



**Smart Jobs Limited v Kemboi (Appeal E151 of 2024)
[2025] KEELRC 2364 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2364 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E151 OF 2024**

**K OCHARO, J
JULY 31, 2025**

BETWEEN

SMART JOBS LIMITED APPELLANT

AND

FEROZE KIPLAGAT KEMBOI RESPONDENT

*(Being an appeal against the Judgment delivered on 11th July 2024 by
Hon. L. K. SINDANI (PM) in Mombasa CMELRC No. E 032 of 2023)*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 20th July 2024, the Appellant challenges the Judgment and Decree of the Learned Principal Magistrate in the above-stated cause, on the main grounds that she erred in law and fact.
 - a. By divesting the Respondent of his burden of proof and laying it wholly upon the Appellant.
 - b. In ignoring the totality of the evidence tendered before her and making a finding that was unsupported by evidence.
 - c. In awarding compensation for unfair termination and notice absent termination.
 - d. In making a finding that the Respondent was entitled to conversion to a permanent employee, even though none of the parties asserted that he was a casual employee.
 - e. In finding that the Appellant failed to prove that the Respondent did work continuously, even though the Respondent's own evidence proved that fact.



2. When this matter came up for directions on the hearing of the appeal, this court directed that it be argued by way of written submissions. The Parties abided by the direction. Their submissions are on record.

The Respondent's Case before the Trial Court.

3. It was the Respondent's case that at all material times, he was an employee of the Appellant, who was employed orally on 6th April, 2021, as a heavy commercial driver. He worked continuously and uninterruptedly up to the time of termination of the employment at the initiative of the Appellant.
4. On 1st September, 2022, at around noon, he and other drivers were informed that there was a vessel that needed to be loaded with empty containers. He loaded empty containers into the vehicle assigned to him, in preparation for loading them onto the vessel, only to be informed that the loading would not take place until 9.00 pm.
5. He parked the vehicle in the queue alongside other vehicles, and by the time his shift ended at 6.00 pm, the loading had not yet commenced. At 6:00 pm, his reliever, Abraham Chumba, reported for the night shift. The Respondent retired for the day.
6. The following day, 2nd September, 2022, he reported to work only to be informed by his supervisor that the motor vehicle he was using the previous day was involved in an accident. He was then instructed to take it to the garage, which he did.
7. Upon arrival at the garage, he was summoned to the Director's, Mr. Julius, who demanded that he write a letter admitting liability and further consent for deduction of his salary, which he declined.
8. Mr. Julius, there and then, verbally terminated his employment. He ordered him off the premises of the Appellant, without paying him his dues.
9. The termination of his employment was not based on any justifiable reason. He was not served with any termination notice or paid salary in lieu of notice. As such, he was entitled to notice pay, Kshs 39,448.16.
10. Throughout his tenure of employment with the Appellant, the Appellant never paid him per the relevant wage orders. He was throughout underpaid. Cumulatively, he was underpaid by the sum of Kshs. 272, 302.75.
11. Further, he was not at any point allowed to proceed on leave. Notwithstanding this, the Appellant didn't compensate him for the leave days earned but not utilised. He was entitled to Kshs. 13,149.39.
12. He asserted further that the Appellant didn't pay him house allowance, or provide him with reasonable accommodation. He sought Kshs. 75,710. 96 as compensation for the unpaid house allowance.
13. He stated that he worked during public Holidays, cumulatively 21 days, entitling him to Kshs— 50,310.70, which the Appellant did not pay him.
14. Without any justification, the Appellant withheld his salary for August and December 2021, and March, July and August 2022.
15. The termination of his employment lacked procedural fairness. He was not issued with a show-cause letter. He was not allowed to make any representations on any accusations against him.



The Appellant's Case before the Trial Court.

16. Upon being served with summons to enter appearance, the Appellant filed a memorandum of appearance, and a Response to the Memorandum of Claim dated 26th April 2023, wherein they denied that the termination of the Respondent's employment was at their initiative but at that of the Respondent, who didn't report to work on 2nd September, 2022, and thereafter. Further, the Respondent's entitlement to the reliefs he had sought.
17. However, at the hearing, they didn't present any witness to testify in support of their defence.

The Judgment by the Lower Court.

18. After hearing the Respondent, considering his evidence, and submissions by both Counsel for the Respondent and the Appellant, the learned trial Magistrate held that the termination of the Respondent's employment was both substantively and procedurally unfair. She awarded him:
 - I. Compensation for unfair termination- four months' gross salary,
 - II. One month's salary in lieu of notice, Kshs. 34, 302.75.
 - III. Compensation for leave earned but unutilized, as was prayed for in the Statement of Claim
 - IV. Compensation for unpaid house allowance per the Statement of Claim,
 - V. Compensation for holidays worked per the Statement of Claim, and,
 - VI. overtime compensation.She awarded him a cumulative amount of Kshs. 571, 205.20.

The Appeal.

19. The Appellant, being aggrieved by the Trial Court's decision, filed this Appeal on the grounds stated above.

Analysis and Determination

20. The Appeal before this Court emanates from a judgment of the lower Court. It is now trite that the role of a first Appellate Court is to subject the evidence and material that were before the trial court to fresh scrutiny, allowing it to come to its own independent findings and conclusions. This position was aptly elaborated in the case of *Selle -vs- Associated Motor Boat Co.* [1968] EA 123) where the Court held: -

“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 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, this court is not necessarily bound 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 (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA. 270)”.



21. In the *German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal held that: -
- “A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court’s conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily, and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, did not have the benefit of seeing the witnesses testify. (See *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212).”
22. Bearing in mind this mandate, this Court has carefully considered and analyzed the material that was placed before the learned trial Magistrate, the submissions filed and authorities relied on and find that the Appellant’s appeal herein revolves around two issues, whether or not the learned trial Magistrate misappreciated as to who bore the burden of proof in the circumstances of the matter, whether or not the learned trial Magistrate erred in law and fact when she found that the termination of the Respondent’s employment was unfair, and whether or not the Respondent was entitled to the reliefs she granted.
23. Undeniably, despite filing a Response to the Memorandum of Claim, the Appellant did not present any witness before the trial Court to testify in support of the defence. A careful consideration of the trial Court’s judgment reveals that the learned trial Magistrate’s stance on the failure was that it rendered the Respondent’s evidence unchallenged.
24. The Appellant’s counsel argued that, despite the Appellant’s failure as mentioned earlier, the Respondent still bore the burden of proof for his claims. They referenced Sections 107 and 109 of the *Evidence Act* to support this point. Further reliance was placed on the case of *GAS Kenya Limited v Amber Enterprises Ltd* [2020] eKLR.
25. The Respondent, on the other hand, cited the decision in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others*, Nairobi [Milimani] HCCS No. 1243 of 2001, submitted that the failure leaves the evidence adduced by the Claimant uncontroverted and therefore unchallenged.
26. This Court has time and again said, and it is trite law, that where a Respondent files a Statement of Response, but fails to present evidence in support of the assertions in their pleadings, those pleadings remain mere statements with no evidential value. The failure does not lessen or obviate the requirement on the Claimant to discharge any burden of proof, as explicitly provided for by statute. It doesn’t guarantee them automatic success in their case.
27. Having said this, it then becomes imperative to point out what specific legal burdens the Respondent and the Appellant bore in the circumstances of this matter before the trial Court and whether they discharged the same.



28. Section 47 [5] of the [Employment Act](#), 2007 provides;

“ [5] For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.”

29. It is evident that the provision imposes a legal burden of proof on both the employee and the employer. For each party, this burden is activated and must be fulfilled at different stages. Initially, the employee must present evidence that prima facie demonstrates, for instance, that the termination or dismissal was substantively and/or procedurally unfair, or contrary to the terms and conditions of a contract of employment and/or in violation of constitutional stipulations and/or a Collective Bargaining agreement. If the employee doesn't demonstrate this, they shall not be said to have discharged their burden; their case will fall at the hurdle.
30. It is only after the employee discharges the burden that the burden of proof shifts to the employer to prove that the termination or dismissal was procedurally fair [section 41 of the [Employment Act](#)], substantively justified [section 43], on a fair and valid reason[s] [section 45], and with equity and justice [section 45[7]]. See also, [Kenfreight \[E.A\] Limited v Benson K. Nguti](#) [2019] eKLR.
31. I have carefully reviewed the Respondent's pleadings and evidence before the trial Court. I hold that in the absence of any evidence from the Respondent, he has demonstrated that the termination occurred without adhering to the principles of procedural fairness, as he was not notified of the accusations against him and was not allowed to defend himself. Furthermore, considering the circumstances surrounding the incident that led to his dismissal, the reason would not be regarded as fair and valid.
32. Having discharged his duty, the burden shifted to the Appellant to establish the matters mentioned hereinabove, on a balance of probabilities. Legal burdens are dischargeable by the person bearing the same only upon adducing sufficient evidence to establish the matters/ facts which it must prove, not unless those matters or facts are admitted, or the court has taken judicial notice of the same.
33. As the Respondent did not present any evidence before the trial court, there could not be and cannot be any reasonable conclusion other than that the Appellant did not prove that the termination of the Respondent's employment conformed to the stipulations of section 41 of the [Act](#), was with a fair and valid reason, and was equitable.
34. The learned trial Magistrate didn't err in reaching the finding that the termination of the Respondent's employment was unfair.
35. The Appellant did not present any evidence to the trial Court to prove that the Claimant was a piece rate worker, to refute the Respondent's claim that, at all material times, he was employed under an oral contract, whose tenure was indefinite. The extensive submissions by the Appellant's counsel and the authorities cited are not helpful.
36. Having found that the learned trial Magistrate didn't err in holding that the termination was unfair, I now turn to consider the reliefs she awarded in favour of the Respondent.
37. I have carefully considered the pleadings by the Respondent placed before the trial Court, the learned trial Magistrate's analysis of the same and the evidence in regard thereto generally, and in the context of the Appellant's failure to controvert the Respondent's entitlement to the same, and find no compelling reason to disturb her holding.



38. In sum, I find no merit in the Appellant's appeal. It is hereby dismissed with costs.

READ, DELIVERED AND SIGNED THIS 31st DAY OF JULY 2025.

OCHARO KEBIRA

JUDGE.

