



**Shihungu v Morrison (Appeal E143 of 2023)
[2025] KEELRC 1901 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1901 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E143 OF 2023
DKN MARETE, J
JUNE 25, 2025**

BETWEEN

EDITH MUSAVI SHIHUNGU APPELLANT

AND

MARY MORRISON RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the lower court delivered on 10th July 2023, wherein the learned Magistrate dismissed the Appellant's claim in its entirety. The Appellant, being aggrieved by the said judgment has lodged this appeal seeking to set aside the lower court's decision and to be granted the reliefs initially sought in the statement of claim.
2. The matter before the lower court concerned allegations of unfair termination of employment, failure to pay terminal benefits, and non-remittance of statutory deductions. The Appellant had worked for the Respondent as a house help from December 2016 until her termination in September 2019. The termination occurred while the Appellant was hospitalized following a severe road accident a fact that forms the crux of her claim of unfair dismissal.
3. The lower court in its judgment found that the Appellant had failed to prove the existence of an employment relationship with the Respondent. This finding was primarily based on the Magistrate's view that the evidence adduced by the Appellant was insufficient to establish such a relationship. The Appellant now contends that this finding was erroneous and seeks redress from this court.
4. The Appellant has set forth several grounds of appeal in her memorandum which can be summarized as follows:
 - (a) Erroneous Finding on Employment Relationship



The learned Magistrate erred in law and fact by holding that the Appellant failed to prove her employment with the Respondent, despite the Appellant's uncontroverted testimony and documentary evidence, including M-Pesa transactions and witness statements.

(b) Misapplication of the Burden of Proof

The lower court failed to apply Section 10(7) of the *Employment Act*, 2007 which mandates that where an employer fails to produce employment records the burden shifts to the employer to disprove the alleged terms of employment. The Respondent's failure to participate in the proceedings or produce any records should have weighed in favor of the Appellant.

(c) Disregard of Material Evidence

The Magistrate disregarded critical evidence such as the Appellant's testimony regarding her termination via WhatsApp and the circumstances surrounding her dismissal while hospitalized. The court's dismissal of this evidence without proper justification constitutes a misdirection.

(d) Failure to Consider Submissions and Authorities

5. The lower court overlooked the Appellant's written submissions and the legal authorities cited including *Robai Musinzi v. Safdar Mohamed Khan* [2012] eKLR which affirms that oral contracts of employment are enforceable under Kenyan law.
6. The Appellant prays that this honorable court allows the appeal, sets aside the judgment of the lower court and grants the reliefs sought in the statement of claim.
7. The central issue in this appeal is whether the Appellant proved the existence of an employment relationship with the Respondent. The lower court held that the Appellant failed to discharge this burden, citing the lack of a written contract and the absence of corroborative evidence for the period between 2016 and 2019.
8. The Appellant's case was premised on the following evidence:
 1. Oral Contract: The Appellant testified that she was employed verbally by the Respondent in December 2016 to work as a house help. Sections 7 and 8 of the *Employment Act*, 2007 explicitly recognizes oral contracts of employment, provided the essential terms are agreed upon. The Appellant's testimony regarding her terms of employment (daily wage, working hours, and probation period) was detailed and unchallenged.
 2. M-Pesa Transactions: The Appellant produced M-Pesa statements showing regular payments marked 'Business Payment from 517822-1 & M Bank App.' While the Respondent's name did not appear in these transactions, the Appellant linked them to the Respondent's husband, who allegedly facilitated the payments. The Respondent's failure to rebut this assertion or produce contrary evidence was significant.
 3. Termination via WhatsApp: The Appellant testified that she was terminated while hospitalized, following a dispute over her medical bill. The lower court dismissed this evidence on the grounds that the WhatsApp messages were not produced. However, the Appellant's testimony on this point was credible and required rebuttal, which the Respondent failed to provide.
9. The lower court's insistence on 'corroborative evidence' for the entire employment period (2016–2019) was overly stringent, particularly in light of the Respondent's failure to participate in the



proceedings or produce any records. Section 10(7) of the Employment Act places the burden on the employer to disprove alleged terms of employment where no records are produced. The Magistrate's failure to apply this provision constituted a material error of law.

10. In the celebrated authority of *Mary Chemweno v. Kenya Pipeline Company* [2019] eKLR, the court held that the absence of a written contract does not negate employment where other evidence supports the relationship. Similarly, in *Robai Musinzi v. Safdar Mohamed Khan* [2012] eKLR, the court emphasized that employers who fail to issue written contracts cannot later rely on such omission to deny the existence of employment.
11. In light of the foregoing, this court finds that the Appellant discharged her burden of proving the employment relationship. The lower court's contrary finding was erroneous and cannot stand. Having established the existence of an employment relationship, the next issue is whether the Appellant's termination was unfair. The Appellant testified that she was dismissed while hospitalized, without notice or a hearing, following a dispute over her medical bill. This allegation was not rebutted by the Respondent.
12. Sections 41, 43 and 45 of the Employment Act prescribe the requirements for fair termination, including notice, a hearing, and valid reasons. The Appellant's termination during a medical crisis, without adherence to these procedural safeguards, was per se unfair.
13. Again, in *Alphonse Machanga v. Operation 680 Ltd* [2013] eKLR the court held that termination during a medical crisis without due process constitutes unfair dismissal. The lower court's failure to address this issue, owing to its erroneous finding on the employment relationship was a further misdirection.
14. The Appellant sought the following relief;
 - i. Compensation for unfair termination: 12 months' salary (Kshs 240,000).
 - ii. Notice pay: One month's salary (Kshs 20,000).
 - iii. Unpaid leave: For 3 years (Kshs 60,000).
 - iv. Service pay: At 15 days per year (Kshs 45,000).
 - v. Statutory deductions: Unremitted NSSF and NHIF (Kshs 55,440).
 - vi. Certificate of Service.
15. These reliefs are consistent with the Employment Act, 2007 and the evidence adduced. The lower court erred in requiring the Appellant to meet an impossibly high evidentiary threshold while ignoring the Respondent's statutory duty to maintain records. This appeal restores the Appellant's rights under the Employment Act and ensures justice is served.
16. The appellant's case is acceptable and proven on the test of a balance of probabilities and preponderance of evidence. This must have escaped the learned magistrate and therefore the need for revision.
17. In these premises, I am inclined to allow the appeal and award relief as follows;
 - i. 8 months' salary as compensation for unfair termination:..... Kshs 160,000.
 - ii. One month's salary in lieu of notice:Kshs 20,000.
 - iii. Unpaid leave for 3 years:Kshs 60,000.



- iv. Service pay: Kshs 10,000x3 =..... Kshs.30,000.00.
Total of claim Kshs 270,000.00
- v. The amount of claim shall accrue interest at court rates from today's date until payment in full.
- vi. The Respondent shall issue a Certificate of Service within 30 days.
- vii. The costs of the claim and this appeal shall be borne by the Respondent.

DELIVERED, DATED AND SIGNED THIS 25TH DAY OF JUNE 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

Miss Amboko instructed by Wanga Amboko & Company Advocates for the Appellant.

No appearance for the Respondent.

