



**Njenga v Revital Healthcare [EPZ] Ltd (Appeal E117 of 2024)  
[2025] KEELRC 2401 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2401 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E117 OF 2024**

**K OCHARO, J  
JULY 17, 2025**

**BETWEEN**

**ROSE NJENGA ..... APPELLANT**

**AND**

**REVITAL HEALTHCARE [EPZ] LTD ..... RESPONDENT**

*(An appeal against the judgment and decree of the principal Magistrate, G. Sogomo of 10th May, 2024, in Mombasa CM-ELRC cause No. E 108 of 2028)*

**JUDGMENT**

**Introduction**

1. Claiming that at all material times, she was an employee of the Respondent, whose employment was unfairly terminated by the latter, the Appellant sued them seeking various remedies. These included one month's salary in lieu of notice, compensation for leave days earned but not utilised, unremitted NSSF contributions, and compensation for unfair termination of employment, amounting to a total of KShs. 485,580.
2. The Respondent opposed the claim, arguing that the Appellant was a casual, not a permanent, employee at all relevant times. Therefore, her claim for unfair termination lacked legal basis. They did not terminate her employment. Moreover, given the circumstances of the case, the Appellant was not entitled to the reliefs he sought.
3. After hearing the parties regarding their respective cases, the learned trial Magistrate concluded in his judgment, dated as aforesaid, that the Appellant was a piece rate worker; as a result, her claim for unfair termination and entitlement to the reliefs sought lacked merit. Consequently, he dismissed the claim.
4. The Appellant, aggrieved by the full decision of the trial court, filed this appeal requesting the court to overturn the judgment and, in its place, render its own judgment allowing her case in the lower court.



### **The Appellant's case before the Lower Court.**

5. The Appellant stated that she was first employed by the Respondent in November 2011, as a box packer, earning a daily wage of KShs. 970. At the end of the month, she would be paid KShs. 25,220.
6. She asserted that she used to work for the Respondent from 7 am to 7 pm for seven days a week.
7. In October 2017, the Respondent began relocating its operations from Jomvu to Kikambala in Kilifi County.
8. In December 2017, her colleagues and she approached the Respondent's Human Resources Manager, Ms. Bridgit, to request their two months' unpaid salary. The Manager instructed them to go home and wait to be called to collect the salary.
9. She further stated that the Manager did not call them as promised. When she went to the Respondent's Jomvu premises to follow up on her salary, she found that the Respondent had fully relocated to Kanamai, Kilifi County.
10. She contended that the Respondent's decision to terminate her employment was unfair. The Respondent didn't adhere to the dictates of Sections 41, 43, and 45 of the *Employment Act*.
11. Contrary to the law and the tenets of natural Justice, the Respondent didn't accord her a hearing before terminating her employment.
12. The Respondent used to deduct her salary for contributions to the National Social Security Fund but never remitted the deducted amount.

### **The Respondent's Case before the Lower Court**

12. The Respondent presented Brigit Fatuma, its Human Resources Manager, to testify on its behalf. The witness stated that the Respondent never employed the Appellant as she asserted. To the contrary it could engage her from time to time on intermittent occasions, as a casual labourer whose engagement was only subject to availability of work at the Respondent's premises.
13. The Appellant never worked continuously for the Respondent but instead had several, often prolonged, breaks between her days of service. The Summary of her working days as well as attendance records are a testament to this.
14. Her compensation was computed daily as she was earning a daily wage and not monthly as claimed. The compensation was per the relevant Minimum Wages Regulations applicable from time to time.
15. The Appellant's working hours were all compliant with statutory stipulations, and any overtime worked was duly compensated.
16. She further stated that sometime in October 2017, the Respondent published a notice directed to all its employees, both casual and permanent, informing them of its decision to relocate its operations to Kikambala in Kilifi.
17. She asserted that the Appellant's salary was never withheld at any point.
18. Upon relocation to Kikambala, several casual workers refused to turn up and therefore, the Respondent issued those that showed up with written employment contracts. As a result, the casual labourer's that relocated were converted into contract employees. The Appellant was among those who didn't turn up.



### **The Judgment by the Lower Court.**

19. After hearing the parties and considering their respective cases, the Learned trial Magistrate held that the Appellant had failed to prove his case. He consequently dismissed it.

### **The Appeal to this Court.**

20. Aggrieved by the Judgment, the Appellant filed this appeal, anchoring the same on the following grounds;
- I. That the learned Magistrate erred in law and fact in dismissing the Appellant's Memorandum of Claim dated 6<sup>th</sup> August 2018 with costs whereas there was clear and uncontroverted evidence that the Appellant was an employee of the Respondent who was not facilitated to relocate to the Respondent's work premises in Kanamai-Kilifi County.
  - II. That the learned Magistrate erred in law and fact in finding that the Appellant was employed by the Respondent on piece rate basis despite clear evidence that the Respondent was deducting and remitting statutory deductions [NSSF] from the Appellant's salary.
  - III. That the learned magistrate erred in law and fact in finding that, the termination of the Appellant's employment by the Respondent was not unfair or illegal.
  - IV. That the learned Magistrate erred in law and fact by relying on an abstract copy of Respondent's staff attendance register without the original staff attendance register being availed for scrutiny by the Court and the Appellant's Counsel. The trial Court thus arrived an unfair and unjust decision.
  - V. The learned trial Magistrate erred in law and fact in disregarding the fact that the Respondent adjudged the Appellant a deserter and terminated her employment without affording her an opportunity to defend herself from the aforesaid allegations.
  - VI. The learned trial Magistrate erred in law and fact in delving into facts that were not pleaded or raised during the hearing thus arriving at un just decision.
  - VII. The learned trial Magistrate erred in law and in fact by dismissing the Appellant's prayers.
  - VIII. The learned trial Magistrate wholly and completely disregarded the evidence tendered by the Appellant together with her written submissions particularly the decision in John Cherera Mghendi v Revital Health Care [EPZ] Limited whose facts are a replica of the case herein.

### **Analysis and Determination.**

21. This Court appreciates its role as the first Appellate Court in this matter, to reconsider and reanalyse the material presented before the trial Court, and to arrive at its own conclusions without necessarily being bound by those of the trial Court. However, in doing so, the Court reminds itself that it neither saw nor heard the parties. Where it diverges from the trial Court's findings, it must provide clear reasoning for the same. See also- Musera v Mwechelesi & Another [2007] KLR.
22. In my view, the Appellant's appeal will succeed or fail on the following broad grounds:
- I. Did the Learned trial Magistrate err in law and fact when he held that the Respondent's employment was not unfairly terminated?



- II. Did the Learned trial Magistrate err in law and fact, by failing to award the Appellant the reliefs he had sought or any of them?
23. The learned trial Magistrate dismissed the Appellant’s case holding that the Appellant had not go beyond the hurdle of proving that an unfair termination occurred as required under Section 47[5] of the *Employment Act*. I have carefully scanned through the Appellant’s Counsel’s submissions and note that he didn’t address this point.
24. The Section 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 the termination of employment or wrongful dismissal shall rest on the employer.”
25. Counsel for the Respondent submitted that the Appellant did not discharge her legal burden under the above stated provision of the law. In support of the submissions, Counsel cited the case of Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikibia[2021] eKLR.
26. The section creates a reverse burden. The employee is first required to establish, prima facie, that an unlawful termination or wrongful summary dismissal occurred. Under this section it is expected of the employee to set forth evidence that prima facie, shows inter alia, that the termination or summary dismissal was for instance, without adherence to the dictates of procedural fairness, substantive justification, terms and conditions of the contract of employment, terms and conditions of a collective bargaining agreement, or even the stipulations of *the constitution*. The Appellant did none of this.
27. It should not be forgotten that under the said provision, in discharging the burden, the primary responsibility on the employee is to demonstrate that a termination or summary dismissal occurred, then proceed to show that it was unlawful or wrongful.
28. Termination initiated by the employer, being an act that signifies the conclusion of the employer-employee relationship, I can state without doubt that the Appellant did not adduce any evidence before the trial court that would demonstrate such an act. Her testimony under cross-examination explicitly indicates that she was aware the Respondent company was relocating and had indeed relocated, but she did not go to their new premises. She claimed that the Respondent did not assist her in reporting there by providing her with money. If, for whatever reason, the Respondent had a duty to do this and failed to do so, then the Appellant could only sue for constructive dismissal.
29. It is only after the employee discharges the burden that the evidential burden shifts to the employer to prove that the summary dismissal or termination was justified [sections 43 and 45 of the Act], and that it was procedurally fair [section 41 of the Act].
30. In the upshot, the Appellant didn’t discharge her burden under Section 47[5] of the *Employment Act*, 2007. The learned trial Magistrate rightly held that there was no unfair termination. This Court notes that the Appellant’s legal duty under this section was not discussed, and a decision made thereon in the case of John Cherera Mgend[*supra*]; for this reason, I respectfully depart from the Judgment.
31. The learned trial Magistrate found that the Appellant was working under a piece rate arrangement. Considering the definition of piece rate work under the definition section of the *Employment Act*, and the material that was placed before him, I take a clear view, and agree with the Appellant’s Counsel,



that the material doesn't demonstrate the characteristics of piece rate work in the relationship that was between the Respondent and the Appellant.

31. However, I am not convinced by the position of the Appellant and her Counsel's submissions that the arrangement was a term. The Appellant, in my view, worked for the Respondent as a casual employee at all material times. Section 2 of the *Employment Act* defines a casual employee as "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time."
32. The Respondent presented an extract of the attendance and payment registers to the trial Court to support the claim that the Appellant was a casual worker. Further, she did not work continuously. The Appellant's Counsel argues that the learned trial Magistrate should not have given any evidential weight to the documents, as the original registers were not produced. The Respondent's Counsel maintains that the records produced pertain only to the Appellant. If the complete set of registers had been tendered, data for more than 500 employees might have been disclosed, potentially violating the Data Protection Act.
33. It is not contended by the Appellant that a pre-trial conference in respect of the lower court matter was not undertaken. It is not stated that the Appellant indicated at any point, before the trial proceeded, that it would oppose the production of any document that was less than the entire set of registers. When the documents were tendered in evidence, the Appellant didn't raise any objection to their production. In my view, it is too late for the Appellant to attack the evidential value of the documents on the basis they have.
34. Procedure Rules establish the mechanism for inspecting documents. This mechanism is designed to assist in situations involving documentary evidence, as was the case in the matter before the lower court, where large volumes of documents needed to be produced as evidence for the interrogation of a small portion of them, and also to reduce the exposure of data of individuals not involved in the proceedings. The Appellant didn't use the procedure. Again, the matter of the pre-trial conference and its impact on the production of documents in proceedings, as well as the inspection of documents procedure, was not considered by the court in the John Cherera case [supra].
35. In light of the foregoing premises, I come to the inescapable conclusion that the suit before the trial Court was a suitable candidate for dismissal. The learned trial Magistrate rightly dismissed the same. As a result, I uphold the dismissal and dismiss the appeal herein without costs.

**Read, Signed and Delivered this 17<sup>th</sup> Day of July 2025.**

**OCHARO KEBIRA**

**JUDGE**

