



REPUBLIC OF KENYA



**Amuri Investment v Aswani (Employment and Labour Relations Appeal
E092 of 2021) [2025] KEELRC 1440 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1440 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E092 OF 2021**

MN NDUMA, J

MAY 15, 2025

BETWEEN

AMURI INVESTMENT APPELLANT

AND

BENSON ASWANI RESPONDENT

JUDGMENT

1. The appeal serving before court is against the decision of Hon. A. M. Obura (Mrs) CM, at Milimani Commercial Court, Nairobi in which the trial court made a judgment dated 19/8/2021 in which the court found that the Claimant/Respondent had failed to prove that his employment was unfairly and unlawfully terminated by the Appellant. The court dismissed the claim for unfair and unlawful dismissal therefore. However, the court found that the Claimant had proved that he was entitled to payment of terminal benefits including:
 - a. Kshs. 92,485.00 in lieu of leave days not taken
 - b. Kshs. 56,760.00 in respect of unpaid public holidays worked
 - c. Kshs. 750,529.00 being underpayment since the Claimant was a caretaker and not a cleaner.
 - d. House allowance in the sum of Kshs. 144,756.00 in the absence of evidence by Respondent to show that the salary paid was consolidated and included house allowance and
 - e. Service pay in the sum of Kshs. 177,853.85 calculated at Kshs. 30,826.00/26 x 15 x 10 years worked.



2. The trial court relies on Section 10(7) of the *Employment Act*, 2007 to find that the claims by the Respondent had been proved on a balance of probability in the absence of production of documents by the Appellant to rebut the claims put forth by the Claimant which provision provides: -

“10(7) If in any legal proceedings an employee fails to produce a written contract or the written particulars prescribed in sub-section (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

3. The court further relied on Section 74(1)(f) and (i) which provides: -

“An employer shall keep a written record of all employees employed by him with whom he has entered into a contract under this Act which shall contain the particulars ---

(f)Of an employee’s annual leave entitlements days taken and says due specified in section 28---

(i)Where the employer provides housing particulars of the accommodation provided and where the wage rates are deconsolidated particulars of the house allowance paid to the employee.”

4. The grounds of appeal are set out in the memorandum of appeal dated 6th September 2021 wherein the Appellant has set out the following grounds: -

- i. That the learned Magistrate erred in law and in fact by upholding the prayers by the Respondent herein in his Memorandum of Claim.
- ii. That the learned Magistrate erred in law and fact by finding that Appellant herein had not provided evidence of the employment of the Respondent herein as cleaner.
- iii. That the learned Magistrate erred in law and fact by making an award for underpayment to the Respondent herein on the basis that he was employed as caretaker.
- iv. That the learned Magistrate erred in law and fact by finding that the Appellant herein had not provided evidence of leave days taken by the Respondent herein during his employment.
- v. That the learned Magistrate erred in law and fact by making an award in favour of the Respondent herein for leave days and unpaid public holidays.
- vi. That the learned Magistrate erred in law and fact by making an award in respect of house allowance whereas a similar provision for house allowance had been reckoned in the underpayment amounts computed by the Respondent herein.
- vii. That the learned Magistrate erred in law and fact by granting service pay to the Respondent herein contrary to the provision of section 35(6) of the *Employment Act*.
- viii. That the learned Magistrate erred in law and fact by giving amounts to the Respondent herein in respect of claims predating 6th November 2016 as these amounts were time barred under section 90 of the *Employment Act*, 2007.
- ix. That the learned Magistrate erred in law and fact by awarding Kshs. 750,429.00 for underpayment instead of Kshs. 720,529.00 as prayed for by the Respondent herein in his Memorandum of Claim.



5. This being a first appeal the court is guided by the decision in the case of Abok James Odera t/a, A. J. Odera & Associates versus John Patrick Macharia t/a Macharia and C. Advocates [2013] eKLR where the court held: -

“This being a first appeal we are reminded of our primary role as a first Appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusion reached by the learned trial judge are to stand or not and give reasons either way.”

6. This position was restated in the case of Gitobu Imanyara and 2 others versus Attorney General [2016] eKLR where the court held that: -

“[A] an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

7. In this matter as set out in the appeal record, the evidence by the Respondent(Claimant), was that he was employed by the Respondent as a caretaker on 3rd March 2009 and worked diligently until the time of alleged constructive dismissal of the Respondent by the Appellant having transferred the Respondent from Nairobi County to move to Meru on 3/6/2019 but failed to provide facilitation for the transfer of the Respondent from Nairobi to Maua by providing transport of household goods of the Respondent and relocate the family of the Respondent.
8. On 14/6/2019 the Appellant informed the Respondent that since he had not reported to Maua, it was assumed that he had declined the job and moved on to another job. The Respondent testified that he had immediately responded to the Appellant stating that he had not declined the job or transfer but was awaiting the Appellant to comply with the law by moving his property and family from Nairobi to Maua.
9. The Claimant testified that the dismissal was unlawful and claimed damages in respect thereof. The Claimant also testified that he was entitled to the terminal benefits set out in the memorandum of claim including

- i. one month salary in lieu of notice
- ii. Leave not taken Kshs. 92,485.05 for the period February 2017, 30828.30; February 2018 Kshs. 30,828.35 and February 2019 Kshs. 30,828.35
- iii. Unpaid public holidays Kshs. 56,760.00 as follows
 - a. 6 days for 2017 (6 x 1290 x 2 = 15,480.00
 - b. 12 days for 2018 (12 x 1290 2 = 30,960.00 and
 - c. 4 days for 2019, (4 x 1290 x 2 = 10,320.00
- iv. Underpayments Kshs. 720,529 as follows:

May 2015 – April 2017
(22,718.00 – 12,000)10,718 x 4 = 256,992

May 2017 – June 2019



$(30,828.30 - 13000) 17,828 \times 26 = 463,537$

- v. House allowance Kshs. 144,756.00 as follows:
June 2016 – June 2019
 $(15\% \text{ of } 26,807.24 = 4,021.10 \times 36$
- vi. Service gratuity Kshs. 177,853.85 as follows:
 $(30,828.26 \times 15 \times 10)$
10. The Claimant added that he was not paid salary since 3/6/2019 and this was evidence of constructive dismissal contrary to the allegations by Appellant that it did not dismiss the Claimant/Respondent.
 11. The claimant adduced documents showing his salary increase to Kshs. 13,000/= with effect from 1/8/2014. Letter of transfer from Nairobi to Maua dated 3/6/2019 with effect from Friday 14/6/2019. The letter said “Your basic salary will remain the same at Kshs. 13,000/= per month.”
 12. Under cross-examination by Mr. Kiranka Advocate for the Appellant, the Respondent stated he worked for the Respondent for 10 years. The Respondent admitted he had been transferred to Maua but waited to be facilitated to move which did not happen. That he had sent an SMS to the employer stating that he needed transport costs to travel to Meru but the Respondent did not respond. That they communicated normally through text messages. That the Respondent did not get a letter of termination of employment. That Claimant denied that he had refused to move from Nairobi to Maua. The Respondent said he had not taken leave for 3 years though he had requested for leave but was not granted. Respondent said he did not write a letter seeking payment in lieu, the Respondent said he did not abscond. The Respondent denied that he was satisfied with his pay and said he requested for review. The Respondent said he was the only caretaker employed by the Appellant. That one Eric Mwangi was the watchman. The Respondent agreed that it was his duty to ensure cleanliness of the premises. The Respondent said he was always paid on time.
 13. RW1 Stanley Ngare testified that he was an investment banker and real estate business man. RW1 said that the Respondent was an employee of the Appellant. RW1 said he did not sack the Respondent. RW1 said on 3/6/2019 he called the Respondent and served him with a letter of transfer which the Respondent accepted. That the Respondent did not write asking for relocation of his family to Maua. RW1 said they did not terminate the employment of the Respondent. That the Respondent was paid his salary always and was given bonus every Christmas and that he went on annual leave every December. That the Respondent was a cleaner. That the Respondent used work time to clean tenants’ motor vehicles and was warned by RW1. That the claims by Respondent are false.
 14. Under cross-examination by Mrs. Nyanyindo for the Respondent, RW1 said that he expected the Respondent to use his money to relocate to Meru. That the Respondent did not ask for assistance to relocate. That there was no provision for transfer allowance. RW1 said he was aware that the Respondent had a family. That he was to move to Meru from 24/6/2019. That the Claimant was a cleaner. That he was not aware that the law provided for transfer allowance.
 15. RW1 said he had no documentary evidence that the Respondent went on leave in 2017. That he had an SMS dated 19/12/2018 where the Respondent said he was on leave. That the document was produced by the Claimant before court.
 16. That the Claimant did not work during public holidays but used to come to clean tenants’ cars. That Respondent was paid a consolidated salary. That there is no document before court to show that the Respondent was not a caretaker. RW1 said he had provided a contract of employment to the



Respondent but the same was not before court. RW1 said he sent an SMS to the Respondent dated 19/6/2019 asking him if he wanted to resume duty. RW1 said the Claimant sent an SMS in response to his SMS on 19/6/2019. That Respondent never objected to go to Meru. That the Respondent was paid all his dues.

17. RW2 Ayub Ogalo testified that he was a gardener employed by the Appellant. That he had introduced the Respondent to the Appellant. That the Respondent took over from him. That the Respondent was a caretaker and RW2 used to relieve him when he was on leave.
18. Under cross-examination RW2 said he was not a gardener of the Appellant. RW2 said the Respondent used to clean stairs and gardening work. RW2 said the Respondent took his leave days in December and he would always relieve him of his duties during the period. RW2 said they were given three weeks of leave days.

Determination

19. The parties filed their written submissions and provided list of authorities. The issues for determination are: -
 - i. Whether the appeal has merit
 - ii. Whether the Appellant is entitled to the reliefs sought.
20. There is no cross-appeal and so the question whether the determination by the trial court that the Respondent/Claimant had not proved that he had been constructively dismissed from work is not in issue. The court finds no misdirection on the part of the trial magistrate in that effect.
21. The main issue for determination is whether the Respondent/Claimant had proved on a balance of probabilities that he was entitled to the reliefs granted to him by the trial court. The court will therefore deal with the merits or otherwise of each of the reliefs granted by the trial court.

Payment in lieu of leave days not taken

22. The Respondent/Claimant testified on oath that he was not granted any leave days by the Respondent for the period February 2017, February 2018 and February 2019. The Respondent claimed a full month's salary of Kshs. 30,828.35 in lieu of leave days not taken in respect of each year. RW1 and RW2 however testified that the Respondent/Claimant was granted leave for 3 weeks every December. RW2 stated that he relieved the Respondent/Claimant every time he went on leave in December. The Respondent had worked for the Appellant since the year 2009, a period of 10 years. The Respondent did not explain why he was denied leave in the year 2017 to 19 in particular if all along he had been granted leave by the Respondent. The trial court did not make any finding on the credibility of the testimony by RW1 and RW2 to the effect that the Respondent took 3 weeks leave every December and was during that time relieved by RW2. The trial court only relied on the absence of documentary evidence to find that the Appellant had not discharged the burden of disproving the allegation by the Claimant/Respondent that he never went on leave.
23. This court finds that the evidence by RW1 as corroborated by RW2, which oral evidence was not discredited by the court was sufficient to discharge the burden of rebuttal placed on the Appellant in terms of section 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya. The Respondent did not explain why he had always gone on leave but all over a sudden was denied leave for a period of 3 years out of the 10 years offered by him to the Respondent. The trial court erred in rejecting the evidence by RW1 and RW2 on this matter without faulting the credibility of the same. The court finds that this claim has no merit and the finding by the trial court is set aside.



Unpaid public holidays

24. The court awarded the Respondent in respect of unpaid public holidays for the period 2017 to 2019 only. RW1 testified in rebuttal of this claim without offering any oral or documentary evidence that the Respondent was not paid for the 22 public holidays worked and not paid. The court finds that the Appellant having failed to keep records did not discharge the burden of rebuttal placed on it under section 10(7) of the *Employment Act* 2007. The trial court did not err in this respect and the court upholds the award of Kshs. 51,760.00 in respect of unpaid public holidays. The court find that this was a continuous injury that was not time barred under section 90 of the *Employment Act* 2007.

Underpayment and house allowance

25. The Respondent/Claimant testified that he was paid Kshs. 13,000.00 per month from March 2009 when he was employed. RW1 stated that the basic salary of the Respondent was Kshs. 12,000.00 and was later adjusted to Kshs. 13,000. That the Respondent held the position of a cleaner and not caretaker as alleged by the Respondent/Claimant. The Respondent asserting that he was a caretaker and not a cleaner relied on the minimum wage order of 2015 and 2017 to claim that he was entitled for 2015 to a basic salary of Kshs. 22,718.00 and a house allowance of Kshs. 3,407.00 which amount to Kshs. 26,125.00 and a basic salary of Kshs. 26,807.25 from 2017 and a house allowance of Kshs. 4,021.10 which amounts to Kshs. 30,828.30. RW2 stated that he was a reliever of the Respondent/Claimant whenever he was on leave every December as a cleaner. Again, the trial court did not fault the credibility of the testimony of RW1 and that of RW2 regarding whether or not the Respondent/Claimant was a cleaner or a caretaker. The magistrate relied on failure by the Appellant to provide a contract of employment to find that the Respondent had failed to discharge its burden of rebuttal in terms of section 10(7) of the *Employment Act* in this respect.
26. This court finds that the Respondent/Claimant was also under an obligation to show that he had during the 10-year period of employment written to the Appellant regarding the status of his employment. Connected to this matter was the failure by the Respondent to write to the Appellant regarding payment of his house allowance. The court does not understand why the claim for underpayment is made from May 2015 to June 2019 whereas the claim for house allowance is made only from June 2016 to June 2019 yet the Respondent did not dispute the evidence by RW1 that he was paid Kshs. 12,000 from the year 2009 up to April 2014 and the salary was increased to Kshs. 13,000 from May 2017 up to the time of separation in June 2019.
27. The court finds that in the absence of any documented claim by the Respondent/Claimant on the matter of status of his employment and the matter of consolidation of his salary the Respondent did not discharge the primary onus of demonstrating a case in terms of section 107 and 108 of the *Evidence Act* Cap 80 laws of Kenya which case the Appellant was obliged to rebut or disprove in terms of section 10(7) of the *Employment Act* 2007 by production of documentary evidence.
28. Accordingly, the court finds that the trial court erred in law and fact by finding that the Respondent/Claimant had proved the claims for under payment and house allowance. Accordingly, the court sets aside both claims.

Service pay

29. Service pay is either provided under contract of employment or upon demonstration that the Respondent did not provide social security or pension to the employee during the tenancy of the employment in terms of section 35(5) as read with 35(6) of the *Employment Act*, 2007. The Respondent has the onus of demonstrating compliance with the provisions of section 35 by producing



a pay slip and or statements for NSSF or a registered pension or Provident Fund. The Appellant did not testify at all in this regard and so completely failed to rebut the claim set out in the memorandum of claim and witness statement of the Claimant/Respondent that he was entitled to payment of gratuity upon separation.

30. Accordingly, the court upholds the finding by the trial magistrate that the Respondent/Claimant was entitled to payment of service pay in the sum of Kshs. 177,853.85.
31. In the final analysis the court upholds the judgment by the trial court to the extent that the Respondent/Claimant is awarded: -
 - i. Kshs. 56,760.00 for unpaid public holidays.
 - ii. Kshs. 177,853.85 service pay
 - iii. Provision of certificate of service
Total award Kshs. 234,613.85
 - iv. Interest at court rates from date of judgement of trial court on 19/8/2021 till payment in full.
 - v. Costs of the suit
32. For the avoidance of doubt, the judgment of the trial court in respect of other awards is set aside

DATED AT NAIROBI THIS 15TH DAY OF MAY 2025

MATHEWS NDUMA

JUDGE

