



**Eldomatt Supermarket Limited v Nagaki (Employment and Labour Relations Appeal E034 of 2023) [2025] KEELRC 1352 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1352 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E034 OF 2023**

**MA ONYANGO, J**

**MAY 9, 2025**

**BETWEEN**

**ELDOMATT SUPERMARKET LIMITED ..... APPELLANT**

**AND**

**EMMANUEL MUYUNDO NAGAKI ..... RESPONDENT**

*(Being an appeal from the Ruling of the Chief Magistrates Court at Eldoret delivered by Hon. Christine Menya, Principal Magistrate in Eldoret CMELRC No. 35 of 2019 delivered on 10th November 2023)*

**JUDGMENT**

1. The Appellant herein was the Respondent in Eldoret CMELRC No. 35 of 2019 where he had been sued by the Respondent herein who was the Claimant in the said suit vide a Memorandum of Claim dated 28<sup>th</sup> February 2019 as amended by Amended Memorandum of Claim dated 18<sup>th</sup> March, 2019, seeking terminal dues for alleged unfair and unlawful termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 10<sup>th</sup> November, 2023 in favour of the Respondent herein and awarded him a total of Kshs. 563,503, costs and interest.
3. The Appellant being dissatisfied with the said Judgment filed the instant appeal vide the Memorandum of Appeal dated 4<sup>th</sup> December, 2023 in which he raises the following grounds of appeal:
  - i. That the Learned Magistrate erred in law and in fact in partially allowing the claim.
  - ii. That the Learned Magistrate erred in law and in fact in failing to dismiss the claim on the ground that the Claimant's employment was terminated on account of effluxion of time.
  - iii. The Learned trial magistrate erred in law and in fact in dismissing the contract of employment made between the Claimant and the Respondent.



- iv. The Learned Trial Magistrate erred in law and in fact in allowing and awarding Kshs. 563,503/ = plus costs of the suit without any basis and contrary to the evidence on record
  - v. That the Learned Magistrate erred in law and in fact in failing to consider and appreciate the evidence on record and make a proper finding.
  - vi. That the Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions in MELRC CAUSE NO.35 OF 20:19 and thereby arriving at a wrong decision.
  - vii. The learned Magistrate erred in law and in fact in awarding an inordinately high award of damages for unfair termination of employment and underpayment without basis.
4. The Appellant prayed for the following reliefs:
- i. That this appeal be allowed,
  - ii. That the Judgment delivered on 10<sup>th</sup> November, 2023 by Honorable Christine Menya and consequential orders thereof be set aside,
  - iii. That this Honourable court be pleased to dismiss the claim in MELRC CAUSE NO. 35 OF 2019 with costs to the Appellant
  - iv. That the costs of the appeal be to the Appellant.
5. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 12<sup>th</sup> September, 2024 while the Respondent's submissions are dated 15<sup>th</sup> October, 2024.

### **Analysis**

6. This being a first appeal, I am required to consider the evidence adduced before the trial court, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. In his Amended Memorandum of Claim, the Appellant herein sought the following orders against the Respondent:
- a. Declaration that the Claimant's services were unprocedural, unlawfully and unfairly terminated with effect from 4<sup>th</sup> September, 2018 and in the circumstances the claimant is entitled to compensation of his dues for the unfair termination .
  - b. The sum of Ksh.1,625,685/= as pleaded in paragraph 13 hereinabove.
  - c. An order compelling the Respondent to issue the Claimant a Certificate of Service under Section 51 of the *Employment Act*, 2007.
  - d. Costs of this suit and interest at court rates from the date of filing this suit until payment in full.
  - e. Any other relief(f) this Honourable Court may deem just and fit to grant.
8. The prayer for Kshs. 1,625,685 was itemized to include one months pay in lieu on notice Kshs. 18,518; leave dues from 2015 to 2018 of Kshs. 64,411; compensation for unfair termination of employment of 12 months salary at Kshs. 193,233, house allowance for 41 months at Kshs. 99,032, overtime of Kshs. 990,150, rest days of Kshs. 88,028 and underpayments for 41 months at Kshs. 172,313.
9. In the Amended Memorandum of Claim the Claimant (now Respondent in this appeal) stated that he was employed by the Respondent on April, 2015 and worked until 4<sup>th</sup> September, 2018 as a



- Supermarket Line Attendant/Assistant among other undertakings/duties as assigned to him by the managers and supervisors. That his employment was terminated without reason on 4<sup>th</sup> September, 2018. At the time of termination he was earning Kshs.11,900 as basic salary.
10. He averred that he served the Respondent with loyalty and diligence and full dedication until 4<sup>th</sup> September, 2018 when the Respondent's Director Mr. Jay Deep orally conveyed to the Claimant through Mr. Hezron Otieno the Supervisor the unlawful termination of his employment and refused to pay his terminal dues.
  11. The Claimant contended that his dismissal was illegal, unfair and unlawful as it violated the provisions of sections 41(1) and (2), 44(4), 45(2) and 43 of the Employment Act.
  12. In reply, the Respondent (Appellant in this appeal) filed its Memorandum of Response dated 14<sup>th</sup> March 2019. The Respondent denied that the Claimant was employed as a supermarket line attendant/assistant from April, 2015 to 4<sup>th</sup> September, 2018 as alleged in his claim. It was the Respondent's averment that the Claimant was employed as a general labourer on a six months fixed term contract from 1<sup>st</sup> March to 30<sup>th</sup> August, 2018, which lapsed and was not renewed.
  13. The Respondent further averred that it paid NSSF and NHIF for the Claimant, paid him house allowance and paid him any overtime worked. The Respondent averred that the Claim was frivolous and an abuse of court process and prayed that the same be dismissed with costs.

#### **The Evidence adduced**

14. At trial the Respondent testified as PW1 and adopted his witness statement as his evidence in chief. He produced his documents. He testified that he was employed in April, 2015 as line attendant and did other duties like loading and off-loading. That the employment was oral with a promise of permanent employment after 3 months. That he worked for 3 years. His last salary was Kshs. 11,900. The Respondent paid his NSSF as per statement which he produced.
15. He testified that he worked well until 2<sup>nd</sup> September, 2018 he asked for permission to take his brother who was seriously sick to hospital. Because the brother was seriously sick he called his supervisor to request for a further day which was granted. On 4<sup>th</sup> September, when he reported for work he was told by Hesbon that the CEO said he should not return to work. When he asked for the reason he was told to see the CEO. He went to the CEO's office and waited as the CEO had not arrived. When the CEO arrived he ordered PW1 out of his office.
16. He went to Human Rights office and the Appellant was summoned by letters dated 21<sup>st</sup> and 29<sup>th</sup> September, 2018.
17. Under cross examination PW1 denied that the contract produced by the Appellant was ever issued to him. He denied that he was issued with a cheque dated 17<sup>th</sup> September, 2018 produced by the Appellant. He further denied that the payslips produced by the Appellant were ever issued to him.
18. The Appellant called Lydia Koech who testified as DW1 and introduced herself as the HR at Eldomatt. She adopted her witness statement recorded on 20<sup>th</sup> December, 20219 as her evidence in chief. She also adopted the documents filed by the Appellant which he produced.
19. She testified that the DW1 was employed on a fixed term contract of 6 months from 1<sup>st</sup> March to 30<sup>th</sup> August, 2018 as a general worker. He was paid Kshs. 11,900 as per payslips produced, was paid overtime, house allowance and for weekends. His contract ended and he was paid all his dues. He was not fired. His contract ended and his services were no longer required.



20. Under cross examination DW1 stated that the contract produced did not state the salary. That the signatures are different. That it is not dated. That it did not indicate the identity card number of the employee. That DW1 could not tell when the contract was prepared.
21. DW1 stated that she knew J. Dip who was a director of the Appellant. That he issues instructions to fire employees.

### **The Appeal**

22. As stated above the appeal was disposed of by way of written submissions.

### **The Appellant's Submissions**

23. In its submissions dated 12<sup>th</sup> September, 2024 the Appellant submitted on grounds 1, 2 and 3 of the Grounds of Appeal that the learned magistrate erred in partially allowing the appeal. That the Appellant disputed the Respondents case that he was dismissed when he went to attend to his sick brother, Evans Nagaki and was given permission by his supervisor. according to the Appellant the Respondent's fixed term contract for the period 1<sup>st</sup> March to 30<sup>th</sup> August, 2018 expired. The Appellant submitted that the learned magistrate erred in concluding that the Appellant's evidence was fallacious and that the contract produced had inconsistencies.
24. The Appellant relied on the case of Dan Caxton Undusu v The Jubilee Insurance Company of Kenya Limited where the court stated that fixed term contracts have a definite commencement and termination date.
25. The Appellant further relied on the case of Margaret A. Ochieng v National Water and Conservation Corporation [2014] eKLR and Francis Odero Okello v Kenya Power and Lighting Company [2019] eKLR both of which emphasized that when a fixed term contract is terminated after expiry there is no need for notice.
26. On grounds 4, 5, 6 and 7 the Appellant submitted that the award of the court in the sum of Kshs.563,503 was without basis and contrary to evidence. That the learned magistrate failed to consider the Appellant's submission thereby arriving at the wrong decision.
27. It is submitted that the award of Kshs. 18,518 failed to make arithmetic sense as the Respondent's salary was Kshs. 11,900. Further that the Respondent did not adduce evidence that he was employed in 2015.
28. It is submitted that there were contradictions in the Respondent's evidence which the court ought to have considered.
29. It is submitted that there is no evidence that the Respondent never went on leave, worked on rest days without pay and was underpaid yet the trial magistrate awarded these reliefs. That the pay slips at pages 44 to 46 of the Record of Appeal prove that the Respondent was paid overtime and rest days.
30. It is submitted that the learned magistrate awarded 12 months compensation yet the Respondent worked for only 6 months. That the award was without justification as stated by the Court of Appeal in Civil Appeal No. 127 of 2015 the Postal Corporation of Kenya v Andrew K. Tanui where the court cited its decision in CMC Aviation Limited v Mohammed Noor where the court stated the trial court did not state why it opted to give the remedy provided under section 49(c) and not other remedies under section 49(1)(a) or (b).
31. The Appellant further relied on the decision in Ol Pajeta v David Wanjau Muhoro [2017] eKLR where the court stated that the court did not justify why it awarded maximum compensation. That



even though the court may have been exercising discretion, such exercise should not be capricious or whimsical, but based on sound judicial principles.

### **The Respondent's submissions**

32. The Respondent on its part crystallised the grounds in the Memorandum of Appeal into the following issues:
- a. Whether the trial court erred in failing to dismiss the claim on the ground that the respondent's employment was terminated on account of effluxion of time.
  - b. Whether trial court erred in dismissing the contract of employment made between the respondent and the appellant.
  - c. Whether the trial court erred in failing to consider the inconsistencies in the respondent's statements.
  - d. Whether the trial court erred in the computation of terminal dues.
  - e. Whether the trial court took into account the Appellant's case and submissions in its judgment.
  - f. Whether the instant appeal is meritorious.
33. On the 1<sup>st</sup> issue the Respondent submitted that .....

### **Determination**

34. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that present themselves for determination based on the grounds of Appeal are as follows:
- a. Whether the Respondent was on a fixed term contract of employment or not;
  - b. Whether the termination of the Respondents employment was by effluxion of his fixed term contract or was an unfair termination of employment
  - c. Whether the Respondent is entitled to the awards by the trial court;
  - d. Who should pay costs of the appeal

### **Whether or not the Respondent was on a fixed term contract of employment**

35. The Appellant faults the decision of the trial court dismissing the contract produced by the Respondent. the contract is at page 42 of the Record of Appeal. As is evident from the document signatures on page 1 thereof attributed to the Respondent and that on page 2 of the document are markedly different even to a person who is not a handwriting expert. This fact was admitted by the Appellant's witness. The Respondent also denied any knowledge of the same.
36. Further, the document does not have the I/D Number, even though the same is expressly provided for on the document. The space for filling in the details of the I/D is blank.
37. Thirdly the document does not have a date of execution. The document also refers to production of a photograph and national ID which were not produced and which DW1 could not explain.
38. As submitted by the Respondent section 9 provides for signature of an employment contract while section 10(2) provides for the contents thereof as follows:



- a. the name, age, permanent address and sex of the employee;
  - b. the name of the employer;
  - c. the job description of the employment;
  - d. the date of commencement of the employment;
  - e. the form and duration of the contract;
  - f. the place of work;
  - g. the hours of work;
  - h. the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
  - i. the intervals at which remuneration is paid; and
  - j. the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and
  - k. any other prescribed matter.
39. As correctly observed by the trial magistrate at page 108 of the Record of Appeal (page 2 of the Judgement), "A keen look at the purported contract of employment purportedly signed by the Claimant reveals that the same falls short of the provisions of section 9 of the *Employment Act* which provides the contents of a valid and enforceable contract of service. The purported lacks proper particulars of the Claimant's employment as executed the same. Furthermore, the claimant has disputed the signature appearing on the purported contract as being alien to him.
- this Honourable court fathoms that it is not a handwriting or signature forensic analyst or expert, but a look at the two sets of signatures: the one on the respondent's pleadings and affidavit and the one on the purported contract, the court opines that these were authored by different persons. Furthermore, and more importantly, during cross examination, DW1 indeed confirmed that the signatures appearing on the first and second pages of the purported contracts of service were fundamentally different and appeared to be authored by two different individuals. From the forgoing therefore, this Court is inclined to agree with the Claimant that the purported contract of employment was manufactured by the Respondents for the purposes of these proceedings and the same was not executed by him. This court therefore finds 9 that the Claimant was not employed under the purported contract of service and as such termination on account of the same cannot be enforced.
40. I agree with the finding of the trial court that the purported contract cannot pass the test of the law. I further noted that the Statement from NSSF which the Appellant stated it was paying for the Respondent which is at page 25 of the Record of Appeal indicates that the Appellant paid NSSF for the Respondent from November, 2016 to August, 2018. This is longer than the six months covered by the purported contract of employment produced and relied upon by the Appellant.
41. It is my finding that the trial magistrate correctly made a finding that the purported contract was not genuine.
42. Having found that the fixed term contract produced and relied upon by the Respondent was not valid, the Respondent's defence falls by the wayside. It therefore follows that the Appellant did not have any explanation for the termination of the Respondent's employment, leaving no challenge to



the Respondent's allegation that his employment was terminated unfairly on 4<sup>th</sup> September, 2018 following his absence with permission to take his sick brother to hospital.

43. In the absence of justification for the termination and proof of fair procedure in the termination of the Respondent's employment, I uphold the finding of the trial court that the termination of the Respondent's employment was unfair.
44. Regarding the remedies to the Respondent, the Appellant submitted that none of them was deserved, proved or justified. I will consider each of the awards separately.
45. The first award is for Kshs. 18,518 on account of pay in lieu of notice.
46. In the Respondents pay slips and based on the evidence adduced in court his last salary was a basic of Kshs. 11,926.40 with house allowance of Kshs. 1788. The Respondent testified that he was working as Supermarket line attendant/Assistant. According to the Regulation of Wages (General) Order applicable for September, 2018, the basic pay for a general labourer was Kshs. 11,926.40 with house allowance of 15% amounting to Kshs. Kshs. 1,788.90. the Regulation for Wages Amendment Order for 2018 was gazette on 19<sup>th</sup> December, 2018 after the Respondent left employment.
47. The correct pay in lieu of notice is Kshs. 11,926.40 +1788.90 kshs. 13,715.40. I set aside the award of Kshs. 18,518 and substitute therefor Kshs. 13,715.40
48. The other award is leave due for the years 2015 to 2018. The Appellant's submission was that the Respondent did not prove he did not go on leave. As provided in section 10 and 74 of the Employment Act it is the duty of the employer to keep records and to produce them whenever required. Section 10(7) is explicit that If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
49. In the instant case the Appellant did not produce any leave records. Based on the statutory 21 days annual leave for the period 2015 to 2018, the Respondent is entitled to 84 days. Leave is worked out based on the basic pay. This works out to Kshs. 38,532. The award of Kshs. 64,411 is set aside and replaced with Kshs. 38,532.
50. The next award is on compensation which the trial court awarded at the maximum of 12 months. The Respondent having worked for 4 months and taking into account all the circumstances of his case including the relevant factors under section 49(4) of the Employment Act it is my view that the trial court exercised its discretion without considering all the relevant factors and arrived at an award that was excessive. It is my view that an award of 6 months salary is reasonable in the circumstances taking into account the terms of service of the Respondent, the manner in which his employment was terminated, the length of service and all other relevant factor. I set aside the award of Kshs. 193,233 and substitute therefore an award of Kshs 82,292.40 being the gross pay of Kshs. 13715.40x6.
51. The Respondent was awarded rest days of Kshs. 88,028 based on 4 rest days a month. I have looked at the payslip for the Respondent produced by the Appellant and did not see any payment in respect of rest days. No evidence was adduced by the Appellant that the Respondent was given rest days as provides in sections 10 and 74 of the Act.
52. The Regulation of Wages (General) Order provides for overtime, rest days and public holidays as follows:
  6. Overtime
    - (1) Overtime shall be payable at the following rates—



- (a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;
  - (b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.
- (2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee's basic minimum monthly wage.
- (3) Notwithstanding subparagraph (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks—
- (a) one hundred and forty-four hours for employees engaged in night work;
  - (b) one hundred and sixteen hours for all other adult employees

7. Weekly rest

Every employee shall be entitled to one whole rest day in each week: Provided that—

- i. an employer and his employee may, by mutual consent, agree to the deferment of the employee's rest day and the rest day so deferred may be taken by the employee on a subsequent day or may, subject to a maximum accumulation of fourteen such rest days at any one time, be accumulated and taken, as leave with full pay in addition to the employee's entitlement to annual leave with full pay under paragraph 9;
- (ii) the weekly rest day of a person under the age of sixteen years shall not be so deferred.

8. Holidays with full pay

The days specified in the Fourth Schedule shall be holidays with full pay

53. Having not proved that the Respondent was paid overtime for rest days as provided by law, I am satisfied that the trial court correctly awarded the same. The tabulation of the award was however not based on the correct salary. It should be based on the basic wage of Kshs. 11,926.40. the correct amount should be 75,228.10
54. The last item is underpayments. As I have noted above, the Respondent was not underpaid as his last salary was based on the statutory minimum wage for 2017 which was applicable as at the date of termination of his employment. The award of the trial court on this item is accordingly set aside.
55. The Respondent having partially succeeded in the appeal, it is my view that the most reasonable order on costs is that each party shall bear its costs of the appeal.
56. The award on costs in the lower court is not disturbed as the finding that the Respondent was unfairly terminated has been upheld.
57. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 9<sup>TH</sup> DAY OF MAY 2025**

**MAUREEN ONYANGO**

**JUDGE**



**ELD ELRC APPEAL NO. E034 OF 2023 JUDGMENT**

