Nairobi University v Opar (Employment and Labour Relations Appeal E082 of 2024) [2025] KEELRC 1576 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1576 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E082 OF 2024

AN MWAURE, J

MAY 30, 2025

BETWEEN

NAIROBI UNIVERSITY .... APPELLANT

AND

HEZRON NJONG OPAR .... RESPONDENT

(Being an Appeal from the Judgment of the Honourable Orenge K.I, Principal Magistrate delivered on 10th February 2023 in Nakuru CMCC No. 28 of 2008)

JUDGMENT

1. This appeal emanated from the High Court and was subsequently transferred to this Honourable Court for determination.
2. The Appellant, being dissatisfied with the judgment of Honourable Principal Magistrate Orenge K.I, filed this appeal vide a Memorandum of Appeal dated 6th March 2023, where the Appellant came up with 10 grounds that: -
    1. The learned magistrate erred in law in refusing to allow the Defendant's witnesses to testify even after filing witness statements and bundle of documents in support of the Defendant's defence, and consequently the Defendant's right to a fair trial was violated and the entire proceedings are a travesty of justice.
    2. The learned Magistrate erred in law and fact in holding that at all time material there existed a contract of employment between the Plaintiff and the Defendant under whose terms the Plaintiff was entitled to wages for alleged services rendered.
    3. The learned Magistrate erred in law and fact in holding that the Plaintiff has discharged his burden of proof on a balance of probability as required by the provisions of section 107 of the *Evidence Act*, Cap 80, Laws of Kenya

4. The learned Magistrate erred in law and fact in holding the Plaintiff's claim was unchallenged even when the Defendant had filed a statement of Defence, witness statement, cross-examined the Plaintiff during the trial and had marked for identification several documents countering the Plaintiff's evidence.

5. The learned Magistrate therefore erred in law in shifting the burden of proof to the Defendant contrary to principles of law

6. The learned Magistrate erred in law and fact in failing to distinguish the cases relied upon by the Plaintiff and consequently misapplied the principal of law expounded in the said authorities to the detriment of the Appellant, as the court was not faced with any opposing probabilities

7. The learned Magistrate erred in law and fact in admitting into evidence and relying on unsubstantiated documents and accounts manufactured by the Plaintiff himself, and therefore arrived at an erroneous decision in awarding the Plaintiff the principal amount as pleaded.

8. The learned Magistrate erred in law and fact in awarding the Plaintiff costs and interest in the suit against clear evidence that the Plaintiff had delayed the prosecution of the suit for several years necessitating an application to dismiss the suit for want of prosecution, which application was denied in the court allegedly in the "interest of justice", even though the same court went on to deny the Appellant an adjournment in order to call its key witnesses.

9. The learned Magistrate erred in law in considering extraneous matters and making a hypothesis not based on fact or law, and thus arrived at a grossly flawed decision.

10. The learned Magistrate's decision is therefore full of contradictions and in variance with the evidence tendered before the court, his analysis of evidence selective and his application of the law flawed, leading to gross miscarriage of justice.

3. The Appellant prays that:

   a. The Appeal herein be allowed the judgment and decree of the Hon. Orenge K.I, Principal Magistrate issued on 10th February 2023 be set aside and substituted with an order dismissing the Plaintiff's suit before the lower court with costs to the Appellant.

   b. Without prejudice to the foregoing and in the alternative, this Honourable Court be pleased to remit the suit before the Lower Court for trial before another court of competent jurisdiction.

   c. Costs of the Appeal herein be borne by the Respondent

4. This appeal was disposed of by way of written submissions.

Appellant's written submissions

5. The Appellant submitted that the trial court violated the principle of Audi Alteram Partem (no one should be condemned unheard) by denying it a fair chance to present its case. Despite a five-year delay, the Appellant's bid to dismiss the Respondent's suit was rejected in 2016. In 2018, the Appellant requested an adjournment to call a key witness but was denied, forcing it to prematurely close its case. A later attempt to set aside this order in 2021 was also dismissed in 2022, with the court failing to consider the Appellant's arguments or reasons for the adjournment request.

6. The Appellant relied on Article 50 of *the Constitution*, which guarantees the right to a fair hearing. The Appellant also relied on the case of Savanna Development Company Ltd v Merchantile Company Ltd, Case No. 120 of 1992, where the court stated that it has discretion to grant adjournments based on

valid reasons, potential prejudice to the opposing party, and possible compensation through costs. In Peter M. Kariuki v Attorney General [2014] eKLR, the court emphasized that adjournments should be granted judiciously, considering the conduct of the parties and the sufficiency of reasons provided. Additionally, in Job Obanda v Stage Coach International Services Ltd & Another [2002] eKLR, the court stressed that denying an adjournment without assessing potential miscarriage of justice could justify appellate intervention. The Appellant argued that courts must carefully evaluate adjournment requests to prevent unfair outcomes.

7. The Appellant submitted that the trial court failed to fairly exercise its discretion by denying an adjournment request despite the defence witness having filed their statement two years earlier. The Appellant also submitted that the court did not record the reasons for the witness's absence or consider the nature of their evidence. Additionally, the Appellant contends that similar requests by the opposing party had been granted over the five years the case was pending.

8. The Appellant submitted that it was the Plaintiff's duty to provide evidence of the contract between himself and the Defendant. The Black's Law Dictionary, 8th Edition, describes a contract as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable in law." In Caleb Onyango Adongo v Bernard Ouma Ogur [2020] eKLR, the court cited the case of Rose and Frank Co. v J R Crompton & Bros Ltd [1923] 2 KB, established that a contract requires a mutual intention to create legal obligations, communicated explicitly or implicitly. Legal scholars emphasize that a plaintiff must prove a definite offer and acceptance to establish contractual relations. Courts generally take an objective approach in determining contract existence. In William Muthee Muthami v Bank of Baroda [2014] eKLR, the Court of Appeal reaffirmed that a valid contract must include offer, acceptance, and consideration for an aggrieved party to claim a breach.

9. In Ahmed Mohamed Noor v Abdi Aziz Osman [2019] eKLR, the court cited the case of Bungoma Election Petition No. 4 of 2014 Makali v Koyi John Waluke & 2 others (2018) eKLR, it was held that the legal burden in a case lay with the claimant throughout the trial in accordance with section 107 of the *Evidence Act*.

10. The Appellant submitted that the Learned Magistrate wrongly proceeded as if the Respondent's evidence was unchallenged, despite cross-examination by the Defendant. Although the Defendant was denied the opportunity to call witnesses, the Plaintiff's claims were contested. Additionally, the Appellant also submitted that it had filed its Witness Statement two years before its adjournment request was denied, yet the court failed to consider the balance of convenience, despite the statement being on record.

11. In Charterhouse Bank Limited (under Statutory Management v Frank N. Kamau [2016] eKLR the Court of Appeal stated that before a trial court can conclude that a plaintiff's case is unchallenged or proven on a balance of probabilities due to the defendant's failure to call evidence, it must first ensure that the plaintiff has presented credible and convincing evidence. If the defendant cross-examines the plaintiff or their witnesses and significantly discredits their testimony, the court cannot rule in favour of the plaintiff solely because the defendant did not testify. The plaintiff must provide sufficient evidence that, even without rebuttal, proves the claim on a balance of probabilities. Without such proof, the absence of the defendant's testimony alone does not entitle the plaintiff to judgment.

12. The Appellant submitted that the Learned Magistrate held that the Plaintiff's evidence was credible and remained unchallenged, as it failed to present any counter-evidence. Documents marked as exhibits confirmed that the Plaintiff rendered services but received no payment. The Appellant also submitted that the Learned Magistrate failed to distinguish the precedent set in Waruru Munyororo v Joseph Ndumia Murage & Another, HCC No. 95 of 1988, where the Defendant did not cross-examine the

Plaintiff. In contrast, in the present case, the Respondent was cross-examined, and his evidence was discredited. The Appellant contended that the Magistrate's ruling contradicted the Court of Appeal's decision in Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau [2016] eKLR in support of that proposition.

13. The Appellant submitted that the Learned Magistrate ruled that the Respondent's documents were unchallenged despite cross-examination, but failed to verify their authenticity or require testimony from their authors. The Respondent admitted to authoring key documents, including a worksheet used to claim payment, but there was no corresponding approval from the Appellant. As a result, the Respondent did not meet the burden of proof to establish the alleged debt. The Learned Magistrate was deemed to have misdirected himself by declaring the Respondent's case proven without tangible evidence.

14. The Appellant relied on Sections 26(1) and 27(1) of the *Civil Procedure Act*, which provides that the courts have discretion to allow interest on liquidated claims and may do so at such rate as it deemed reasonable and costs against an unsuccessful litigant. The Appellant relied on the case of Scherer v Counting Instruments Ltd [1986] IWLR 615, where the Court of Appeal set out the principles of awarding costs, stating that the general rule is that costs follow the event, meaning the party responsible for unjustifiably bringing another to court must compensate them. However, the judge has full discretion to determine cost orders based on the justice of the case. While a successful party may expect to recover costs, they have no absolute right to them, as the decision depends on judicial discretion. This discretion must be exercised fairly, based on established principles and case facts, and must be supported by relevant grounds to ensure proper judicial function.

15. The Appellant submitted that the Plaintiff delayed prosecuting the case, prompting the Defendant to seek dismissal for want of prosecution. Additionally, the Appellant contended that the Lower Court's judgment was flawed due to misinterpretation of the law and facts, resulting in an unfair ruling. The Appellant claimed this led to a miscarriage of justice and violated its constitutional right to a fair hearing. Consequently, the Appellant urged that this Honourable Court allow the appeal by setting aside the trial court's judgment, and award costs.

Respondent's written submissions

16. The Respondent submitted that the Appellant argued that it was denied a fair hearing, violating principles of natural justice and Article 50 of *the Constitution*. It cited multiple dismissed applications, including one for suit dismissal in 2015, adjournment in 2018, and setting aside orders in 2021. The case history shows the Appellant filed its defence in 2008, participated in cross-examination, but later failed to present its case, leading to judgment in favour of the Respondent in 2009. Though the Appellant successfully set aside the judgment in 2010, proceedings remained intact. Instead of scheduling its defence hearing, the Appellant filed an application to dismiss the suit in 2015, despite the Plaintiff's case already being heard and closed.

17. The Respondent submitted that the Appellant's application to dismiss the suit for want of prosecution was denied, as the plaintiff had already testified and closed their case, leaving the matter pending for the defence hearing. The Appellant later abandoned a preliminary objection and was granted a final adjournment for its defence hearing, but ultimately closed its case without presenting evidence. Subsequent applications, including one to set aside orders, were dismissed. The court clarified that only the judgment was set aside, not the proceedings. The written submissions were filed, and judgment was delivered on 10th February, 2023. The Appellant's claim of unfair dismissal of its application was refuted, as the case was already progressing, and evidence showed the file had been misplaced but actively pursued by the Respondent.

18. The Respondent relied on the case of Catherine Chepkemoi Mukenyang v Evanson Pkemei Lomaduny & another [2022] eKLR, where the court cited the case of R v Aga Khan Education Services ex-parte Ali Sele & 20 others High Court Misc. Application No. 12 of 2022, the court stated that natural justice does not always require a hearing, especially when expediency in decision-making outweighs the need for further proceedings.

19. In Nalichandra Devchand Dhodia & Anor v Evans Onyango (2019) eKLR, the court stated that the Defendant's claim of being condemned unheard on 6th December, 2018, lacked merit, as there was no evidence that the Defendant was unaware of the hearing date or required to attend. The Defendant's counsel failed to show communication with their client regarding the hearing. The court emphasized that once a party is given sufficient notice and chooses not to attend, the proceedings cannot be deemed a violation of their right to be heard. Additionally, the Defendant and counsel were expected to uphold the overriding objective under sections 1A and 1B of the *Civil Procedure Act*, ensuring efficient and fair resolution of disputes. Their failure to attend court and later seek to set aside the order closing the case, despite lacking witness lists, statements, or documents since 2012, contradicted legal provisions and Article 159(2)(b) of *the Constitution*.

20. The Respondent submitted in this case, the Appellant's counsel, Miss Gitau, informed the court that the defence did not intend to call any witnesses and formally closed its case without requesting an adjournment. Given that the defence had already been granted a final adjournment previously, the claim that the defendant was denied the right to be heard is unfounded. Any statement to the contrary would be misleading and would not contribute to the fair resolution of the dispute.

21. The Respondent submitted that the Appellant argued that its right to a fair hearing under Article 50 of *the Constitution* was violated when its applications for adjournment and to set aside orders closing the defence case were denied. The court referenced Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR, which outlines exceptions where interlocutory orders are immediately appealable, including when they affect a substantial right or determine the action. The ruling of 9th September, 2022, was deemed immediately appealable as it conclusively determined the Appellant's ability to reopen the defence case. However, the court held that the appellant failed to establish sufficient cause, and its claim regarding the right to a fair trial should not be considered in the appeal.

22. The Respondent submitted that the Appellant did not object to producing in evidence the documents and argued that there existed no contract or that the Respondent did not establish the existence of a contract between it and the Respondent has no factual or logical. In Caleb Onyango Adongo v Bernard Ouma Ogur [2020] eKLR, the court examined whether an implied contract existed, as there was no written agreement. The Appellant, a timber dealer, testified that the Respondent requested timber splitting and transport services, agreeing to pay Kshs.129,000/=. Payments were made in installments, leaving an unpaid balance of Kshs.98,400/=, which the Respondent acknowledged in an undertaking. The Respondent, however, claimed full payment and argued that the Appellant did not complete the work. The court determined that the transaction involved an offer, acceptance, and consideration, thereby establishing a valid implied contract.

23. In Midado Communications Limited v Total Kenya Limited [2016] eKLR the Court of Appeal cited the case of Timoney and King v King, 1920 AD 133 at 144 that a contract can even exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded.

24. The Respondent submitted that the trial court found the Respondent's evidence unchallenged, as the Appellant neither objected to the documents presented nor provided counter-evidence. The key issue was whether a contract existed and if the claimed payment rate was accurate; however, the Defendant

failed to challenge the Respondent's case during the trial. Concerning the Appellant's submissions, the court reiterated that a party is bound by its pleadings and cannot introduce evidence through written submissions. Furthermore, the Appellant did not produce any documents, and identification alone does not make a document an exhibit. The claim that the trial court failed to demand testimony from the document makers was dismissed, as the Appellant's counsel did not object to their production. The court ruled that the documents met legal requirements, rendering the Appellant's argument an afterthought.

25. The Respondent submitted that there was no proof that the trial court misapplied legal principles or considered extraneous matters. Additionally, the Appellant failed to present any evidence, oral or documentary, that could have influenced the court's decision in its favor. Holding a different opinion does not equate to a legal misapplication. The Respondent emphasized that an appellate court only intervenes if the trial court was clearly wrong, misdirected itself, or overlooked relevant factors, leading to an incorrect conclusion.

26. The Respondent submitted that the awarding of costs is the court's discretion and relied on the case of Limuru Country Club & 6 Others v Rose Wangui Mambo 15 Others [2019] KECA 101 (KLR), the Court of Appeal cited the Supreme Court case of Uganda in Impressa Ing Fortunato Federice v Nabwire [2001] 2 EA 383 rendered itself stating that section 27 of the *Civil Procedure Act* grants judges absolute discretion in awarding costs, which must be exercised judiciously based on the facts of each case. While costs generally follow the event, a court may order otherwise for valid reasons. A successful party may be denied costs if its conduct led to the litigation. Appellate courts do not interfere with a trial court's discretion unless there is a clear misdirection or improper exercise of judicial authority.

27. The Respondent urged this Honourable Court to find that the appeal lacks merit and should be dismissed with costs.

Analysis and determination.

28. The court has considered the memorandum of appeal and submissions by both counsels. Being the first appellate court, its role is to reassess, re-evaluate and re-analyse the for that. This position was stated in the cases of Selle & Another v Associated Motion Boat Co. Ltd, and Others [1968] EA 123 and Peters v Sunday Post [1958] EA 424. seeing or hearing the witnesses, and making due allowance conclusions, bearing in mind that it had no advantage of Evidence on record and make it's own independent

29. The issue for determination before this Honourable Court is whether the appeal has merit. Looking at the record of appeal, the Respondent filed a suit against the Appellant for Kshs.143,400/= with costs of the suit and interest. The court has looked at the proceedings, noting that the Respondent adduced his evidence and the Appellant did not call a witness to testify since 2008 up to date. Article 159(2)(b) of *the Constitution* clearly states that justice shall not be delayed. The Appellant on several occasions sought adjournment and on 8th August 2018, the Appellant closed its case. In Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] KECA 334 (KLR), the Court of Appeal held that the respondents, having opted not to call any witness, there was no evidence on record in support of the respondents' defence. Since the Appellant had filed its pleadings, it was bound by them as it was held in the case of Independent Electoral and Boundaries Commission & Another v Mule & 3 others [2014] KECA 890 (KLR).

30. The Appellant filed an application dated 29th November 2021 and was dismissed on 9th September 2022. This was an application for court to set aside its orders issued on 8th August 2018 closing the case. The trial court observed the inordinate delay in finalizing this case.

By the way the claim had been filed on 11th January 2008.

31. From the records from the trial court the Appellant did not call any witnesses and the counsel then closed the case on 8th August 2018. Finally, judgment was delivered on 10th February 2023 and the trial court held there was evidence that the Plaintiff who is the Respondent herein was owed money for teaching lessons on behalf of the Appellant.

32. The Appellant alleges that there is no proof of an employer and employee relationship between the Appellant and the Respondent.

    There is no contract of employment between the respective parties that was availed in court. There are few scattered letters from the Appellant however indicating that there was a relationship with the Respondent like one dated 27th March 2006 and 3rd March 2006. The employer seems to have very casually handled his employee and yet Section 74 of the *Employment Act* is clear that the onus of keeping records of documents for the employee are on the employer. It is not fair for the Appellant to use his laxity to punish the employee for lack of documents.

    The court is satisfied both from the documents provided by the employer and from the employee that the Respondent rendered services to the Appellant. The Appellant either failed to keep the records or chose not to produce them.

    The court finds there was an employment relationship between the Appellant and the Respondent and the Appellant must make good the Respondent's entitlements.

33. The many other grounds raised by the Appellant in its appeal have not been proved and are mostly mere allegations. There are allegations that the Appellant was not heard and his submissions were not considered. They aver that the trial magistrate erred in holding that the Plaintiff's case was not challenged. This court as well finds the Appellant had all opportunities to defend his suit but instead kept absenting himself from court and finally closed its case without calling their witnesses. Such witnesses would greatly have assisted the court to determine the case.

    In such absence the court agrees with the trial court that the defence evidence was uncontroverted.

34. Whereas this does not mean that if evidence is not adduced to controvert a case that judgment must of necessity be issued in favour of the Applicant however in this particular case this court is satisfied the Respondent did prove he was owed money, he worked for as an adjunct lecturer. It is unfortunate the case has taken decades to be determined but everything comes to an end.

35. In Rift valley Railways (K) Limited v Kiya Kalakhe Boru [2015] KECA 900 (KLR), the Court of Appeal stated that it is trite law that he who alleges must prove, and this burden only shifts after such 'proving'. In this instant appeal, there is sufficient evidence proving that the Respondent established that he was an employee of the Appellant, as the same was not challenged.

36. In view of the foregoing, the court finds that the appeal lacks merit and therefore it is dismissed and the trial court's judgment is upheld.

37. The Respondent shall have the costs of the appeal and the trial court costs as well.

    Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MAY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COvID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE