay in lieu of notice Kshs. 18,399.70
 - ii. 12 months' compensation for unfair termination Kshs 220,796
 - iii. Certificate of service be issued within 30 days of the judgment
 - iv. Costs of the suit and interests at court rates until payment in full
 19. It is the said judgment that is now the subject of this appeal.

Appellant's submissions

20. The Appellant crystallized the grounds of appeal into the following two issues:
 - i. Whether the trial court erred in disregarding material evidence produced before court and consequently holding that the Respondent was an employee of the Appellant company
 - ii. Whether the trial court erred in relying on Order 1 Rule 15 of the Civil Procedure Rules
 - iii. Whether the appeal is merited
 - iv. Who is entitled to costs.
21. On the first issue, the Appellant submitted that the main issue for the trial court's determination was whether there was a subsisting employment relationship between the Appellant and the Respondent to warrant the grant of the orders sought by the Respondent. The Appellant maintained that the notice to show cause letter dated 18th June 2020, the minutes of the disciplinary meeting held on 29th June 2020 and the termination letter dated 2nd July 2020 found at the page 21, 55 to 57 of the record of appeal show that they were issued by Saipo ventures Limited. That at page 22 of the Record of Appeal, a copy of the NSSF statement reveals in the details that the Respondent's employer is indicated as Saipo ventures.
22. The Appellant submitted that the Respondent did not tender any contract of employment between himself and the Appellant in utter disregard of section 107 of the *Evidence Act* and the principles set out in the case of *Transport Workers Union v Euro Petroleum Products & Another* [2019] eKLR as quoted in the case of *Zarika Adoyo Obondo v Tai Shunjun & Another* [2020] eKLR.
23. Further, it was submitted by the Appellant that the disciplinary process contemplated under the provisions of section 41, 43 and 44 of the *Employment Act* require employers to strictly comply with the said provisions to ensure that the tenets of fair labour practices are adhered to. In this regard, the Appellant submitted that it reported to Saipo ventures Limited that the Respondent was carrying unauthorized goods in the Appellant's vehicle as a result of which, Saipo ventures Limited initiated the disciplinary process against the Respondent.



24. It is the Appellant’s submission that there was overwhelming evidence before the trial court pointing to the nature of the employment relationship between Saipo ventures Limited and the Respondent which the trial court failed to consider and evaluate. The Appellant thus urged the court to hold that Saipo ventures Limited was the Respondent’s employer and as such, the award of Kshs 239,195 as compensation for unfair termination against the Appellant was thus improper and without any factual or legal basis.
25. On whether the trial court erred in relying on Order 1 rule 15 of the Civil Procedure Rules, the Appellant submitted that it has no claim for contribution, indemnity or howsoever against Saipo ventures Limited and thus contrary to the holding of the learned magistrate, third party proceedings could not issue.
26. On the last issue, the Appellant submitted that the Appeal is merited and urged the court to allow the Appeal as prayed. The Appellant prayed for costs of the Appeal.

The Respondent’s submissions

27. On his part, the Respondent submitted that from the Memorandum of Appeal, the only bone of contention is whether the Respondent was an employee of the Appellant. According to the Respondent, in his evidence before the trial court he produced a Staff Identity card, the property of the Appellant which document was not challenged in evidence.
28. The Respondent while addressing the issue of third party proceedings raised by the Appellant in ground 7 of its Appeal contended that if the Appellant had been wrongfully sued, it would have sought to enjoin Saipo venture as a 3rd party in the proceedings before the subordinate court. In support of this position, the Respondent cited the case of Cheruiyot Edwin Mutai v Cyrus Ngaruiya [2020] eKLR.
29. It is the Respondent’s submission that the appeal lacks merit and he sought for its dismissal with costs.

Analysis and determination

30. I have considered the Appellant’s Record of Appeal and the submissions by both parties. The many grounds of appeal may be summarized as follows:
 - i. Whether the Learned Magistrate erred in holding that the Respondent was the Appellant’s employee
 - ii. Whether the compensatory damages awarded to the Respondent by the trial court should be set aside.
 - iii. What orders should issue

Whether the Learned Magistrate erred in holding that the Respondent was the Appellant’s employee

31. On the first issue for determination, the onus of proving employment under a contract of service lies with the person who alleges that he was so employed. Under section 2 of the *Employment Act* an employee has been defined as:

“A person employed for wages or salary and includes an apprentice and indentured learner.”



32. An employer is defined as
- “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual”
33. A contract of service is defined as:
- “an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership”
34. The Respondent in his evidence at the trial court produced a staff identity card which indicated that it was the property of Kensalrise Limited. In its defence, the Appellant stated that the staff identity card, was its property and served the purpose of allowing workers into its premises. That it did not infer the existence an employment relationship.
35. The Respondent further produced the notice to show cause and the minutes of the disciplinary hearing relating to his disciplinary process as well as the termination letter issued to him. From a scrutiny of these documents, it is clear that they emanated from Saipo ventures Limited as evidenced by the stamps thereon. The Respondent also produced NSSF Statement as part of his list of documents dated 11th August 2020 which shows that he was remunerated by Saipo ventures Limited, a party who was adversely mention in the proceedings before the trial court but was not sued.
36. From the above analysis, there is no doubt that the Respondent was not an employee of the Appellant in view of section 2 of the *Employment Act*. The holding by the trial court that the Appellant was liable for the unfair dismissal of the Respondent was therefore erroneous.
37. In the absence of an employer/employee relationship between the Appellant and the Respondent, the second issue for determination is a moot point.
38. Consequently, the appeal herein succeeds. The judgment of the trial court delivered on 9th September 2022 is hereby set aside and substituted with an order dismissing the Respondent’s suit filed in the trial Court.
39. Each party shall bear its own costs of both the appeal and of proceedings in the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 4TH DAY OF APRIL 2025

MAUREEN ONYANGO

JUDGE

