



Muoka v Khan (Appeal E232 of 2024) [2025] KEELRC 2344 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2344 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E232 OF 2024**

**JW KELI, J
JULY 24, 2025**

BETWEEN

JASPER KITHUKA MUOKA APPELLANT

AND

MOHAMED SAFDAR KHAN RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. H. M. Ng'ang'a
(PM) delivered on 13th July, 2024 in Milimani MCELRC/E1022/2021)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. H. M. Ng'ang'a (PM) delivered on 13th July, 2024 in Milimani MCELRC No. E1022 of 2021 between the parties filed a memorandum of appeal dated the 30th of July 2024 seeking the following orders:-
 - a) This Appeal be allowed.
 - b) The Judgment and Decree of the Honourable Hosea Ng'ang'a delivered on 15th July, 2024 in Milimani MCELRC No. E1022 of 2021 be set aside and/or varied.
 - c) The costs of this appeal be awarded to the Appellant.
 - d) That the court allows the prayers in the statement of claim in its entirety.
 - e) This Honourable Court makes such and further orders as it deems fit and just to meet the ends of justice.

GROUND OF THE APPEAL

2. The Honourable Trial Magistrate erred in law and in fact by failing to direct his mind properly on the provisions of the *Employment Act* 2007.



3. The Honourable Trial Magistrate erred in law in finding that the Appellant did not prove that he was unfairly terminated.
4. The Honourable Trial Magistrate erred in law and in fact in finding that the Appellant was not entitled to the reliefs sought in the statement of claim being among others: service pay, leave pay, house allowance, overtime pay, unpaid salary, and compensation for unfair termination.
5. The Honourable Trial Magistrate erred both in law and in fact in finding that the Respondent is awarded costs of the suit.
6. The Honourable Trial Magistrate erred in law and in fact in misdirecting himself and acted on a wrong principle in reaching the judgment.

Background To The Appeal

7. The Appellant filed a claim against the Respondent vide a memorandum of claim dated the 4th of June 2021, seeking the following orders:-
 - a. A declaration that the Claimant's termination was unlawful.
 - b. An order for the Respondent to pay the Claimant Kshs. 2,273,112/-.
 - c. Costs and interest.(see pages 3-4 of the ROA dated the 26th of March 2025).
8. The Appellant also filed his verifying affidavit, list of witnesses, his witness statement and list of documents, all dated the 4th of June 2024 (pages 5-9 of ROA).
9. The claim was opposed by the Respondent, who entered appearance vide a memorandum of appearance dated 6th June 2021 (page 10 of ROA). They also filed a response to the claim dated the 21st of June 2021 (pages 11-12 of ROA), witness statement of the Respondent dated 22nd July 2021, witness statement of Wiycklife Okutoyi Alubokho dated 22nd July 2021, and list of documents dated 6th June 2023 (pages 13-23 of ROA).
10. The Claimant's/Appellant's case was heard on the 26th of October 2023, where the Claimant testified in the case. He relied on his witness statement as his evidence in chief, produced his documents, and was cross-examined by counsel for the Respondent, Mr. Okeyo (pages 38-40 of ROA).
11. The Respondent's case was heard on the same day, when the Respondent testified in the case. He relied on his witness statement as his evidence in chief, produced his documents, and was cross-examined by counsel for the Appellant Ms. Muhia (pages 40-41 of ROA). RW2, Wiycklife Okutoyi Alubokho, testified in the matter on the 15th of February 2024. He relied on his witness statement as his evidence in chief, and was cross-examined by counsel for the Appellant, Ms. Jepkemboi (pages 43-44 of ROA).
12. The parties took directions on the filing of written submissions after the hearing. The parties complied.
13. The Trial Magistrate Court delivered its judgment on the 13th of July 2024 partly allowing the Claimant's claim to the extent of unpaid leave days for a maximum of three (3) years, amounting to Kshs. 154,077/-, with costs to the Respondent (Judgment at pages 46-57 of ROA).

Determination

14. The appeal was canvassed by way of written submissions. Only the Respondent filed.



15. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
“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 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 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.”
16. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Issues for determination

17. The appellant did not file written submissions hence the court considered the grounds of appeal.
18. The Respondent filed written submissions and addressed the grounds of appeal.
19. The court having perused the grounds of appeal found the issues for determination in the appeal to be –
 - a. Whether the trial court erred in its finding on claim of unfair termination
 - b. Whether the trial court erred in its finding on reliefs
 - c. Whether the trial court erred in awarding costs of the suit to the respondent.

Whether the trial court erred in its finding on claim of unfair termination

20. The appellant in the witness statement stated he was unfairly terminated for lack of procedure. The background to the termination was that on the 24th May 2021 at 6.45pm, the respondent’s wife instructed him to defrost and cook chicken. The appellant informed her that the process would take long and end up delaying him from leaving work before the curfew hours. That the respondent’s wife became wild, abused him and chased him out of their house with instructions not to go back again. The respondent was present throughout the incident but did not intervene. The respondent called him the following day and informed him that he would pay his salary and terminal dues once he became financially stable. The respondent did not ask him to resume duty but colluded with his wife to terminate his employment contrary to the law (page 7 of ROA).
21. The respondent filed a defence and denied the claims. The respondent in his own witness statement of 22nd July 2021 stated that the claimant worked for him until May 2016 when he requested to leave work and he paid him all his dues as agreed in February 2016 and left. That in September 2016 his daughter was getting married. He called the claimant to help in the preparations of Hindu marriage, which takes over 30 days. The appellant accepted and came in August 2016 till September.



22. That on 21st may 2021, the claimant worked till evening. That he did not report next day and when he called him, he said he was old and tired and wanted to tend to his butchery business and his farm. That he sent the appellant his salary on 26th May 2021.
23. The Respondent's witness RW2 (Wiycklife Okutoyi Alubokho) dated 22nd July 2021 in his witness statement stated that he knew that the respondent lived alone with his wife, who cooked. That he had worked for the respondent in the general maintenance of the home. The appellant was a general helper. The appellant left his job in 2016 on his own and never came back.
24. During cross-examination, the appellant stated that in 2016 he did not open a butchery. When the respondent's daughter was wedding he had gone home and the Respondent called him back to work. He was chased and told to go home by the respondent's wife.
25. During cross-examination of RW1(Respondent), told the court the claimant never came back after he left. That he absconded work. That he called him many times. The Appellant told him to pay his balance of Kshs.10000 as he wanted to open a butchery. RW1 told the court he paid the balance and filed the MPESA statement. The court noted the appellant admitted he got the cash. RW2 was a co-worker. He told the court that the claimant was paid his dues as he had told him so. He had no evidence. That when the claimant left work he was present, he wore his clothes, talked to mama (Respondent's wife) and left.
26. The trial court held as follows:- '32. The Claimant has made allegations that the Respondent's wife in a disagreement at the home allegedly 'became wild, abused him and chased him from their house with instruction not to go back again'. I must first deal with the Respondent's argument around his character - the averment that his character could not have changed all of a sudden. Section 55(1) of the Evidence Act states: "In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is inadmissible except in so far as such character appears from facts otherwise admissible."33.It is my view from the facts already on the record, that the Respondent had a cordial relationship with the Claimant. Whereas not conclusive, I note that the Claimant readily returned to work in 2016 at the request of the Respondent. Further, he does not make any complaints of a toxic work environment before the one incident prior to his dismissal incident. I find it persuasive that indeed such character appears unseemly.
34. Nevertheless, the Claimant has a burden to provide a prima facie case before any presumption of unfair termination arises. In such an informal setting as a household, evidence of daily happenings is difficult to have record of. His allegations against the Respondent's wife remain unproven.
35. In the present case, I find the testimony of Wycliffe Okutoyi to be heavily persuasive. As a former co-worker, he testifies that the Claimant absconded work. He further adds that the Claimant never complained about being terminated, even though they always discussed a lot of things.
36. While this evidence is inconclusive, I hasten to add that neither party has produced substantive evidence that this court can rely on. I must reiterate that in a civil case such as this one, the standard of proof is on a balance of probabilities.. In consideration of the evidence on record, I find that the Respondent -- by way. of producing a witness to testify about the circumstances of the Claimant's employment - sways the case in his favour.
37. The court in the case of Kiilu v Isinya Resorts limited [2022] eKLR when faced with similar evidential circumstances stated: "The respondent's case overwhelms that of the claimant. This is because the claimant has failed to satiate the burden of proof of unlawful termination



of employment as provided under section 47 (5) of the *Employment Act*, 2007. He has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability. I therefore find a case of no termination of employment and hold as such.

38. Consequently, I find that the Claimant has failed to prove his case and this claim is dismissed.”
27. Having re-evaluated the evidence before the trial court and read the decision of trial court I am guided by the Court of Appeal decision on my role as first appellate court -. In the celebrated case of *Selle -vs- Associated Motor Board Company & Others*(1968) EA 123, the court held that an appellate court on a first appeal is bound to differ with the findings of the trial court if only the court failed to take into account a particular circumstance or probabilities or if the impression of the demeanour of witness is inconsistent with the evidence generally. The court is however to bear that it neither saw or heard the witnesses. It is the trial court that observed the demeanour of the witnesses and their truthfulness. In the case of *Peters -vs- Sunday Post Ltd* (1958) EA 424. the court rendered itself that- "it is a strong thing for an appellate court to differ from the findings on a question of fact of the judge who had the advantage of seeing and hearing the witness...but the jurisdiction to review the evidence should exercised with caution; it is not enough that the appellate court might have come to a different conclusion" The above cases were cited with approval by the Court of Appeal in Civil Appeal No. 293 of 2002 at Nairobi between Francis Gicharu Kariri and Peter Njoroge Mairu (2005)eKLR. The Court of Appeal further held as follows in the same case:"2 an appellate court cannot properly substitute its own factual finding for that of a trial court unless there's no evidence to support the finding or unless judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction that should be exercised with caution.. Where it appears that a decision may seem equally open either way, the appellate court approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and should not be disturbed".
28. Applying the foregoing decisions, on re-evaluation of the evidence before the trial court, I find the decision of the trial court was founded on evidence before the trial court. The appellant did not prove unfair termination. His testimony of having been chased by the wife of the respondent was controverted by evidence of RW2 his co-worker who corroborated evidence of the respondent that the appellant just left work and did not return. The evidence that he was called by the respondent was corroborated by the admission of receipt of the cash which the respondent had told the court he had asked for on being called to return to work. The court having not seen the witnesses and especially in the character of RW1 as found by the court and guided by the decisions of Court of Appeal (supra) finds no basis to interfere with the decision of the trial court on the termination. (see also *Mbogo v Shah*, supra)

Whether the trial court erred in its finding on reliefs

29. The Appellant sought for the following relief in his memorandum of claim dated 4th June 2021 -
- (a) A declaration that the Claimant's termination was unlawful.
 - (b) An order for the Respondent to pay the Claimant Kshs.2,273,112/=
 - (c) Costs and Interest
30. The particulars for the sought sum of Kshs 2273112 were as follows:-
- a) One Month salary in lieu of termination notice-Kshs. 20,000.00
 - b) Unpaid Salary for the Month of May 2021-Kshs. 20,000.00



- c) Leave days 21days each year (Kshs 667*21days*11 years)
Kshs. 154,077.00
 - d) House allowance 15% of the salary (15% of Kshs 20,000*12months 11 years)-
Kshs. 396,000.00
 - e) Overtime worked for 4 hour each day (Kshs 83*4hours*365days*11years) -Kshs.1,332,980.00
 - f) Service pay 15 days each year (Kshs 667*15 days 11 years)-Kshs. 110,055.00
 - g) 12 months' Salary Compensation (12months*Kshs 20,000)-Kshs. 240,000.00
- TOTAL- Kshs.2,273,112.00

31. The court upheld the decision of the trial court on the fairness of the termination effectively dispensing with prayer (a) of the claim, notice of termination and the claim for compensation.
32. On the claim for Unpaid Salary for the Month of May 2021 Kshs. 20,000.00, the trial court held that the salary was paid in full. The court found that the appellant admitted receipt of the cash paid by MPESA. The appellant did not file submissions to explain why he faults the decision. I find no basis to interfere with the decision of the trial court on the relief.
33. On the claim for Leave days 21days each year (Kshs 667*21days*11 years) Kshs. 154,077.00, the trial court held that there was no evidence of the claimant having been granted leave. The trial court awarded the claimant(appellant) unpaid leave days for a maximum of three years in the sum of Kshs. 154,077. (page 56 of the ROA was the said judgment). There was no cross-appeal. The court found an error on the face of the record in the computation. 21days for 3 years is tabulated as follows- 21/30x 20000x3 years thus award of Kshs. 42,000/-
34. On house allowance - the trial court found the salary was Kshs. 20000. That the applicable minimum wage order was of 2018 and at Kshs. 14658.85. The court finds that 15% (house allowance as per the General Wages (Regulations) Order) of the said minimum wage was within the paid Kshs.20000 and hence no issue of house allowance. The court upholds the decision of the trial court.
35. On service pay - the trial court held as follows:- ‘45. Prayer (f) is for service pay in the sum of Kshs 110,055.00. Section 35 of the Employment Act stipulates that service pay is exclusive to employees whose contract of service has been terminated under subsection 35(1)(c). Having failed to prove his case of unfair termination, the Claimant is denied this prayer.’ Section 35(1)(c) of the Employment Act reads:-‘(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.’
36. Section 35(5) on service pay reads:- ‘(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. “Further, as relates service pay section 35(6) reads-‘(6) This section shall not apply where an employee is a member of—
 - (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and



- (d) the National Social Security Fund.”
37. The purpose of section 35(5) and (6) of the *Employment Act* is to provide for social security for all employees. Section 35 (1) (c) addresses monthly paid employees and need for notice by either party. Does that mean in the event of absconding, hence notice of termination, like in the instant case, the employee is not entitled to social security? I would return in the negative as social security is earned by period of service and is not conditional on the manner of separation or termination of employment. The court is persuaded in its decision by the decision of Justice Ongaya in *Henry Kamau Ngare v Teachers Service Commission & another* [2016] KEELRC 1568 (KLR) where the court held:- “Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee’s right within the realm of employment law such as is recognized under section 5 of the *Pensions Act* and section 35 (5) and section 40 (1) (g) of the *Employment Act*, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41 (1) and 41(2) (b) of *the Constitution* of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee’s crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee.”
38. Consequently, the court holds that the trial court erred in its interpretation of the law on payment of service pay and the decision is set aside. The trial court held that the appellant was employed by the respondent in 2009. During the cross-examination, the claimant told the court he was employed in 2012. That was the same position taken by the respondent (RW1) and RW2 at cross-examination. The court found that the finding of employment in 2009 was not based on the evidence before the court. The appellant exited employment in May 2021. Section 35(5) on service pay reads:- ‘(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.’ The court finds that the complete years of service to be 2012 to 2020 thus service pay for 8 years. The salary was Kshs 20000 thus $20000 \times 15/30 \times 8$ years total sum of Kshs. 80000 service pay is awarded on appeal.
39. On claim for Overtime worked for 4 hour each day (Kshs $83 \times 4 \text{hours} \times 365 \text{days} \times 11 \text{years}$) - Kshs.1,332,980.00- the appellant had stated he worked 8am to 8pm. This was denied by the respondent who stated they were Muslims hence slept at 7 pm. RW2 also denied claim of overtime as stated. The trial court held as follows:-

“42. Prayer (c) is for unpaid overtime in the sum of Kshs. 1,332,980.00, The Claimant provided no evidence of the same, whereas RW2 testified that the work hours were different to what the Claimant alleged. Guided by the case of *Esther Wambura Ndegwa v Laboratory and Allied Limited* [2021] eKLR, I find that the Claimant has not provided evidence to show that he indeed worked overtime, and consequently this claim fails for want of proof.” Guided by the decision by Court of Appeal in Civil Appeal No. 293 of 2002 at Nairobi between *Francis Gicharu Kariri and Peter Njoroge Mairu* (2005)eKLR. Where the court of appeal further held as follows in the same case: "an appellate court cannot properly substitute its own factual finding for that of a trial court unless there's no evidence to support the finding or unless judge can be said to be plainly wrong"; The appellant told the court he was asked to defreeze and cook chicken at 6.45pm and refused as he would be late. How can he then say he worked till 8pm. Is 1 hour and 15 minutes not sufficient to defrost and



cook chicken? I find no basis to interfere with the decision of the trial court.
Overtime claim of extra hours of work must be proved like special damages.

Whether the trial court erred in awarding costs of the suit to the respondent.

40. I would return in the positive. Costs follow the event. The claimant having been awarded on leave days had succeeded in the claim albeit partially, hence was entitled to costs. The award of costs to the respondent was plainly wrong (Mbogo v Shah).

Conclusion

41. The appeal is allowed. The Judgment and Decree of the Hon. H. M. Ng'ang'a (PM) delivered on 13th July, 2024 in Milimani MCELRC No. E1022 of 2021 is set aside and substituted as follows:-

Judgment is entered for the claimant against the respondent as follows:-

- a. Service pay for 8 complete years of service for Kshs. 80000.
- b. Untaken leave days for 3 years Kshs. 42000.
- c. The total sum of Kshs.122000 (a and b) above is awarded with interest at court rate from date of filing suit until payment in full.
- d. Costs of the suit to the claimant.

42. The appellant is awarded costs of the appeal.

43. Stay of 30 days.

44. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH JULY 2025.

J. W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Ms. Chepchirchir h/b Kirwa

Respondent: Okeyo

