



REPUBLIC OF KENYA



**West Kenya Sugar Company Limited v Shayo (Employment and Labour Relations Appeal E006 of 2023) [2024] KEELRC 197 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 197 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E006 OF 2023**

**JW KELI, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT**

**AND**

**PATRICK KUTOTO SHAYO ..... RESPONDENT**

*(Appeal against the Judgement and Decree of Hon. Dolphina Alego (SPM) delivered on the 20th March 2023 at Kakamega MELRC No. 186 of 2019)*

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgement and Order of Hon. Dolphina Alego (SPM) delivered on the 20<sup>th</sup> March 2023 at Kakamega MELRC No. 186 of 2019 between Patrick Kutoto Shayo v West Kenya Sugar Company Limited filed the Memorandum of Appeal dated 18<sup>th</sup> July 2023, (pg.9 – 12 of the Record of Appeal) seeking the following orders: -
  - a. This Appeal be allowed.
  - b. The Judgment by the Honourable Dolphina Alego (SPM) dated and delivered on 20<sup>th</sup> March 2023 at the Chief Magistrate court, Kakamega in Kakamega MELRC Cause No. 186 of 2019- Patrick Kutoto Shayo v West Kenya Sugar Company Limited and consequential decree be set aside.
  - c. The costs of this Appeal and those of the trial Court be awarded to the Appellant.
  - d. Such further or other reliefs as this Honourable Court may deem just and fit to grant in the circumstances of this Appeal.
2. The Appeal was premised on the following grounds:-



- i. The Learned Magistrate erred in law and fact in failing to consider, identify, and appreciate the fact that the Respondent had engaged himself with the Appellant as a driver on a piece rate basis on various dates.
- ii. The Learned Magistrate erred in law in failing to appreciate that the Driver Cane Haulage Report and Driver Payment Report showcase 2 Separate and distinct records and accordingly erred in assuming that since the Respondent was paid a month after he is said to have absconded duty that the respondent must have worked with the Appellant in that month too.
- iii. The Learned Magistrate erred in law in failing to consider and appreciate Section 47(5) of the [Employment Act, 2007](#)
- iv. The Learned Magistrate erred in law and fact in finding that the Appellant terminated the Respondent despite the Respondent not having proved that he was terminated.
- v. The Learned Magistrate erred in law and fact in finding that the appellant did not follow the due and fair procedure on termination.
- vi. The Learned Magistrate despite entering judgement for the Respondent as prayed for erred in law and fact by only making a determination on whether the Respondent was terminated and due process followed, without reasoning or making any determination on any of the other claims or prayers by the Respondent in its Statement of Claim.
- vii. The Learned Magistrate despite entering judgement for the Respondent as prayed for and without having reasoned or making any determination on any of the other claims or prayers by the Respondent in its Statement of Claim, failed to make clear the amounts owed to the Respondent.
- viii. The Learned Magistrate erred in law and fact in entering judgement for the Respondent as prayed for since prorata leave, overtime for extra hours worked, rest days and house allowance, and other terminal dues are remedies not available to the Respondent due to the nature of his piece rate employment with the Appellant.
- ix. The Learned Magistrate, despite entering judgement for the Respondent as prayed for, erred in law and in fact by failing to appreciate and consider, and make a verdict on the Appellant's submissions which indicated that the Respondent's amended Memorandum of Claim dated 20<sup>th</sup> April 2021 was never served upon it and in any case was never amended with leave of this Honourable Court.
- x. The Learned Magistrate erred in law and in fact in disregarding the evidence tendered by the Appellant and/or falling to consider the said evidence in its totality.
- xi. The Learned Magistrate erred in law and in fact in failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case.
- xii. The Learned Magistrate erred in law and in fact in failing to consider the Applicant's submissions which were duly filed.
- xiii. The Learned Magistrate erred in law and in fact in appreciating and considering the Respondent's submissions only to the prejudice and detriment of the Appellant.
- xiv. The Learned Magistrate erred in law and in fact in misapprehending the evidence on record.



- xv. The Learned Magistrate erred in Law and fact in failing to properly and exhaustively evaluate the evidence on record.
- xvi. The Learned Magistrate erred in law and in fact in arriving at conclusions and inferences which are not supported by evidence and/or based on any documentation.
- xvii. Other grounds and reasons to be adduced at the hearing hereof.

**Background to the appeal**

3. The Respondent/Claimant vide a Statement of Claim and Verifying affidavit dated 5<sup>th</sup> November 2019 and filed on 26<sup>th</sup> November 2019 sought before the trial magistrate court the following reliefs:-

- a. One month’s salary in lieu of Notice
- b. Prorate Leave
- c. Underpayment of wages
- d. Public Holidays
- e. Overtime for extra hours worked
- f. Rest Days
- g. 12 months compensation salary
- h. Costs of this suit.
- i. Certificate of Service.
- j. House allowance

(Pg 13-16 of the Record is the Statement of Claim and Verifying affidavit dated 5<sup>th</sup> November 2019).

4. The Respondent/Claimant vide an Amended Statement of Claim dated 20<sup>th</sup> April 2021, supported by his Verifying Affidavit sworn on even date and filed on 16<sup>th</sup> July 2021(Pg. 1 of the Supplementary Record of Appeal dated 28<sup>th</sup> November 2023) sought before the trial magistrate court the following reliefs:-

- a. One month’s salary in lieu of Notice.....Kshs.27,449.65/-
- b. Prorate Leave.....Kshs. 80,061.47/-
- c. Underpayment of wages.....Kshs. 292,437.9/-
- d. Public Holidays.....Kshs. 116,278.8/-
- e. Overtime for extra hours worked..... Kshs. 75,600/-
- f. Rest Days.....Kshs. 265,796.16/-
- g. 12 months compensation salary.....Kshs. 329,395.38/-
- h. Costs of this suit.
- i. Certificate of Service.



- j. House allowance.....Kshs. 205,872.38/-.
5. The Respondent/Claimant in addition filed his Witness Statement dated 5<sup>th</sup> November 2019, his list of Documents dated on even date, and his bundle of documents, all filed on 26<sup>th</sup> November 2019(Pg. 17 – 25 of the record are all pleadings by the Claimant before the lower court).
  6. The claim was opposed. The Appellant/Defendant/Respondent entered appearance through the firm of Olendo, Orare & Samba Advocates LLP on 18<sup>th</sup> December 2019 and on 9<sup>th</sup> January 2020 filed its Memorandum of Defence dated 16<sup>th</sup> December 2019(Pg.-26-31). The Respondent filed a Notice of Change of Advocates dated 18<sup>th</sup> May 2020 by the firm of O & M Law LLP(Pg.32-33) and on 15<sup>th</sup> February 2022, filed the Respondent’s list of witnesses dated 11<sup>th</sup> February 2022(pg. 34), the Witness Statement of Duncan Abwawo sworn on even date(Pg. 35-36), the list and bundle of documents dated 11<sup>th</sup> February 2022(pg. 37) and the Respondent’s bundle of documents(Pg. 39-40).
  7. The Respondent filed a Reply to the Memorandum of Defence dated 4<sup>th</sup> January 2020 and received in court on 12<sup>th</sup> January 2020.(Not in the Record of Appeal)
  8. The matter proceeded by way of viva voce evidence with parties calling their witnesses (Pg. 109 of the Record - Missing pages of the proceedings ). The parties filed written submissions after the hearing (Pg. 41-94) and judgment was delivered on 20<sup>th</sup> March 2023(Pg. 99-106). The trial magistrate entered judgment in favour of the Respondent/Claimant as follows: “.....it is also not in doubt as per one D Exhibit marked 2 dated 6<sup>th</sup> December 2019 at 11.14.46.am and the claimant was paid 57 Kshs. For the duration between 1<sup>st</sup> of March,2017 and 31<sup>st</sup> March 2017 transporter WEKSCOL. This court also takes judicial notice that the reason why this matter is in court is the fact that the claimant has sought legal redress because he is no longer an employee at the respondent’s premises and it is also not in doubt that he did not abscond because the records affirm payments even beyond what was averred. One cannot be paid when he or she absconds. The Human Resource witness before the court has also attested that he joined the institution after this ordeal. Maybe the handing over notes were not done well to him and thus the lapse in communique. Nicholas Muasya Kyule v Farmchem Limited (2012) eKLR and Kennedy Muriuki Gichangi v County Government of Kirinyaga (2019) eKLR where the court held that dismissal for misconduct must be done through a fair procedure which is set out under section 41 of the *Employment Act*.

Section 43 of the *Employment Act* provides that: -“in any claim arising out of termination of a contract, the employer shall be required to prove the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

Section 41 of the Act provided that:-“subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

In view of the finding above that, the dismissal of the claimant was for not valid reason and that fair procedure was not followed. I make declaration that the dismissal was unfair and therefore unlawful. Conclusively this court enters judgment for the claimant as prayed in the claim.” (page 105-106)



## Written Submissions At Appeal

9. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by O & M LAW LLP were dated 14<sup>th</sup> November 2023 and filed on an even date. The Respondent's written submissions drawn by V.A. Shibanda & Company Advocates were dated 28<sup>th</sup> November 2023 and filed on 4<sup>th</sup> December 2023.

## Determination

10. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a 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 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.”

11. Further in *David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another Nyeri HCCA No. 43 of 2013*, the court opined:- ‘Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions.’”

## Issues for determination

12. The Appellant in its submissions identified the following issues for determination in the appeal:-
  - a. Ground 9- Which Memorandum of claim was properly on record?
  - b. Ground 7- Whether the trial court properly established the amount claimed for in the claim.
  - c. Ground 6- Whether the trial court reasoned or made any determination on all of the claims by the Respondent in its statement of Claim
  - d. Ground 1,2,3,4,5,8,10,11,12,13,14,15,16- Whether the Respondent was terminated by the Respondent and whether the Respondent was entitled to the reliefs sought.
13. The Respondent in his submissions identified the following issues for determination in the appeal:-
  - a. Which Memorandum of Claim was properly on record
  - b. Whether the trial court reasoned or made any determination on all claims by the respondent In its statement of claim.
  - c. Whether the respondent was terminated by the appellant and whether the respondent was entitled to the reliefs sought.



14. The court finds that the issues placed by the parties for determination in the appeal are about the existence of an employment relationship and the nature and extent of damages sought and formulates the issues for determination in the appeal as follows:-
- a. Which of the Statement of Claim of 4th November 2019 and the Amended Statement of Claim dated 20th April 2021 was properly on record?
  - b. What was the nature of employment between the Appellant and the Respondent and, whether the Respondent was unfairly dismissed?
  - c. Whether the Trial Learned Magistrate's judgment was ambiguous and imprecise
  - d. Whether the Respondent is entitled to the reliefs sought.
  - e. Whether the appeal is merited.

**Issue a). Which of the Statement of Claim of 4<sup>th</sup> November 2019 and the Amended Statement of Claim dated 20<sup>th</sup> April 2021 was properly on record?**

15. The Appellant in their submissions dated 18<sup>th</sup> August 2022 (pg.54-55 of the Record) before the Trial court, pointed out that the Amended Statement of Claim dated 20<sup>th</sup> April 2021 was never served upon them nor was the same filed with the leave of the court.
16. The Appellant argues that there is no record in the proceedings before the lower court to indicate that there was any application seeking to amend the Memorandum of Claim nor any permission from the trial court to do so. The Appellant submits that the Respondent failed to follow the procedure under Section 100 of the *Civil Procedure Act* and the Judgement entered against the Appellant by the Trial Magistrate was as prayed in the "Claim" and not as per the "amended Statement of Claim".
17. The Respondent on his part submits that when the Appellant raised the issue of having never seen the amended statement of claim in their submissions of 18<sup>th</sup> August 2022, the Respondent filed a response dated 23<sup>rd</sup> August 2022 (pg. 94 of record) stating that the amended statement of claim was served upon the Appellant on 16<sup>th</sup> July 2021 through an email [litigation@omlaw.co.ke](mailto:litigation@omlaw.co.ke) and [info@omlaw.co.ke](mailto:info@omlaw.co.ke) and that the Appellant did not deny that fact. That an affidavit of service was also filed to that effect (Pg. 95-98 of the Record).
18. The Respondent states that the Appellant did not oppose or object to the same or raise an issue during the hearing and is only stating that they were never served.
19. The Respondent submits that the Amended Statement of Claim dated 20<sup>th</sup> April 2021 is properly on record and was what the trial court relied on.

**Analysis**

20. The Respondent did not contest the fact that he applied to amend his statement of claim. The issue is whether the said application seeking to amend the Statement of Claim was heard and determined.
21. I have carefully considered the lower court record and found that a Notice of Motion application dated 20<sup>th</sup> April 2021 was filed by the Respondent seeking permission to be allowed to amend its claim. The prayers sought were as follows: -
- a. That the Applicant/Claimant be allowed to amend Statement of Claim.



- b. That the Amended Statement of Claim annexed hereto be deemed to be duly filed and served subject to the payment of mandatory court fees.
  - c. That costs of this application be provided for.
22. The application was supported by the Grounds that:-
1. The amendment is necessary in order to for this court to determine the real question issues or dispute
  2. That the respondent is unlikely to suffer any injustice if this application is allowed.
  3. The respondent will have the opportune moment to file an amended defence in reply to the Amended Statement of Claim
  4. That it is in the interest of justice and equity that this application be allowed.
23. There was no record of a hearing of the said application on the face of the Court record, and the application on the court record indicated at the top that the same matter was slated for mention on 16<sup>th</sup> August 2021.
24. The court proceedings of 16<sup>th</sup> August 2021 indicate that parties only took a date by consent for the viva voce hearing that was slated for 28<sup>th</sup> March 2022. There was no mention of the application seeking to amend the Statement of Claim by the Respondent as the Applicant who was seeking to amend his Statement of Claim.
25. Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules, 2016, provides that a party can amend his pleadings without leave of the court before service or before the close of pleadings but thereafter, leave must be obtained before amending the pleadings.
26. Under Rule 13(4) of the Employment and Labour Relations Court (Procedure) Rules, pleadings in a suit close 14 days after service of defence to the claim. In this case, the memorandum of defence was filed on 16<sup>th</sup> December 2019 and the Respondent had filed a reply to the defence dated 4<sup>th</sup> January 2020 and the suit was mentioned for pre-trial conference on 16.8.2021. It was on this date that the application to amend the statement of Claim was also to be mentioned.
27. The Application to amend the statement of claim having been filed after the close of pleadings, the Respondent was mandated to seek leave of the court to file the amended statement of Claim. The Application to amend the Statement was never heard and determined by the lower court.
28. The Respondent's argument that the service of an application attaching an intended Amended Statement of Claim amounts to filing or admission of an Amended Statement of Claim to record is not founded in law. The Respondent did not provide any proof that he filed the Amended Statement independently of the application for the same to have been deemed to have been filed. What was only filed was the application dated 20<sup>th</sup> April 2021 attaching a draft Amended Statement of Claim which was never admitted to the record.
29. The Respondent argues that the Amended Statement of Claim was served upon the Appellant and by that, the Appellant has not raised any concerns about the application to so amend, then the same was deemed duly admitted even without any hearing or admission by the court.
30. The Respondent before the Trial Court filed an affidavit of Service dated 22<sup>nd</sup> August 2022, to show that the application seeking to amend the Statement of Claim attaching the draft Amended Statement



of Claim was served upon the Appellant and that the Appellant was aware the statement of claim was on record.

31. The service upon the Appellant did not amount to “leave of Court” upon the Respondent to deem the said draft Amended Statement of Claim as duly admitted on record.
32. The Appellant raised the issue of the proper Claim before the Trial Court but the Learned Magistrate erred in failing to consider the same issue bearing in mind that the same went to the determination of the reliefs sought.
33. I therefore find that the amended statement of Claim dated 20<sup>th</sup> April 2021 is incompetent and supplementary record is struck off for being filed without leave of the court. The Learned Trial Magistrate in her judgment did not mention the amended claim but simply stated that the court enters judgment for the Claimant as prayed in the claim. The court holds that the claim is one dated 5<sup>th</sup> November 2019.

**Issue b). What was the nature of employment between the Appellant and the Respondent and, whether the Respondent was unfairly dismissed?**

34. The court noted the record omitted the evidence in chief of the Plaintiff. The court then referred to the original record of the lower court which had the full typed and certified proceedings. The Respondent pleaded in his claim that he was employed by the Appellant in 2012 as a driver and that he signed a book with his name written on it and was earning Kshs. 580/- per day which was paid every two weeks. He produced as his evidence his Demand Notice and postage certificate (P-Exh-3a and 3b); NHIF Card and statement(P-Exh-2b and 2a); NSSF Card and statement(P-Exh-1b and 1a); as proof of his employment. He submitted that NHIF and NSSF dues were deducted from his salary but were not always fully remitted. He submits that he worked for 5 years until his employment was terminated with no warning letter or show cause letter on or about February 2017 and during the hearing on 26<sup>th</sup> August 2017, which the Respondent asserts violated his right under Section 41 of the Employment Act to be accorded a fair hearing before his employment was terminated. He stated that his termination was unprocedural and unfair within the provisions of Sections 41,43,45,46 and 47 of the Employment Act entitling him to the award of 12 months’ compensation under Section 49(c) of the Employment Act, and other reliefs sought in his statement of Claim.
35. The Appellant submitted that contrary to the Respondent’s assertion that his employment was terminated in February 2017, the Appellant asserts that the Respondent was at work on 15<sup>th</sup> and 17<sup>th</sup> March 2017 and stated that the Respondent was engaged by the Appellant as a piece rate worker and the attendance of work was intermittent subject to availability of cane Haulage work and availability of the Respondent.
36. The Appellant stated that the Respondent did not work diligently for five years and worked sporadically having in September 2016 absconded work on the 10<sup>th</sup>, 11<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 25<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup>; October 2016, he worked for six days only, January 2017 he worked for two days only and absconded the whole of February 2017 and only came to work on 15<sup>th</sup> and 17<sup>th</sup> March 2017(pg. 38 of Record). The Appellant argued that the Respondent having being a piece rate worker could not claim to have received his wages at a fixed monthly rate as they were paid daily in proportion to the cane hauled between the farmer’s field and the Appellant’s factory.
37. The Appellant submits that the Respondent’s engagement was dependent on his availability to present himself for work and be paid for work done, and the Appellant did not terminate his employment as no



formal contract was in place between it and the Respondent to require a formal notice of termination. The Learned Trial Magistrate found that:-

“it is also not in doubt as per one D Exhibit marked 2 dated 6th December 2019 at 11.14.46.am and the claimant was paid 57 Kshs. For the duration between 1st of March,2017 and 31st March 2017 transporter WEKSCOL.

This court also takes judicial notice that the reason why this matter is in court is the fact that the claimant has sought legal redress because he is no longer an employee at the respondent’s premises and it is also not in doubt that he did not abscond because the records affirm payments even beyond what was averred. One cannot be paid when he or she absconds.

The Human Resource witness before the court has also attested that he joined the institution after this ordeal. Maybe the handing over notes were not done well to him and thus the lapse in communique....”

### **Analysis**

38. It is not disputed that the Respondent had been engaged by the Appellant as a driver.
39. During the hearing, the Respondent testified that, in 2012 he had been a turn boy and only became a driver in 2016. This is also evidenced by his driving license issued on 7<sup>th</sup> January 2016. The Respondent could not have been employed as a driver in 2012 when he did not have a driving license (P-Exhi-4). His statement of claim states that he was employed “on or about 2012 as a driver” This position cannot be true as he became a driver in 2016 when he obtained his driving licence on 7<sup>th</sup> January 2016. The court finds the Respondent had been a turn boy in 2012 and his claim before the court is as a driver. The Appellant provided proof that indeed the Respondent worked in 2016, during which period, he had become a driver. The Respondent himself confirmed during the hearing that he was a turnboy in 2012. The court finds that the Respondent’s claim before the court was as a driver and not as a turn boy.
40. During the hearing, the Respondent produced his NHIF and NSSF statements stating that he was employed in 2012 and his NHIF and NSSF had been remitted through the years up to March 2017 by the Appellant although not for all months.
41. The Respondent in his witness statement of 5<sup>th</sup> November 2019, stated that he was dismissed on or about February 2017(pg. 17). The same stand that he was dismissed in February 2017 is also in his Statement of Claim and in his Demand letter of 5<sup>th</sup> January 2019(pg. 20). During the hearing, he testified that his last day at work was on 26<sup>th</sup> August 2017. There was no explanation of the change of the date of his date of dismissal from February 2017 to August 2017 as was indicated in his Witness statement. The Period of August 2017 was not supported by any pleading by the Respondent. Parties are bound by their pleadings.
42. The Appellant produced as its Exhibit D-Exh-1 – a Driver Cane Haulage Report for the period of 8<sup>th</sup> September 2016 to 17<sup>th</sup> March 2017 which DW1 testified was a Report of the days when the Respondent worked for the Appellant and produced D-Exh-2- the Driver Payment Report for the Period of 1<sup>st</sup> March 2017 to 31<sup>st</sup> March 2017, which showed payments made in April 2017.
43. The Trial Magistrate misdirected herself in stating that the payment of Kshs. 57 as per D Exhibit marked 2 made after the Respondent was allegedly dismissed in February meant that the Respondent did not abscond, because One cannot be paid when he or she absconds, as the Appellant produced D-Exhibit 1 which showed that the Respondent had worked in the month of March on 15<sup>th</sup> and 17<sup>th</sup>



March 2017, and the payment thereof on account of the work undertaken in March for the two days was paid in April 2017.

44. The Learned Magistrate failed to consider that the cane weighment that the Respondent worked for on 15<sup>th</sup> March 2017 was 8.60 Tonnes; and 5.94 Tonnes for 17<sup>th</sup> March 2017 and The Cumulative Tonnes for the two days is 14.54 Tonnes as evidenced in D-Exh-2, which was the total number of Tonnes paid to the Respondent on 1<sup>st</sup> April 2017, less deductions. The Payment of the wages in April did not prove that the Respondent had worked beyond the period of March 17<sup>th</sup> March 2017 as asserted by the Respondent and the Learned Magistrate.
45. The Respondent did not provide contrary proof that he worked indeed in March. The Respondent himself alleges that he had been dismissed in February 2017, but the Respondent provided the contrary proof that indeed the Respondent worked for two days in March 2017.
46. The Respondent during the hearing testified that they received payments on Mpesa at the rate of 32/- Per Tonne. He did not produce any proof of any payments that he had received beyond the period of 1<sup>st</sup> April 2017 when the Payments for March 2017 were paid. There was no proof of any work he had done as alleged between the Period of March and August 2017, when he alleged in evidence in chief he was dismissed from work.
47. As per his testimony, his last NSSF and NHIF payments were in the month of March 2017, during the period that he worked for the Respondent. DW1 testified that the payment of NSSF and NHIF was not applicable to piece-rate workers. The indication of an employer in an NHIF and NSSF statement is not conclusive proof that one is an employee in a company appearing on the Statements.
48. At submissions, the Respondent submitted that he had the uniforms of the Appellant and had undergone training thus he was not a piece-rate worker, as uniforms and training could not be issued to piece-rate workers. This information was never pleaded in the Respondent's claim and was only submitted at submission.
49. The Court holds that the Respondent was a piece rate worker based on his statement that, "we used to get the payment notification on our phones. 32 per tonne. Our Payments were varied depending on how one worked ...." Contrary to his assertion that he was paid a fixed sum of Ksh. 580 per day paid every 2 weeks(page 13 paragraph 3 of the claim and page 17 paragraph 4 of the witness statement).

#### **Issue c). Whether the Respondent was unfairly dismissed**

50. Section 47(5) of the *Employment Act* provides as follows: –

“(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.”

51. The Respondent submits that he was sacked in 2017 August and was only issued with a notice at the gate “dismissed until further notice”. He submits that he was never given any proper notice under section 35 of the *Employment Act* and relied on the decisions in Wilfred K. Onyango V DHL Excel Supply Chain Kenya Limited (2017) eKLR; Krystalline Salt Limited V Kwekwe Mwakele & 67 Others (2017) eKLR, Edwin Kabogo Munene v Equity Bank Limited Industrial Cause Number 1123 of 2012(21 March 2012).



52. The Respondent submits that he was never called to any disciplinary hearing or given any reason for his termination in violation of Sections 41, 43, and 45 of the *Employment Act* and relied on the decisions in *Walter Ogal Onuro v Teachers Service Commission (2013)eKLR* and *Alphonse Machanga Mwachanya v Operation 680 Limited (2013) eKLR* and *Donald Odeke v Fidelity Security Limited Cause Number 1998 of 2011*.
53. The Appellant on its part argued that the Respondent having been engaged as a piece rate worker, could only be engaged based on his availability. The assertion that the Respondent was a piece-rate employee was pleaded by the Appellant in its Memorandum of Defence(Para. 16 on pg.29 of the Record). The Respondent filed a Reply to the Memorandum of Defence dated 4<sup>th</sup> January 2020 and received in court on 12th January 2020, but did not rebut the assertion that he was a piece rate employee (The reply to defence was not compiled in the record. The court accessed the trial court file). The Respondent just denied the contents of the paragraph which was a mere denial. The Respondent had the opportunity to provide proof that he was paid monthly, but he never produced any proof. In his Reply to the Defence, he denied without any concrete assertion all the Respondent's assertions without giving any particulars.
54. The Respondent submitted that the Appellant's Driver's Haulage Report(D-EXhb-1) which indicates the days the Respondent worked for the Appellant was not verified or signed by the Claimant to confirm that indeed the claimant had worked on the said date. The Respondent submits that the said report was generated to suit the Appellant's case and thus should be disregarded. The Respondent submitted that the Appellant failed to provide the muster roll for 2012,2013,2014,2015, 2016 and 2017 which contains all the workers and their work attendances.
55. The Driver's Haulage Report(D-EXhb-1) and the Payroll for April 2017(D-EXH-2) produced by the Appellant were produced with the consent of the parties. The issue of credibility of the documents could not arise when the Respondent agreed to their production by consent and did not object to their production.
56. In the Respondent's statement of Claim on record dated 5<sup>th</sup> November 2019, the Respondent stated that he was dismissed on or about February 2017(pg. 17), this was also stated in his Statement of Claim and in his Demand letter of 5th January 2019(pg. 20).
57. During the hearing, he testified that his last day at work was on 26<sup>th</sup> August 2017. The Respondent stated that he was told at the gate in August 2017 that he was dismissed until further notice, this was inconsistent with his assertion that he had been dismissed in February 2017 as per his pleadings and even through the demand letter by his advocate. The inconsistencies with his evidence indicate that the Respondent could not remember when he was dismissed if at all. He specifically during cross-examination stated that his last date at work was 26<sup>th</sup> August 2017. This date was nowhere in his pleadings.
58. The Respondent further stated that he was issued with a Notice at the gate indicating "Dismissed until further notice". This Notice was not produced before the trial court. The Respondent's inconsistent evidence is a clear indication that he did not know when he stopped working, whether it was in February or August 2017. The Appellant produced evidence that the Respondent had worked in March 2017 for two days. The Respondent did not rebut this assertion backed by documentary evidence.
59. The Courts holds that the Trial Magistrate erred in holding that since the Respondent had been paid salary in April, he had not absconded from work. This was also the position of the Appellant. The Appellant submitted that the Respondent was a piece Rate worker and work was given to him when



he was available. The Respondent also confirmed this position during the hearing that, their payments varied depending on how one worked. It was therefore not true that the Respondent was on a fixed contract term, which entitled him to a fixed pay as he alleges, he could only be paid when he worked and based on the quantity of work done.

60. On a balance of probabilities, the Court finds that the Respondent was not terminated from his employment nor dismissed by the Appellant and that the nature of his work was dependent on how much and when he worked.
61. During the hearing, the Respondent alleged that, in 2012 he had been a turn boy and only became a driver in 2016. This is highly probably true as evidenced by his driving licence issued on 7<sup>th</sup> January 2016. The Respondent could not have been employed as a driver in 2012, when he did not have a driving license. His statement of claim states that he was employed “on or about 2012 as a driver” This position cannot be true as he became a driver in 2016. The Appellant provided proof that indeed the Respondent worked in 2016, during which period, he had become a driver. The Respondent himself confirmed during the hearing that he was a turn boy in 2012.
62. The Respondent failed to show that he was indeed dismissed from work and the Learned Magistrate erred in failing to identify when the Respondent indeed stopped working. The Respondent could not have been unfairly dismissed when he was not aware when he had been dismissed. The claim for unfair dismissal was unfounded and the court set aside the decision of the lower court.

**Issue c). Whether the trial learned Magistrate’s judgment was ambiguous and imprecise**

63. The Appellant submits that the Learned Magistrate erred by only deciding that the Respondent was terminated unfairly and that due process was not followed and failed to issue a determination on the other reliefs as prayed by the Respondent in his statement of claim.
64. The Appellant argues that the Learned magistrate failed to make a clear distinction of the amounts owed to the Respondent.
65. The Appellant submitted that the Respondent’s claim pleaded for damages as per scale(pg-13 to 15 of Record) without providing the exact amount of loss he was seeking contrary to the requirement that special damages must be pleaded and strictly proved and stated that the Respondent’s Pleading was imprecise, incomplete and could therefore not be properly determined considering the form and manner it was pleaded. The Appellant relied on the decisions in *Nyatogo v Mini Bakeries Limited* (Civil Appeal E38 of 2021(2023)KEHC 1593 (KLR)(10 March 2023) where the Court of Appeal held that: “in claiming loss of future earnings, the appellant also appears to have limited it to the period from April 2017 to date filing of the suit but he also failed to compute with exactitude the amount of loss he was seeking being a special damage. In my view, the pleading was imprecise and incomplete as a special damage claim and could not therefore be properly determined considering the form and manner it was pleaded.” This position was further buttressed by the Appellant by the decisions in *Mariam Magherema Ali v Jackson M. Nyambu t/a Sisera Store* Civil Appeal; No. 5 of 1990 and *Idi Ayub Shaban v City Council of Nairobi* 1982- 19888 IKAR 681 and *China Wu Yi Limited & Another v Irene Leah Musau* (2022) eKLR.
66. The Respondent submitted that the Learned magistrate made a decision on the claims sought as per its Amended Statement of Claim and based on its calculations and the wages regulations and should thus be upheld.



## Analysis.

67. The Court determined at the onset that the Amended Statement of Claim dated 20<sup>th</sup> April 2021 was never admitted on record and only the Statement of Claim of 5<sup>th</sup> November 2019 was on record.
68. The Respondent in the said claim prayed for: -
- a. One month's salary in lieu of Notice.....Per Scale
  - b. Prorate Leave.....Per Scale
  - c. Underpayment of wages.....Per Scale
  - d. Public Holidays .....Per Scale
  - e. Overtime for extra hours worked.....Per Scale
  - f. Rest Days.....Per Scale
  - g. 12 months compensation salary
  - h. Costs of this suit.
  - i. Certificate of Service.
  - j. House allowance
69. The statement of claim did not have any particulars of the extent of the damages sought nor any particular of amounts that could be granted to the Respondent. There were no particulars as prayed by the Respondent of the period when all the items claimed were due from the Appellant for the Learned Magistrate to have granted the same as prayed in the Claim. The Respondent's Claim did not contain any specific period when leave had not been taken nor the period of underpayment of wages, in which Public Holidays were never taken, overtime hours worked, rest days, the House allowance that were due and the salary unpaid. The Claim only indicated per scale, which scale is not known.
70. The Trial Magistrate entered judgment in the terms that:- "...In view of the finding above that, the dismissal of the claimant was for not valid reason, and that fair procedure was not followed. I make declaration that the dismissal was unfair and therefore unlawful.

Conclusively this court enters judgement for the claimant as prayed in the claim.”

71. I find the decision of the Court of Appeal relied on by the Appellant in Nyatogo v Mini Bakeries Limited (civil Appeal E38 of 2021(2023)KEHC 1593 (KLR)(10 March 2023) appropriate in the instant suit, where the court found that: “in claiming loss of future earnings, the appellant also appears to have limited it to the period from April 2017 to date filing of the suit but he also failed to compute with exactitude the amount of loss he was seeking being a special damage. In my view, the pleading was imprecise and incomplete as a special damage claim and could not therefore be properly determined considering the form and manner it was pleaded.” Emphasis added
72. Additionally the Court of Appeal in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd (1992) KLR 177 stated thus:-

“The law of damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of



a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.” (See Chitty on Contracts 26 edition para 1772 at p117 et seq.) Clearly, the respondents in the instant case could not expect an award of special damages because they did not plead the same. (Emphasis added.)

73. The Courts holds that the Learned Magistrate failed to distinguish the nature of the prayers sought by the Respondent and granted the prayers in a blanket form without considering whether the exact figures for each prayer were specifically pleaded and proved.
74. In the upshot, I agree with the Appellant that the Learned Magistrate erred in granting the orders in a blanket form without establishing whether the exact special damages sought were pleaded and proved.

**Issue d). Whether the Respondent is entitled to the reliefs sought.**

75. The Respondent claimed for:-
- a. One month’s salary in lieu of Notice.....Per Scale
  - b. Prorate Leave.....Per Scale
  - c. Underpayment of wages.....Per Scale
  - d. Public Holidays .....Per Scale
  - e. Overtime for extra hours worked.....Per Scale
  - f. Rest Days.....Per Scale
  - g. 12 months compensation salary
  - h. Costs of this suit.
  - i. Certificate of Service.
  - j. House allowance
76. It was established that the Respondent was never dismissed from employment having not established first when he had been dismissed and having not proved that he was employed on other terms rather than as a piece rate worker. The Respondent therefore failed to prove that he had been terminated from employment and thus was not entitled to any notice pay.
77. Having found that the Respondent failed to plead the special damages in exactitude to enable the court to determine them, the Respondent was not entitled to any special damages that were not pleaded or proved, and the decision in Nyatogo v Mini Bakeries Limited(supra) is upheld on this issue.
78. The Court holds that the Learned Magistrate erred in granting the reliefs in a blanket form when the same were never pleaded in the main claim save for prayers or proved.

**Issue e). Whether the appeal is merited.**

79. In the upshot, the appeal dated 18<sup>th</sup> July 2023 succeeds in its entirety and the Statement of Claim dated 5<sup>th</sup> November 2019 is dismissed.



## **Final Order**

80. The Court enters judgment for the Appellant by allowing the appeal dated 18<sup>th</sup> July 2023. The judgment of Honourable Dolphina Alego (SPM) dated and delivered on 20<sup>th</sup> March 2023 at the Chief Magistrate court, Kakamega in Kakamega MELRC Cause No. 186 of 2019- Patrick Kutoto Shayo v West Kenya Sugar Company Limited and consequential decree is set aside.
81. Costs awarded to the Appellant of this appeal and the suit.
82. It is so Ordered

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> FEBRUARY 2024.**

**JEMIMAH KELI,  
JUDGE.**

In the presence of:-

Court Assistant: Lucy Macheso

For Appellant: - Javer

For Respondent: Shibanda

