



REPUBLIC OF KENYA



**Raksha International Medical Services Meditirina Hospital Rai International Medical Services
v Ogetange (Appeal E038 of 2024) [2025] KEELRC 1805 (KLR) (19 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1805 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E038 OF 2024
NZIOKI WA MAKAU, J
JUNE 19, 2025**

BETWEEN

**RAKSHA INTERNATIONAL MEDICAL SERVICES MEDITIRINA HOSPITAL
RAI INTERNATIONAL MEDICAL SERVICES APPELLANT**

AND

LEAH NYANCHOKA OGETANGE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Jacinta. A. Orwa (CM)
in Homa Bay Chief CMELRC NO. E007 OF 2023 delivered on 31st May 2024)*

JUDGMENT

1. In a judgment dated 31st May 2024 the Learned Magistrate found that the Respondent was entitled to:
 - a. Kshs. 63,000/ unpaid house allowance;
 - b. Kshs. 55,918/- unpaid salary for October, November, and December, 2021;
 - c. Kshs. 35,000/- unpaid salary for August 2022;
 - d. Kshs. 35,121/- for public holidays worked in 2021 and 2022;
 - e. A certificate of service upon undertaking a handing over;
 - f. Costs of the suit; and
 - g. Interest from the date of judgment till payment in full.
2. Dissatisfied with the judgment the Appellant lodged this appeal, citing the following grounds:
 - i. That the Magistrate erred in law and fact by failing to appreciate that parties are bound by their pleadings.



- ii. That the learned Magistrate disregarded the Appellant's evidence on record;
 - iii. That the Trial Court wrongly shifted the burden of proof to the Appellant to prove facts alleged by the Respondent;
 - iv. That the Court failed to exhaustively and properly evaluate the evidence;
 - v. That the Magistrate erred in law and fact by failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case.
 - vi. That the Magistrate failed to recognize the principle of freedom of contract and that the employment contract was voluntarily executed by both parties;
 - vii. That the Court ignored documentary evidence showing that the Respondent had been duly paid, especially in relation to salaries, and proceeded to award sums that had already been settled;
 - viii. That the Trial Court erred in law and in fact in awarding the Respondent house allowance for the entire period of his employment despite evidence to the contrary.
 - ix. That the Trial Court misdirected itself in finding that the Respondent's terms of engagement were contrary to section 32(1) of the [Employment Act](#) despite the contract stating otherwise.
 - x. That the award of Kshs. 63,000/- as house allowance was inconsistent with the evidence on record which showed the salary was consolidated;
 - xi. That the Trial Court erred in law by attempting to rewrite the contract to entitle the Respondent to house allowance yet the same was captured in the contract, resulting in a decision that totally contradicts the contract.
 - xii. That the Magistrate failed to appreciate that the Appellant had demonstrated, on a balance of probabilities, that the Respondent took at least 10 days of leave;
 - xiii. That the Court failed to consider the leave application form which confirmed the Respondent was granted and took leave;
 - xiv. That the Magistrate erred in law and fact in arriving at conclusions and inferences not supported by evidence and/or based on any documentation and consequently awarding a manifestly high sum of Kshs. 200,237/- as compensation.
 - xv. That the court failed to give due consideration to the Appellant's evidence and submissions, leading to an erroneous conclusion.
3. In light of the above grounds, the Appellant urged this Court to allow the appeal, set aside the judgment of the Trial Court, and substitute it with an order dismissing the Respondent's claim with costs. The Appellant also sought costs of this appeal.
 4. The appeal was canvassed by way of written submissions. The Appellant filed its submissions on 22nd April 2025 while the Respondent filed hers on 23rd May 2025.

Appellant's submissions.

5. The Appellant identified two issues for determination:
 - a. whether the trial court erred in awarding house allowance; and



- b. whether the trial court erred in awarding leave allowance.
6. On house allowance the Appellant was adamant that the Respondent’s salary was consolidated. It drew attention to the contract of service and the appointment letter, which in line with section 31(2) of the *Employment Act* expressly stipulated that the Respondent was entitled to a consolidated salary of Kshs. 35,000/-.
7. In support of its position the Appellant submitted that the duty of the Court was to interpret and not to rewrite contracts between parties. It relied on the case of National Bank v Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR and Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR, in which it was underscored that a court cannot rewrite a contract, and that parties are bound by the terms of contract unless coercion, fraud or undue influence is pleaded and proven.
8. As regards leave allowance, the Appellant submitted that the Respondent had applied for and proceeded on leave. It referred to the leave application form showing the Respondent was on leave from 10th to 25th November 2022. It also cited the case of *Lavington Security Guards v Omambia (Appeal E019 of 2023)* [2024]KEELRC 566 (KLR), where leave allowance was denied on account of the Appellant having provided leave application forms showing that the Respondent utilised leave days.

Respondent’s submissions.

9. The Respondent, in response, submitted that the Appellant’s submissions on house allowance should be disregarded since the issue was not raised in the Memorandum of Appeal. She asserted that under Order 42 Rule 4 of the Civil Procedure Rules, new grounds may only be introduced with the leave of the court. She relied on the decision in Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] KECA 288 (KLR), where the Court of Appeal faulted the lower court for determining the appeal on grounds other than those set out in the memorandum of appeal. The above notwithstanding, the Respondent maintained that the Trial Court correctly awarded house allowance. She asserted that her contract did not indicate that house allowance was part of her gross salary, as required under section 31 of the *Employment Act*. She relied on the case of Grain Pro Kenya Inc. v Andrew Waithaka Kiragu [2019] KECA 563 (KLR), where the Court of Appeal stated:

“Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to rewrite a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the Respondent was to be paid “other benefits as required by law.” The judge interpreted that contract although she did not specifically mention this particular clause to mean that the Appellant was liable to pay the Respondent house allowance. We cannot fault the judge for that interpretation because house allowance is a benefit that is required under the *Employment Act* and the contract did not provide that house allowance was consolidated in the basic wage. Counsel for the Appellant invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause “other benefits as required by law”



in the contract to award house allowance. We would have applied section 31(2)(a) of the [Employment Act](#) to exclude it.”

10. With respect to unpaid salary, the Respondent submitted that her evidence was unchallenged and that the burden of proving salary payment rested with the Appellant as the custodian of employment records. She relied on sections 107, 108, and 109 of the [Evidence Act](#) and cited the case of *Kiboko v Osteria Group (Kenya) Limited (Cause E023 of 2022)[2023] KEELRC 2700 (KLR)(27 October 2023)* and the decision of the Supreme Court of Philippines case of *Robe Ann & Others v Super K. Drug Corporation & others (2020) 877 Phil 575*, in which the courts emphasized that the onus was on the employer to prove payment of salary being the custodian of records.
11. On the issue of leave, the Respondent admitted taking a 10-day leave but asserted that she was not paid during that period, in breach of the express terms of her contract which entitled her to leave with full pay. Finally, as to the merits of the appeal the Respondent submitted that the Appellant had failed to prove that the judgment had been obtained by fraud, non-appearance or an irregularity. She relied on section 76(1) and 79A of the [Civil Procedure Act](#). Consequently, she urged the Court to find that the appeal was without merit, vexatious, and deserving of dismissal with costs.

Disposition.

12. The responsibility of a court on appeal is clear. The appellate Court is duty bound to revisit and exhaustively re-evaluate and reexamine the evidence presented before the trial court to arrive at its own independent conclusions all the while bearing in mind that unlike the Learned Magistrate, the appeal court did not have the advantage of seeing and hearing the witnesses testify and give due allowance for that disadvantage.
13. The Appellant has raised new grounds in its submissions which were not in its memorandum of appeal. In the case of *Margaret Njeri Mbugua v Kirk Mweya Nyaga (supra)* the Court of Appeal held:
Order 42 Rule 4 of the Civil Procedure Rules 2010 provides that:-

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. (Emphasis added).

- (16) A plain reading of the above provision clearly shows that a first appellate court in rendering its decision has the necessary power to consider grounds of appeal other than those set out in the memorandum of appeal provided that the parties are given sufficient opportunity to address the court on the new grounds.
14. The Appellant raised the ground of consolidated salary without leave and also the Respondent did not have a chance to properly address the Court on the same save for reprise in her submissions. Be that as it may, the issue of a consolidated salary is one that causes angst. The contract exhibited provided for a consolidated salary and as such, the Learned Trial Magistrate was incorrect in not upholding it. As such the award of Kshs. 63,000/- on this head is reversed.
15. The Appellant fails to appreciate that under the [Employment Act](#), there is shifting of burden of proof as evidenced in sections 5(7), 10(7), and 47(5) of the Act. The Learned Magistrate did not fall in error



when she imposed the lawful burden on the Appellant to prove or disprove. The balance of the decision was found to be sound save for the issue of consolidated salary. As the issue was raised at the last moment the Court will deny the Appellant costs on the appeal.

16. Judgment of the Learned Hon. Jacinta. A. Orwa (CM) in Homa Bay Chief CMELRC No. E007 of 2023 is partly set aside in particular, in regard to the award of house allowance. The rest of the decision is upheld in its entirety. The parties will each bear their own costs for this appeal.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF JUNE 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

