



**Nyanchongi v Seb Estate Limited (Appeal E113 of 2024)  
[2025] KEELRC 1594 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1594 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E113 OF 2024**

**JW KELI, J  
MAY 23, 2025**

**BETWEEN**

**ALFRED MAINA NYANCHONGI ..... APPELLANT**

**AND**

**SEB ESTATE LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the Honourable W.K. Micheni (CM) delivered at Nairobi on the 8th of March, 2024 in MCELRC No. 1958 of 2021)*

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable W.K. Micheni (CM) delivered at Nairobi on the 8th of March, 2024 in MCELRC No. 1958 of 2021 between the parties filed a memorandum of appeal dated the 8<sup>th</sup> of April 2024 seeking the following orders:-
  - a. The Appeal be allowed.
  - b. The Judgment delivered on 8<sup>th</sup> March 2024 in Milimani Chief Magistrate Employment and Labour Relations Court Case No. E1958/2021 be set aside, varied and/or substituted with a Judgment in favour of the Applicant against the Respondent.
  - c. Costs of the Appeal be awarded to the Appellant.

**GROUND OF THE APPEAL.**

2. That the Honourable Trial Magistrate erred in law and in fact by dismissing the Appellant's suit against the Respondent despite the overwhelming evidence adduced against the Respondent during the hearing.



3. That the Honourable Trial Magistrate erred in law and in fact by failing to find that there was an employment relationship between the Appellant and Respondent.
4. That the Honourable Trial Magistrate erred in law and in fact by failing to consider and apply the subjective tests used to determine whether an employment relationship exists between parties to the Appellant and Respondent's case.
5. That the Honourable Trial Magistrate erred in law and in fact in holding that there was no employment relationship between the Appellant and the Respondent on the ground that the Appellant did not produce any itemized pay statement/pay slip and in so doing failed to appreciate the provision under Section 20 of the *Employment Act*.
6. That the Honourable Trial Magistrate erred in law and in fact by failing to interrogate the reason why the Respondent failed to issue a Third-Party Notice to the said "Landlord" whom it claimed against.
7. That the Honourable Trial Magistrate erred in law and in fact by failing to consider the fact that the Respondent failed to tender evidence to the effect that it was an estate manager and neither did it produce a contract evidencing an agreement between it (the Respondent Company) and the Landlord to show the said relationship (estate manager and landlord).
8. That the Honourable Trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions filed at the trial court
9. That the Honourable Trial Magistrate erred in law and in fact in making outright prejudicial substantive conclusions, applying selective justice and disregarding the evidence tendered by the Appellant.

#### **BACKGROUND TO THE APPEAL.**

10. The Appellant filed a claim against the Respondent vide a memorandum of claim dated 12<sup>th</sup> November 2021 seeking the following orders: -
  - a. A declaration that the termination was unlawful and unfair.
  - b. An order that the Respondent pays the Claimant their dues and benefits as aforesaid.
  - c. Costs of the Claim and Interest.
  - d. A certificate of service be issued to the Claimant.
  - e. Further orders and reliefs that the Court shall deem fit and appropriate.
11. The Appellant filed his verifying affidavit, his witness statement, list of witnesses and list of documents all dated 12<sup>th</sup> November 2021 (see pages 7-24 of the ROA dated 31<sup>st</sup> October 2024).
12. The claim was opposed by the Respondent who entered appearance and filed a Statement of Response to Claim dated 7<sup>th</sup> March 2022 (pages 177-178 of ROA); witness statement of Edwin Gitau ( page 179 of ROA); list of witnesses (missing from ROA); and produced the documents it wished to rely on (pages 180-184 of ROA).
13. The Claimant's/Appellant's case was heard on the 1<sup>st</sup> of February 2024 where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the Respondent, Mr. Musyoki (pages 205-208 of ROA).



14. The Respondent's case was heard on the same date where RW1, Edwin Gitau, relied on his filed witness statement and produced the Respondent's documents. He was cross-examined by counsel for the claimant Mr. Omari (pages 208-211 of ROA).
15. The parties took directions on filing of written submissions after the hearing. The parties complied.
16. The Trial Magistrate Court delivered its judgment on the 8<sup>th</sup> of March 2024, dismissing the Claimant/Appellant's case. (Judgment at pages 197 – 201 of ROA).

#### **DETERMINATION.**

17. The appeal was canvassed by way of written submissions. Both parties filed.
18. 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.”
19. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94: “I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

#### **Issues for determination.**

20. The crux of the appeal lay with the issue of whether there was an employer-employee relationship. Only after finding the existence of the relationship would this court consider whether there was a termination of employment, and if there was termination, its fairness and the merit of relief sought.

#### **On whether there was employer -employee relationship.**

21. The trial court having heard the case, made a finding that there was no proof of employer employee relationship between the parties. The court re-evaluated the evidence to reach own conclusion (*Selle*). The appellant in witness statement stated that he commenced employment with the respondent in 2005 without a formal contract. He stated he received net salary without itemized payslip with last net salary at Kshs. 9,120. He was dismissed in May 2020. He wrote a letter to the respondent which did not elicit any response.
22. The respondent denied existence of employment relationship. In witness statement of Edwin Gitau(RW1), it stated that the respondent was an estate agent. RW1 knew the claimant as a security guard in Shammah Estate in which the Respondent was the property management agent. That the respondent had never put itself as a security agent nor registered as Kenya private security under the regulations. In the appeal the respondent filed replying affidavit of Edwin Gitau dated 18th March 2025 reiterating it was an estate agent and not licenced to provide security services and thus does not



provide such services and was incapable of employing the appellant in the capacity of a security guard. That the appellant never produced any documents to prove employer-employee relations. That he did not provide sufficient prove that he received any salary as alleged from the respondent thus indicating further no employer employee relations.

23. Before the trial court, the appellant at cross examination said he was paid by Edwin. That he was employed by the respondent, that he was initially paid by cash and later by MPESA which did not indicate the respondent as the payment was done through an employee.
24. RW1 was Edwin Gitau the person named by the appellant. On cross-examination RW1 told the court that they were the property manager of Shamma Court where the claimant worked. RW1 started working at Ruchwa court then shamma. He said that he did not sue the landlord as they do not know him. He stated that the claimant's name was familiar. RW1 admitted he would pay salary on behalf of the landlord, that the landlord would give him money to pay the guards and workers. That their office was at 14<sup>th</sup> floor Anniversary Towers (as stated by the claimant at cross-examination). That they would issue members of staff and guards with welfare (sic) issued in isolated cases. The witness admitted they received the claimant's demand letter and in place of forwarding to the landlord forwarded to his advocate. He stated that their contract was terminated before the employee was terminated but did not have the evidence.
25. The court finds that the claimant's case of having been employed by the respondent was proved on a balance of probability. The claimant told the court he was engaged and paid salary by the respondent. That Edwin Gitau (RW1) was paying his salary RW1 admitted payment of salary alleging it was on behalf of undisclosed Landlord. He was the supervisor who gave instructions. RW1 was the said Edwin who admitted the foregoing save to deny being employer insisting it was acting on behalf of the landlord. The name of the landlord was not disclosed. There was no evidence of a contract between the landlord and the respondent produced to support the agency relationship. RW1 admitted that on receipt of the demand letter he did not give it to the said landlord rather forwarded to their advocate. The foregoing pointed to the respondent as the employer. The alleged termination of managing Shammah court was not proved. The court found that Respondent had control over the appellant as its employee on the basis of payment of salary and supervision.
26. The employee stated he was told he was dismissed in May 2020. During re-examination RW1 stated that the respondent was the estate agent collecting rent and deducting expenses. In civil proceedings if a sued party alleges a third party is liable for the suit it is their burden to take out third party proceedings. The respondent ought to have joined the alleged landlord failing which it took responsibility over the claim. The court noted that it was untrue that the respondent did not engage security guards. In *Ndolo v Seb Estates Limited* [2024] KEELRC 2031 (KLR)(judgment 25 July 2024) , where RW1 was the witness, the Respondent admitted to have employed a security guard as stated in paragraph 8 thus:- 'In its Memorandum of Response dated 27<sup>th</sup> November 2014, the Respondent admits having employed the Claimant, as pleaded in the Memorandum of Claim, but denies the allegations of constructive termination of employment.' For the foregoing reasons, the court found err in fact and law by the trial court and set aside the decision to hold there was employer employee relationship between the parties.

### **Fairness of the termination.**

27. The claimant asked the trial court to rely on the decision of the subordinate court in *Milimani Commercial MCELRC /E1954/2021*. The respondent protested on the basis of an appeal. The court did not find that there was an appeal decision. The court noted the claimant in the case was dismissed same time as the appellant, and one demand letter was issued. (page 12 of ROA was the demand letter on behalf of the appellant and Patrick Kimacia and others ).The court reviewed the



trial decision and found no reason why the decision would not be adopted to apply in the instant case. (page 172-175 of ROA was the judgment, Milimani Commercial MCELRC /E1954/2021 by Hon. Ogonda ).The court adopts the decision of Hon Ogonda as follows:-'7. whether the Claimant was wrongfully terminated. In the case of Walter Ogal Anuro Vs Teachers Service Commission the Judge stated as follows: "... for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness." The Claimant has complained that he was terminated without notice. The Respondent sent him home without giving any reasons. This evidence is uncontroverted. Section 45(1) of the Employment Act states as follows: No employer shall terminate the employment of an employee unfairly. Section 45(2) of the Act places the burden of proving that the termination was fair on the employer (in this case, the Respondent). It states that: A termination of employment by an employer is unfair if the employer fails to prove- (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason- (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure. (4) A termination of employment shall be unfair for the purposes of this Part where... (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider - (a) the procedure adopted by the employer in reaching the decision to dismiss the -20 employee, the communication of that decision to the employee and the handling of any appeal against the decision; (b) the conduct and capability of the employee up to the date of termination; (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (f) the existence of any previous warning letters issued to the employee.

8. The Respondent terminated the Claimant's employment without giving reason and without issuing notice contrary to section 35(1) of the Employment Act. I hereby declare that the termination of the Claimant's employment by the Respondent was unfair and unprocedural. The Claimant is therefore entitled to compensation for unfair termination under section 49(1)(c) of the Employment Act. The Respondent does not dispute that the Claimant was earning Kshs. 9,500/=. The minimum wage as at the time of termination in May, 2020 was Kshs 13,572/. This is the amount used to calculate the Claimant's compensation under section 49(1)(c) of the Employment Act. The Claimant has prayed for full compensation. I have considered the authority of Civil Appeal No. 352 of 2017, Kenya Broadcasting Corporation Vs. Geoffrey Wakio [2019] eKLR where the court stated as follows: "This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In Ol Pejeta Ranching Limited Vs. David Wanjau Muhoro [2017] eKLR this court categorically stated that the trial Judge must justify or explain why a Claimant is entitled to the maximum award; that the exercise of;I allow the claim for one month's salary in lieu of notice - Kshs. 13,572/=

The Claimant asserts that the Respondent would remit NSSF contributions but was not consistent. He is disqualified from payment of service pay under section 35(6)(d) of the



Employment Act. If there are any unremitted dues, the Claimant is at liberty to report to the relevant authority - see Hassanath Wanjiku Vs Vanela House of Coffees [2018] eKLR.

11. On severance pay, the Claimant did not lead evidence to prove that he was rendered redundant as per section 2 of the Employment Act on the definition of redundancy. He asserted that he was terminated without reason. I therefore decline to award any amounts as severance pay.
12. The Claimant has claimed for leave days not taken and underpayment from year 2012 to year 2020. The Respondent who is the custodian of records did not avail any records to prove that the Claimant proceeded on leave. The Respondent who was paying the Claimant's salary 1 did not refute the claim that the Claimant was earning Kshs. 9,500/= at the time of termination. I therefore allow these claims. However, I have limited these claims to 3 years. I am guided by the authority of Charles Kariuki Mwangi v Intersecurity Services Limited [2018] eKLR where Nzioki wa Makau J., held thus; "The Claimant claimed certain sums for leave, underpayment, severance pay for 6 years as well as house allowance and off days for 6 years. Under the Employment Act, the claims one can make are limited to 3 years. Half of his claim would by operation of law be statute barred and unrecoverable." The said claims works out as follows:

Leave days -  $21/30 \times \text{Kshs. } 13,572 \times 2 \text{ years (years 2020 and 2019)} = \text{Kshs. } 19,000.80/=$   
 $21/30 \times \text{Kshs. } 10,954 \text{ (for year 2018)} = \text{Kshs. } 7,667.80/=$  total Kshs. 26,668.60/=.

Underpayment from year May, 2017 to May, 2020

$\text{Kshs. } 13,572 - 9,600 = \text{Kshs. } 3,972 \times 12 \text{ months} = \text{Kshs. } 47,664 \times 2 \text{ years} = \text{Kshs. } 95,328/=$

$\text{Kshs. } 10,954 - 7600 = \text{Kshs. } 3,354 \times 12 \text{ months} = \text{Kshs. } 40,248/=$

Total = Kshs. 135,576/=

13. The claim for overtime was not proved to the required standard. The amounts were not specified in the Memorandum of Claim and evidence on this was not led at the hearing of the suit. It is not clear how the Claimant arrived at Kshs. 44,400/=. This claim is disallowed.

14. The Claimant is entitled to a total award of Kshs. 257,248.60/=. The Respondent shall bear the Claimant's costs. The interest to apply at court rates from date of filing suit until payment in full. There shall be a 30 days stay of execution." The court adopts the decision to apply mutandis mutandis in determination of the instant appeal.

### **Conclusion.**

28. In conclusion, appeal is allowed. The Judgment and Orders of the Honourable W.K. Micheni (CM as she then was ) delivered at Nairobi on the 8<sup>th</sup> of March, 2024, in MCELRC No. 1958 of 2021 is set aside and substituted as follows:-

Judgment is entered for the claimant against the respondent as follows:-

- a. A Notice pay of 1 months Kshs. - Kshs. 13,572
- b. Leave days total Kshs. 26,668.60/=.
- c. Underpayment Kshs. Kshs. 135,576/=



- d. The Claimant is entitled to a total award of Kshs. 257.248.60/=with interest from date of filing suit.
  - e. Costs of the suit.
29. The appellant to have costs of the appeal.
30. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23 DAY OF MAY, 2025.**

**J.W. KELI,**

**JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant : Charo h/b Omari

Respondent: Musyoki

