



Ihururu Housing Investment Co-operative Society Ltd v Wangari (Employment and Labour Relations Appeal E014 of 2024) [2025] KEELRC 1453 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E014 OF 2024**

**ON MAKAU, J
MAY 15, 2025**

BETWEEN

**IHURURU HOUSING INVESTMENT CO-OPERATIVE SOCIETY
LTD APPELLANT**

AND

GRACE NYAMBURA WANGARI RESPONDENT

(Being an appeal from the Judgment of Honourable M.Lubia (SRM) delivered on 6th June 2024 in Nyeri CMELRC Cause NO. E037 of 2022) (Before Hon. Justice Onesmus N Makau on 15th May, 2025)

JUDGMENT

Introduction

1. The appeal is about a disputed employment relationship between the parties herein. The trial court found that there was in deed an employment relationship that was unfairly and unlawfully terminated by the appellant and awarded compensatory damages.
2. The appellant was aggrieved and filed a Memorandum of Appeal herein dated 2nd July 2024. The grounds of the appeal are: -
 1. That the learned trial Magistrate erred in law and fact by failing to analyse the testimonies of the parties before her thereby arriving at the wrong conclusion.
 2. That the learned trial Magistrate further erred in law and fact when she misdirected herself to the effect that the Respondent was an employee of the claimant despite there being no evidence in support of the same.
 3. That the learned trial Magistrate erred in law and fact when she purported to nullify the judgment of the honourable rent restriction tribunal and ousting its jurisdiction thereby



diverting the real issues in question and overreaching her mandate hence arriving at the wrong decision.

4. That the learned trial Magistrate erred in law and fact in entering judgment against the appellant without addressing herself on the issues raised by the Appellant in its filed statements and submissions thereby arriving at the wrong conclusion.
5. That the learned trial Magistrate erred in law and fact for awarding costs of the suit to the Respondents against the Appellant despite the circumstances that led to the suit.
3. The appellant prays for the following reliefs:
 - a. That the Appeal be allowed.
 - b. That the Judgment, decree and consequential orders made by the trial court in Nyeri E.RC Case No37 of 2022 be set aside and substituted with orders dismissing the suit against the appellant herein.
 - c. That an order do issue that the Respondent meets the costs of this appeal and costs in the Chief Magistrate's court.

Facts of the case

4. The relationship between the two parties started as landlord-tenant relationship but from April 2018, it morphed into employer-employee relationship under an oral contract. The respondent was verbally employed as a caretaker of the appellant's residential premises at Blue Valley Estate. Her salary was Kshs.10,000 out of which Kshs.5,000 was deducted at the source as her rent in the same premises.
5. In June 2020, the appellant terminated respondent's services as caretaker without notice or any wrong doing and appointed another caretaker. The appellant also failed to pay her salary of Kshs.5,000 and demanded Kshs.90,000 as rent arrears and ordered to leave the rented house.
6. The respondent filed suit before the Rent Restriction Tribunal for protection and the appellant lodged a counter claim for Kshs.90,000 rent arrears. The tribunal dismissed the respondent's suit and granted the counterclaim on 11th March 2022.
7. Undeterred, the respondent filed another suit before the Chief Magistrates Court on 6th May 2022 alleging that the appellant had unfairly terminated her employment, violated her rights to fair labour practices and fair administrative action, and further failed to pay her terminal dues. She sought the following reliefs:
 - a. 12 months' salary for unfair termination Kshs.219,000 (365 x 600)
 - b. Service pay (15 days for every year of service) Kshs.18,000
 - c. Damages Kshs.150,000
 - d. Underpayment of Kshs.65,598
 - e. House allowance of Kshs.48,840
 - f. Holidays Kshs.14,400
 - g. Overtime hours at Kshs.511,027
 - h. Rest days at Kshs.21,293



- i. Unpaid leave at Kshs.25,200
 - j. Certificate of service
 - k. Interest on the above at court rates
 - l. The Respondent to pay costs of this claim.
8. The appellant denied that the respondent was its employee and maintained that she was only a tenant who was evicted for failure to pay her house rent totaling to Ksh.95,000. Therefore, it averred that the alleged termination of employment did arise and the reliefs sought are not merited since she was never its employee.
 9. During the hearing, the respondent testified as PW1 and called two witnesses while the appellant called one witness. Thereafter, both sides filed written submissions.
 10. The respondent's case was that she started off as a tenant in the appellants premises in Nyeri town but when the caretaker left work, she was verbally appointed by the appellant as the new caretaker for a monthly salary of Kshs.10,000 out of which Kshs.5,000 was deducted as house rent.
 11. Although she was asked to give them copy of her Identity card and KRA PIN card, she was hired by the respondent chairman Mr.David Wanjohi and Charles Ndirangu who were also paying her salary. The salary was paid in cash or Mpesa. Her duties included cleaning of the premises, collecting bank slips for rent from tenants and going for receipts from the officer. She also signed tenancy agreement with the new tenants.
 12. The above evidence was fortified by the evidence of PW2 and PW3 who were tenants of the appellants when the respondent was the caretaker of the premises. They narrated how the respondent was introduced to them by Mr.Wanjohi and Kihembe as the caretaker and how they witnessed her cleaning the common areas like verandahs, compounds, doors and window panes on daily basis. She also addressed the problems that tenants had, and also paying the security guard.
 13. RW1, Michael Gachinga Kanore, appellant's vice chairman testified that the respondent was only a tenant in the appellant's premises and not an employee. Consequently, he stated that the respondent was not entitled to the reliefs sought in her suit.
 14. He further stated that when the new management took over the office, it appointed Mwalimu Agencies to manage the premises. He contended that the respondent owed it Kshs.95,000 in rent arrears since 2018.
 15. However, he confirmed that he joined the appellants Board in March 2020 and he neither knew the receipts for rent and how they were obtained. He admitted that every tenant signs tenancy forms. He further admitted that the Labor Officer told them that the respondent was an employee of the appellant. He further admitted that Mwalimu Agency wrote to the respondent to handover all the appellant's documents in her custody by 1st June 2020. The letter also notified her that the appointment of the new Agent had rendered her redundant.
 16. After considering the evidence and submissions the trial court (Hon.Lubia SRM) conclude that the respondent was an employee of the appellant and the appellant had unfairly terminated her employment. She then awarded her three months' salary as compensation for unfair termination, one-month salary in lieu of notice plus service pay of Kshs.18,000. The total award was Kshs.58,000 plus costs and interest at court rates.



17. Before this court both sides filed written submissions to dispose of the appeal. In brief the appellant submitted that the trial court erred by finding that the respondent was employed by the appellant without any evidence of a contract of employment. The court was referred to its decision in *Samuel Wambugu Ndirangu v 2NK Sacco Society Ltd (2019) eKLR*.
18. It was further appellant's case that PW2 and PW3 did not adduce any documentary evidence to prove that they were tenants in the appellant's premises as alleged.
19. It was further submitted that the trial court erred by purporting to nullify a judgment of the rent tribunal without any jurisdiction to do so. It was submitted the only court clothed with that appellate jurisdiction was the Environment and Land court before which the respondent lodged Appeal Number ELCA E003 of 2023, and which appeal is pending determination. Reliance was placed on *Ismael O.Omollo v Welco Services International (2022) eKLR* to urge the court to allow the appeal as prayed.
20. On the other hand, it was submitted for the respondent that the trial court was right in finding that the respondent was an employee of the appellant, because according to the *Employment Act*, a contract of employment can be oral or even implied from the conduct of the parties or from the facts. Reliance was placed on section 2 of the Act and the case of *Everret Aviation Limited v Kenya Revenue Authority (through the Commissioner of Domestic Taxes (2013) eKLR* and *Richard Sabwami Simiyu v Michael Maina Karinga & 2 others (2020) eKLR*.
21. It was submitted that the respondent narrated how she was hired by the appellants' officials as a caretaker and the duties she was performing in exchange of a monthly salary of Kshs.10,000. It was further submitted that PW2 and PW3 testified that the respondent was introduced to them as the caretaker by the appellant's management and narrated the duties she was performing including cleaning the premises.
22. It was further submitted that the respondent could not have been a mere tenant and keep the appellants records and sign tenancy forms. It was submitted that the said records were demanded by the Mwalimu Agency Company Limited on behalf of the appellant vide a letter which indicated that the respondent had been rendered redundant by the appointment of the new agent. It was submitted that the evidence on record demonstrates that there was employment relationship between the parties herein.
23. For emphasis, reliance was placed on *Mark Ngaira Ibochio v World Class Cities Ministries (2019) eKLR*, *Collins Wanjala Lukorito v Midal Group (K) Limited (2020) eKLR* and the *Everret Aviation Limited case*, supra.
24. It was further submitted that the trial court was right in finding that the termination of the respondent's employment by the appellant was unfair because there was no prove of misconduct or any other valid reason on her part nor was she afforded any opportunity to be heard before the termination as required under section 41, 43 and 45 of the *Employment Act*.
25. Finally, it was submitted that the trial court was right in awarding the respondent 3 months' salary compensation for unfair termination, one month salary in lieu of notice and service pay and urged this court to further award including overtime pay of Kshs.511,027, salary underpayment of Kshs.65,598 based on 2018 General Wage Order, rest days of Kshs.21,293, annual leave of Kshs.25,200, house allowance at 15% of the basic salary, and salary arrears of Kshs.95,000 that was not paid.
26. The court was also urged to enhance the compensation from 3 months to 12 months' salary. Finally, the court was urged to dismiss the appeal with costs for lack of merits and for being used to delay the respondent's enjoyment of the fruit of her judgment.



27. This being a first appeal, the mandate of the court is to re-evaluate the evidence on record and make my own conclusions, guided by the case of *Selle v Associated Motor Boat Company Ltd (1968) EA 123* the court held thus: -

“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 consider the evidence, evaluate 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.”

28. Having considered the pleadings, evidence and the submissions filed, the following issues fall for determination: -
- a. Whether the respondent was employed by the appellant from April 2018 to June 2020.
 - b. Whether the appellant unfairly terminated the employment.
 - c. Whether the judgment of the trial court should stand.

Employment relationship

29. Section 2 of the *Employment Act* defines employee, employer and contract of service as follows: -

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

“contract of service” means an agreement, whether oral or in writing, and whether expresses or implied to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which part XI of this Act applies.”

30. Flowing from the foregoing definitions, it is clear that employment contract need not be in writing. It is enough if there is evidence that a person (employee) has agreed with another person(employer) to personally provide labour (services) in exchange for wages or salaries.
31. In this case, the officials of the appellant who hired the respondent were not called to rebut the evidence by the respondent that she was hired by the chairman Mr.Wanjohi and Kihembe. PW2 and PW3 testified that the said officials introduced the claimant as the caretaker of the rental premises. They further narrated that the respondent was performing cleaning duties at the premises verandas and the compounds, she also collected rent banking slips from them and went for receipts from the appellants’ office.
32. The appellant also never rebutted the respondent’s evidence that Mwalimu Agencies, who was hired by the appellant to replace her as the Agent in the premises, wrote a letter demanding that she surrenders



all the appellant's records in her custody. The letter also notified her that she had been rendered redundant by the appointment of the new Agent.

33. Having considered all the evidence on record, I am satisfied that the respondent was employed by the appellant as a general employee in its premises from April 2018 to June 2020. There is unrebutted evidence of an oral contract of service, and that the respondent indeed provided services to the appellant as highlighted above. Consequently, I hold that the trial court was right in concluding that the respondent and appellant had an employment relationship.

Unfair termination

34. The respondent's case was that her employment was terminated by the appellant without valid reason and without following a fair procedure. The appellant denied that it employed the respondent and maintained that the issue of termination did not arise. I have already held that there was employment contract. The same was terminated by the appellant's new officials.

35. Section 45 (1) and (2) of the *Employment Act* provides that: -

“45. . Unfair termination

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) 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 employee's 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.”

36. The above provision obliges an employer to meet two legal thresholds for the termination of employment to be fair, that is, substantial fairness and procedural fairness. The former threshold is about the justification for the termination which must be a valid reason while the latter threshold is about procedure followed which must be in accordance with justice and equity.

37. I gather support from *Walter Ogal Anuro v Teachers Service Commission (2013) KEELR 386 (KLR)* where the court held that: -

“However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness.”

38. I gather more support from *George Musamali v G4S Security Services Kenya Ltd [2016] eKLR* where the court held that:

“14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination



must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made."

39. Having considered the evidence on record and as guided above, I am satisfied that the appellant terminated the services of the respondent without any valid reason and without following a fair procedure. The evidence on record is that the appellant terminated the respondent's services in order to outsource the same services from Mwalimu Agencies Company Limited.
40. The foregoing, revealed a redundancy situation but then the employer had a legal obligation to follow the mandatory procedure set out in section 40 of the *Employment Act*. It did not comply with the said statutory procedure and the redundancy became unfair termination within the meaning of section 45 of the Act. Consequently, I hold that the trial court was right in concluding that the appellant, unfairly terminated the respondent's employment.

The Award of Kshs.58,000

41. An appellate court should ordinary not interfere with a discretionary award of damages unless it is unsupported by evidence or the trial court misapprehended the evidence, or it failed to take into account a relevant fact or took into account irrelevant factor and thereby arrived at an erroneous award.
42. In the instant case, the trial court awarded three months' compensation for the unfair termination plus one-month salary in lieu of notice. She never cited any factor to justify the award as required under section 49 (4) of the *Employment Act*.
43. Nevertheless, I find the award of three months' salary compensation reasonable considering that the respondent served for a short period of two years. I have also considered that she did not contribute to the termination through misconduct. Finally, I have considered that the job she was doing could easily be secured with due diligence.
44. Likewise, I find that the award of one-month salary in lieu of notice was justified because without a written contract to the contrary the trial court was mandated to award the same by section 35 (1) (c) and 49 (1) of the *Employment Act*.
45. Finally, I am satisfied that the trial court was right in awarding service pay to the respondent since there was no evidence that the appellant registered her with the NSSF or any other scheme and regularly remitted monthly contributions as required by the law.
46. In view of the foregoing observations, I find that the appellant has failed to demonstrate sufficient ground upon which this court should disturb the award of Kshs.58,000 made by the trial court.
47. The respondent has by her submission urged the court to make further awards which were declined by the trial court in the impugned judgment. However, she did not file any cross-appeal but merely raised



the request vide her written submissions at the tail end of the appeal. Such a request cannot be granted since a party cannot appeal by way of written submissions. She ought to have filed a cross appeal.

48. Allowing that request would be prejudicial to the appellant as it closed its appeal vide its written submissions before the respondent's submissions. Such a move is also contrary to the legal principle of finality which deems legal proceedings to have closed if a party fails to lodge an appeal in the manner prescribed by the law. Consequently, I must reject the respondent's prayer for further reliefs without an appeal.

49. In view of the finding above, I proceed to affirm the trial court's judgment and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF MAY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

