Mathenge t/a Imperial Water Services v Juma (Appeal E210 of 2023)
[2025] KEELRC 2048 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2048 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E210 OF 2023

JW KELI, J

JULY 4, 2025

BETWEEN

PETER MATHENGE T/A IMPERIAL WATER SERVICES ..... APPELLANT

AND

JAMES MALOBA JUMA ..... RESPONDENT

(Being an Appeal against the Judgment of the in MCELRC/E051/2023 James Maloba Juma VS Peter Mathenge T/a Imperial Water delivered by the Hon. B.M. Cheloti on 8th September, 2023)

JUDGMENT

1. Peter Mathenge T/A Imperial Water Services the above named Appellant, appealed to this court against the Judgment in MCELRC/E051/2023 delivered by the Hon. B.M. Cheloti on 8th September, 2023 seeking for the following Orders:-

    a. The appeal be allowed with costs to the Respondent.

    b. The Judgment in MCELRC/E051/2023 delivered by the Hon. B.M. Cheloti on 8th September, 2023 and any consequential orders be set aside and substituted with dismissal orders.

    c. This court do grant such further orders/reliefs as it may deem just and expedient to grant.

Grounds of the appeal

2. The trial court erred in law and in fact in completely disregarding the Appellant's Application dated 16.8.2023 and therefore reaching a wrong decision.

3. The trial court erred in fact and in law by failing to appreciate that there was no employer employee relationship that existed between the Appellant and the Respondent.

4. The trial court erred in law and in fact in awarding the Respondent judgment in the sum of Kshs. 895,383/ as well as costs and interest without any factual basis.

5. The trial court erred in law and in fact in failing to appreciate the principles guiding fair hearing and administration of justice.

6. The learned magistrate erred in law and in fact by holding that the respondent had established his case against the appellant beyond a balance of probability while there was no evidence to support such finding.

7. In her overall consideration of the issues before her, the learned trial magistrate was overtly biased against the appellant.

Background To The Appeal

8. The Respondent/claimant filed a claim against the appellant vide a memorandum of claim dated the 11th January 2023 seeking the following orders-

    a] A declaration that the Claimant's termination is wrongful and unfair.

    b] An order that the respondent to pay the Claimant KES.1,151,883.89/-as terminal dues made up as follows: -

        i] Kshs.740,000/= being unpaid salary arrears Kshs.20,000/= being 1-month salary in lieu of notice

        ii] Kshs. 20000 being 1 month salary in lieu of notice

        iii] Kshs. 40000 being unpaid leave

        iv] Kshs.17,500/= being unpaid pro-rate leave

        v] Kshs.58,806.99/- being unpaid public holidays

        vi] Kshs.35.576.92/= being service pay.

        vii] Kshs.240,000/-being compensation for unfair termination at the rate of 12 months gross salary in terms of section 49[1][c] of the *employment act* laws of Kenya

    c] A certificate of service under Section 51 of the *Employment Act*, 2007.

    d] Cost of this suit and interest on all the amounts herein until payment in full.

    e] Any other or further relief this Honourable Court may deem fit to grant.

    [relief sought at pages 6-7 of the ROA]

9. The Appellant also filed her verifying affidavit, list of witnesses, witness statement and list and list of documents, all dated the 11th January 2023. [Pages 5- 14 of ROA was the claimant's case]. The Respondent filed a supplementary record of appeal dated 14th May 2025, which contained documents filed by the Respondent/ claimant before trial court and the judgment of the lower court.

10. The claim was opposed by the appellant who entered appearance and filed a memorandum of response dated the 16th August 2023 filed together with witness statement of Peter Mathenge of even date [pages 54-58 of ROA]. The court noted defence was filed after the hearing of the claimant's case on 31st July 2023 and after issuance of the judgment date.

11. The Claimant's/Appellant's case was heard on the 31st July 2023, where the Claimant testified in the case relying on her witness statement, produced his documents. There is no record of cross-examination. The claimant further called Alex Musee as his witness and closed his case. [page 60 of ROA].

12. The Respondent's case was closed without calling a witness. The case was thus undefended.

13. The Trial Magistrate Court delivered its judgment on the 8th September 2023 in favour of the respondent/claimant as follows:-

    a. The Respondent to pay the Claimant his terminal dues in the amount of Kshs. 894,383.91/- as tabulated below:-

        i. Kshs.740,000/= being unpaid salary arrears

        ii. Kshs.20,000/= being one month's salary in lieu of notice

        iii. Kshs.40,000/= being unpaid annual leave

        iV. Kshs.58,806.99/= being unpaid public holidays

        V. Kshs.35,576.92/= being service pay.

        vi. Compensatory damages of Kshs.240,000/-

    b. The Respondent to issue the Claimant with a certificate of service forthwith.

    c. The cost of this suit be borne by the Respondent.

    d. Interest on [a] and [c] above at court's rate from the date of delivery of this judgment until payment in full.[Judgment at pages 63-64 of ROA].

Determination

14. The appeal was canvassed by way of written submissions. Both parties 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 submitted on the following issues -

    a. Whether the learned magistrate failed to take into account considerations of which he should have taken account.

    b. Whether judgment meets the ends of justice .

    c. Whether the appellant introduced triable issues.

18. Conversely, the respondent addressed the following issues-Whether there was employer-employee relations to warrant unfair terminationWhether appellant was never accorded fair hearingWhether court disregarded the appellant's applications dated 16.08.2023.

19. The court having perused the grounds of appeal and taking into account the submissions of the parties found the issues for determination in the appeal to be -

    a. Whether the trial court erred in law and fact in disregarding the appellant's application dated 16.08. 2023 and therefore reaching a wrong conclusion

    b. Whether there was no employer employee relationship between the parties

    c. Whether the trial court erred in the reliefs granted.

Whether the trial court erred in law and fact in disregarding the appellant's application dated 16.08. 2023 and therefore reaching a wrong conclusion

The appellant's submissions

20. The Appellant submitted that the Learned Magistrate failed to recognise that the appellant's application dated 16 August 2023 was to be heard on 21 August 2023 and determined before proceeding to hear the matter in absentia. That the application dated 16th August 2023 was filed in court and was received by the registry since directions were issued. The Learned Magistrate did not publish or notify the appellant about the fate of his application before proceeding to formal proof. The non-attendance by appellant or his counsel was beyond his control, unanticipated and excusable. The Honourable Court certified the application as urgent and was to be heard on 21st August 2023, refer to page 71 of the Record of Appeal. Counsel for the appellant at the time joined the virtual court, but unfortunately, his call dropped right before the matter was called out on the cause list. The loss of internet connectivity was unanticipated and beyond the control of the Plaintiff or his counsel and thus excusable. In Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] KEHC 6699 [KLR]. The court drew from the principles of setting aside exparte orders and ruled that failure by the defendant's counsel to respond when the matter was called out was beyond his control, unanticipated and excusable. In that case, the inadvertent happening was due to the Defendant's Advocate suffering an adverse reaction to medication and not being in a position to respond to the matter when the case had been called out. In Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] KEHC 6699 [KLR]citing relevant cases on the issue held inter alia: "The principles governing the exercise of judicial discretion to set aside ex-parte judgements are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it [See PatelvE. A. Cargo Handling Services Ltd [1974] E. A. 75]. The discretion is intended to be exercised to avoid injustice or hardship resulting

from accident, inadvertence excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice [see Shah v Mbogo [1969] E. A. 116]. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether costs can reasonably compensate the plaintiff for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. [See Sebei District Administration v Gasyali [1968] E. Way. 300]. It also goes without saying that the reason for failure to attend should be considered." The High Court in Wachira Karani v Bildad Wachira [2016] KEHC 6334 [KLR] discussed what amounts to sufficient cause. "The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for a hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. [14] Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause". The court went on to further hold: "I find the reason offered to be reasonable and excusable. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case"

21. The appellant further submitted that the Learned Magistrate did not consider the appellant's right to a hearing. The appellant contended that the trial court ought to have directed its consideration to the appellant's application dated 16th August 2023, seeking to have his defence placed on record and allowed to participate in the hearing. The Court of Appeal in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] KECA 282 [KLR] stated "22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

22. The appellant further submitted on whether impugned judgment meets the ends of justice. That a decision allowing the application would not be prejudicial to the Respondent as she would still have an opportunity to give her evidence and even cross-examine the Appellants' case. The inconvenience suffered by the Respondent would be compensated by payment of costs. In Wachira Karani v Bildad Wachira [2016] eKLR the High Court in discussing what amounts to sufficient cause observed - "The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it".In the case of Belinda Murai & 9 others v Amos Wainaina [1979] KECA 25 [KLR] Madan, J.A. [as he then was] was at his best legal wit when he described what constitutes a mistake in the following words: "A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes

overrule..." In the case of Philip Keipto Chemwolo & another v Augustine Kubende [1986] KECA 87 [KLR] Apalo, J.A. [as he then was], posited as follows: "Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline." The Court of Appeal in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commmission & 2 others [2013] KECA 282 [KLR] "[21]. In this case, the inconvenience caused to the respondents by the delay caused by the petitioner and his counsel's failure to attend court on the 10th June, 2013, could have been compensated with costs... We are of the view that the Judge should have proceeded to hear the petition on merit. Dismissing the Petition did not advance the overriding objectives in the administration of justice, nor did the court save time. Indeed the court's time that was fixed for the petition was totally wasted as the court had an opportunity of utilizing the remaining 3 days."

Respondent's submissions

23. The Respondent submitted on whether trial court disregarded the Appellant's Application dated 16.8.2023 as follows- On 21 March 2023 the matter came up for pre-trial direction then proceeded for formal proof hearing on 31" July 2023. At that juncture the claimant's and respondent's cases were marked as closed. On 9th August 2023 the matter was mentioned to confirm the filing of submissions and then subsequently the judgment was delivered on 8th September 2023 against Appellant of kshs.895,383/=. On 16th August 2023 before the delivery of the judgment, the Appellant filed an application dated 16th August 2023 which was certified ready for hearing on 21" August 2023 [see record of appeal at page 68]. On the hearing date, physical file was missing in the court and court informed appellant to follow up the application with the registry to fixed date. Somehow the Appellant was not knee to prosecute his application and abandoned before judgment was delivered against him. That the Appellant is being dishonest that his former counsel tried to join the virtual court but unfortunately, his call dropped right before the matter was called out on the cause lists. Under the Section 107[1] of the *Evidence Act*-Chapter 80 provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. There is no evidence adduced by the former Appellant's advocate that indeed they had internet challenge. There is no report or material on this save for the hearsay allegations. The court is not given any evidence to base on in support of the Appellant's assertion and as such the argument is baseless.The appellant was indolence to follow up the application, failed prosecuted and later abandoned it. The Appellant's failure prosecute his application should not deny the respondent rights to enjoy the fruits of his judgment which the decretal sum is already deposited in the parties advocates join earn accounts only waiting to released to the respondent. The Appellant will not stand to loss if the appeal is dismissed. It should be noted that the Appellant has for over three years is out to use delaying tactics since the year 2022 to date, when failed to honour the agreement for terminal dues [see supplementary record of appeal at page 40]. The appellant asserted that as a matter of Justice litigation must come to an end.

24. On whether Appellant was never accorded fair hearing the Respondent submitted as follows- Under Section 26[1].[2].[5]and[6] of the Employment and Labour Relations Court [Procedure] Rules *Legal Notice 133 of 2024* which provides that a summons sent by electronic mail service shall be sent to the respondent's last confirmed and used e-mail address. Service shall be deemed to have been effected when the sender receives a delivery receipt. Where service has been effected by e-mail by the Court, such email or copy of email on record shall be sufficient evidence of service upon a party. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the

electronic mail service delivery receipt confirming service. The respondent complied with the above rules. [see record of appeal at pages 15-24]. Section 27 of above law provides that a summons may be sent by mobile-enabled messaging application to the respondent's last known and used telephone number. Service shall be deemed to have been effected through a mobile-enabled messaging service when the sender receives a delivery receipt. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service. The respondent complied with the above rules. The notice of summons to enter appearance provided that; Unless you file a Response within twenty-eight days from the date of this summon, the suit will be heard and determined in your absence [see record of appeal at pages 15-17]. The appellant was properly served but failed to enter appearance or file the response within the prescribed mandatory time line. The appellant attached defence in their application abated which in event was just mere denial.Based on the above mention rules of procedure which confirmed that the Appellant was served with all the necessary court documents as was required. The Appellant cannot turn around and say that he was never heard. What could have the respondent done to show that the Appellant was accorded opportunity to defend his case?. We leave it for the court to find the the Appellant was offered natural justice but waived it.

Decision on issue 1.

25. The application referred to in the appeal was dated 16th August 2023 before the trial court sought to arrest the delivery of judgment and for the re-opening of the case by grant of leave to defend the suit and there was annexed draft memorandum of response.[pages 50 -58]. There is no order on directions on the application. In the impugned judgment, the trial court stated that the appellant neither entered appearance nor filed defence within the stipulated time. The court on perusal of the proceedings, did not find any proceedings on the application which was filed after the hearing and before delivery of judgment [see page 61]. The court appellant submitted that the said application was certified urgent and was to be heard on 21st August 2023 and referred the court to page 71 of ROA. On perusal of the record the court found that at page 71 was a page of ruling by Justice Ocharo Kebira and nowhere is the hearing mentioned. The court found the CTS record at page 68 of ROA . On 16th august 2023 the application was certified urgent and fixed for interpartes hearing on 21st August 2023 On that date it is indicated the physical file was not found. While the applicant states the call of the advocate dropped the respondent asserted that the appellant was informed to follow up on the application to fix a date at the registry. The court finds that the issues under the application are moot as the application before the trial court was not canvassed before the trial court and there is no ruling. Even if it was true the call dropped, it was still the obligation of the applicant to follow up on his application and prosecute the same. There is no basis to fault the trial court as the obligation to prosecute cases including applications lie with parties. The court holds that the trial court did not disregard the application as the same was not canvassed. The issues of advocate's mistake or opportunity to be heard at trial having not been canvassed before the trial court cannot arise at appellate level.

On whether the appellant was accorded fair hearing .

26. The right to fair hearing is considered fulfilled once a party is accorded the opportunity to be heard. The court, on perusal of the record, found an affidavit of service sworn by Richard Oyangi Ogola , a court process server on the 27th January 2023, who in detail explained how he served the appellant in person with a mention notice, summons to enter appearance and the statement of claim. The court found other notices culminating with the hearing notice for 31st July 2023, leading to the impugned judgment [pages 15-24 of ROA]. The allegation by the appellant of having not been served with suit and summons was not true. The court was satisfied that the respondent was granted the opportunity to be heard, hence the right to a fair hearing was satisfied. The court found no basis to fault the trial court.

Whether there was no employer-employee relationship between the parties

Appellant submissions

27. The appellant in his draft memorandum of response challenges whether there was an employer-employee relationship. Section 2 of the *Employment Act* defines an employee: "Employee means a person employed for wages and a salary and includes an apprentice and indentured learner." An independent contractor is defined in Black's Law Dictionary, 9th Edition as: "One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it". In Eliud & 484 others Mombasa Cement [Cause E097 of 2023] [2024] KEELRC 1479 [KLR] held that: "46. Without any employment relationship, directly or indirectly, on the evidence before the court, there is no jurisdiction to address the employment benefits claimed. The suit is hereby dismissed." The appellant stated that it defence of lack of employee employer relations was a triable issue.

28. The court of appeal in Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] KECA 846 [KLR] stated: "[10] .... What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court. In Gupta v Continental Builders Ltd [1976-80] 1 KLR 809, the court, dealing with an appeal from an award granted on a motion for summary judgment, and in considering the weight to be granted to the defendant's defence, Madan JA stated that: "If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily."

29. A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of Giciem Construction Company V. Amalgamated Trade & Services LLR No 103 [CAK] this Court stated: "As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence,SHOW CAUSE on 14th May, 2025 before the Hon. Judge he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment." [emphasis added] A bona fide triable issue need not to be one that must succeed. This was stated by this Court in Olympic Escort International Co. Ltd. & 2 Others V. Parminder Singh Sandhu & Another [2009] eKLR [Civil Appeal 306 of 2002] in the following manner: "It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide."

30. The appellant asserted that had the Learned Magistrate allowed the appellant to have their defence on record and participate in the hearing, the existence of an independent contractor relationship between the parties would have removed the suit from an Employment and Labour Relations Court to an ordinary civil suit and reliefs sought herein would be inapplicable.

Respondent's submissions

31. The Respondent submitted that from the evidence which was filed in the subordinate court by the Respondent, the Appellant deliberately removed it in their record of appeal. The removed evidence by the Appellant gives overwhelming indications that an employer-employee relationship existed. The evidence showed that the Appellant employed the respondent until they separated unfairly, their dispute of unfair termination was referred to labour office. Three letters were written to the Appellant. The Appellant respondent to the third communique from the labour and a meeting was scheduled between the parties herein. The respondent averred that the appellant availed himself for joint meetings aimed at resolving the employment dispute through dialogue. In the meeting, the Appellant agreed to pay the respondent terminal dues kshs.505,000/= not late that 6th December 2022 in full and final settlement [see respondent's supplementary record of appeal at pages 40 and 44]. However, the respondent did not honour this agreement. This document speaks for itself loud and clear that there was employer- employee relations which informed the learned magistrate that employment existed and their separation was unfair. The aftermath of unfair termination led to total award of kshs.895,383/= to the respondent which was just in the circumstance.

Decision on issue 2.

32. On was there an employer –employee relationship -The appellant in the draft response at paragraph *4* stated that the respondent was not an employee but operated as a commission agent who earned his living making commissions after the sale of water from the respondent's business. The trial court stated as follows on the issue of employment – ''They Claimants averred that in July 2009, he was employed by the Respondent as a salesperson earning a salary of Kshs. 20,000/- per month and a daily commission of between Kshs. 800/- to Kshs. 900/-. They entered into an oral contract. The Claimant and the Respondent mutually agreed that the Claimant's salary would be deposited into the Respondent's Mpesa account until it accumulated to Kshs. 500,000 and the same would be paid to the Claimant triple the amount as a soft loan. The Claimant averred that on 30th July, 2022, he requested the Respondent to either pay him salary which had accumulated to Kshs. 740,000/- or advance him a soft loan of Kshs. 1,500,000/- inclusive of the accumulated salary of Kshs. 740,000/- He averred that the Respondent summarily terminated the Claimant's employment. The Claimant averred that the Respondent neither remitted his NHIF nor NSSF contributions. The Claimant reported the matter to the labour office who in turn wrote letters to the Respondent''.

33. Before the trial court was the MPESA statement which indicated some deposits by the appellant [pages 5-36 of the supplementary record dated 14th May 2025,], a letter by the Ministry of Labour to the appellant on salary arrears and demand for terminal dues of Kshs. 505000 by the labour officer dated 28th November 2022 and letter on conciliation meeting [pages 37-40]. The trial court further recorded as follows:- 'The Respondent responded to the third communique from the labour office and a meeting was scheduled between the labour office and the Parties herein. The Claimant averred that during the meeting, the Respondent agreed to pay him Kshs. 505,000/- being his accumulated salary not later than 6th December, 2022. However, the Respondent did not honour this agreement. The Respondent had refused to either reinstate the Claimant or pay him his terminal dues despite been given demand and notice of intention to sue.'' The appellant in draft defence denied all the foregoing. The ministry of labour is recognised under labour laws through its labour officers to resolve employment disputes. There was a demand letter sent to the appellant and produced in court.''The court having upheld there was a fair hearing, there having been no defence, the evidence before the trial court was unchallenged. The trial court relied on the evidence before it to find there was an employee-employer relationship. The court is guided by the decision 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." Was the trial court clearly wrong? I do not think so taking into account the communication and demand for payment of salary arrears by the Ministry of Labour and the trial court having heard the oral testimony of the respondent of which this court on appeal has no benefit of. [Selle v Associated Motor Boat Co. [1968] EA 123]. The appellant took the position that the respondent was earning commission from sale of its water which position was not corroborated by any evidence. Conversely, the respondent called Alex Musee who confirmed to the trial court the appellant was their employer. Alex said he was the conductor. [page 60 of ROA]The ground of appeal is held to be without merit.

Whether the reliefs granted were merited.

34. The Court on first appeal is to re-evaluate the evidence before the trial court to reach its own conclusion[Selle]. The court perused the evidence before the trial court. The demand letter dated 28th November 2022 from the Ministry of Labour for salary arrears was for Kshs. 505,000 [page 40 ROA]. It was acknowledged by the trial court at page 44 of ROA. The respondent relied on the said document as his evidence in court. The court finds that the amount of salary arrears having already be determined by the Labour Officer, there was no basis to find otherwise and it was not explained why the trial court deviated from the Labour Officer's decision to award Kshs 740,000. The salary arrears award is set aside and substituted with Kshs. 505,000 as per the demand letter.

35. Notice pay of 20000 is upheld under section 35 of the *Employment Act*.

36. Award on leave and public holiday- The court perused the witness statement of the claimant and there was no pleading of untaken leave or public holiday. Such claims must be pleaded and proved. the witness statement was adopted as the evidence in chief. Further, the court noted that the claims were not raised before Labour Officer. Interestingly, the trial court held that the claim for public holiday failed yet proceeded to erroneously award. The court finds that the claims of accrued leave and public holidays were not proved on a balance of probabilities and are set aside.

37. Service pay award - the claimant proved he was not on pension or NSSF hence the claim for service pay is upheld under section 35[5 and 6] of the *Employment Act*.

38. Compensation - The trial court awarded maximum compensation. The claimant had been engaged July 2019 to 30th July 2022, making it 3 years of service. Section 49 of the *Employment Act* requires he court to consider the 13 factors under subsection 4 on the appropriate remedy to wit:- 'A labour officer shall, in deciding whether to recommend the remedies specified in subsections [1]

    and [3], take into account any or all of the following—

    a the wishes of the employee;

    b the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

    c the practicability of recommending reinstatement or re-engagement;

    d the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

    e the employee's length of service with the employer;

f the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g the opportunities available to the employee for securing comparable or suitable employment with another employer;

h the value of any severance payable by law;

i the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j any expenses reasonable incurred by the employee as a consequence of the termination;[k] any conduct of the employee which to any extent caused or contributed to the termination;

l any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

m any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee." The trial court did not justify the maximum award. The court, taking into account service of 3 years, the fact that the respondent did not contribute to the termination and the fact that there was no basis for finding any difficulty that the Respondent could secure a similar job, finds that the maximum award was excessive. The same is set aside and replaced with award of 5 months' compensation for unfair termination[Butt v Khan].

Conclusion

39. In the upshot, the appeal is partially successful on the reliefs granted. The Judgment of the in MCELRC/E051/2023 James Maloba Juma v Peter Mathenge T/a Imperial Water delivered by the Hon. B.M. Cheloti on 8th September, 2023 is set aside and substituted as follows:- Judgment is entered in favour of the claimant against the respondent as follows:-

    a. The termination is held as unfair

        i. Kshs.505000/= being unpaid salary arrears

        ii. Kshs.20,000/= being one month's salary in lieu of notice

        iii. Kshs.35,576.92/= being service pay.

        vi. Compensatory damages of Kshs.100,000/-

        Total sum awarded Kshs. 660,576.92/-

    b. The Respondent to issue the Claimant with a certificate of service section 51 forthwith.

    c. The cost of this suit be borne by the Respondent.

    d. Interest on [a] and [c] above at court's rate from the date of delivery of this judgment until payment in full.

39. Costs of the appeal to the respondent.

40. Stay of 30 days

41. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant –Mbiyu Kamau

Respondent: Otieno

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