



**Mustafa v Mwangandi (Appeal E031 of 2024)  
[2024] KEELRC 2403 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2403 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E031 OF 2024  
M MBARŪ, J  
OCTOBER 1, 2024**

**BETWEEN**

**AMIR MUSTAFA ..... APPELLANT**

**AND**

**ANZANZI KEA MWAGANDI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. G Sogomo delivered  
on 9 February 2024 in Mombasa CMELRC No.E629 of 2022)*

**JUDGMENT**

1. The appeal herein relates to the judgment delivered on 9 February 2024 in Mombasa CMELRC No.629 of 2022. The appellant is seeking that the judgment be varied, substituted and or set aside and the appeal be allowed with costs.
2. The appeal arises from a claim filed by the respondent before the trial court where she claimed that she was employed by the family matriarch in the year 1994 as a seamstress at a wage of Ksh.6, 000 per month. The salary was reviewed over the years. She continued working in the family business but as his severance package was being organized, the matriarch was diagnosed with terminal illness and died soon thereafter in the year 2018. She continued working for the family business until 31<sup>st</sup> January 2022 when the appellant dismissed him from his employment without notice of justified cause and payment of his terminal dues. The respondent claimed the following dues;
  - a. One month notice pay Ksh.23,309.40;
  - b. Underpayments of Ksh.4,602.85 from 2013 x 6 years Ksh.331,405.20  
Underpayments of Ksh.11, 309.40 from 2019 for 25 months Ksh.282, 753;
  - c. House allowances 2013 to December 2019 Ksh.124,410;



- House allowance 2019 to 2022 Ksh.37, 410.25;
- d. Accrued leave pay for 27 years Ksh.440,547.66;
  - e. Damages for unfair termination of employment Ksh.279,712.80;
  - f. Service pay for 27 years Ksh.314,676.90;
  - g. Costs of the suit.
3. The appellant in response, the appellant's case was that the family matriarch helped the respondent with a sum of Ksh.10, 000 during her lifetime out of goodwill and good work relations in contributing towards a plot that she wanted to purchase. There was no employment as alleged save, the respondent would be engaged occasionally on different days which did not constitute a continuous period of employment. There was no employment by the appellant nor MS Halima as alleged. The claims made are denied and the claims for unpaid allowances are time barred under section 90 of the [Employment Act](#). These claims should be dismissed with costs.
4. The trial court heard the parties and held that there was proof of employment between the parties protected under the provisions of Section 37(1) of the [Employment Act](#). This arose from Mpesa records produced in court on wage payments over the years and paid monthly. This employment was terminated unfairly and the respondent was entitled to notice pay and compensation at four (4) months' salary. The claim for leave pay was dismissed since work attendance was found erratic; service pay was awarded for 42 months, and house allowance was awarded for 42 months. In totality, the trial court awarded as follows;
- a. Notice pay Ksh.23,309;
  - b. Underpayments  
June 2018 to December 2019 Ksh.27, 617.10;  
January 2019 to January 2022 Ksh.407, 138.40;
  - c. House Allowance  
June 2018 to December 2019 Ksh.2, 942.40;  
January 2019 to January 2022 Ksh.53, 870.76;
  - d. Unpaid leave nil;
  - e. Compensation Ksh.93,236;
  - f. Service pay Ksh.12,237.23;
  - g. Certificate of service;
  - h. Costs and interests.
5. Aggrieved, the appellant filed the appeal on the grounds;
1. The learned magistrate misdirected himself in finding that the respondent had established an existing employee-employer relationship with the appellant and thus liable in law yet the respondent failed to discharge the burden of proof on who her employer was.



2. The learned magistrate erred in law and fact by declaring that the respondent's employment had converted from casual to permanent despite her services being engaged intermittently and on a needs basis.
  3. The learned magistrate erred in law and fact in finding that the respondent's termination of employment was not procedural and substantively unfair.
  4. The learned magistrate erred in law and fact in failing to grant the appellant's right to a fair trial in particular an opportunity to be heard and defend himself as embodied under Article 25 of *the constitution*.
  5. The learned magistrate erred in law and fact in applying the wrong principles while awarding a one-month salary in lieu of notice in the sum of Ksh.23,309;
  6. The learned magistrate erred in law and fact in applying the wrong principles while awarding underpayments in the amount of Ksh.434,755.50;
  7. The learned magistrate erred in law and fact in applying the wrong principles while awarding unpaid house allowances in the sum of Ksh.56, 813.16.
  8. The learned magistrate erred in law and fact in applying the wrong principles while awarding maximum compensation for unfair termination of employment in the amount of Ksh.93,236;
  9. The learned magistrate erred in law and fact in applying the wrong principles while awarding service pay of Ksh.12, 237.23.
  10. The learned magistrate erred in law and fact by ignoring the principles applicable and the relevant authorities cited in the written submissions.
  11. The learned magistrate erred in law and fact in reaching a decision which was tantamount to denying the appellant access to justice.
6. Both parties attended and agreed to address the appeal by way of written submissions.
  7. The appellant submitted that the respondent alleged that she was employed by the family matriarch as a tailor in the family business from the year 1994 to 7 March 2018 on a wage of Ksh.12, 000 per month. This employment was until the matriarch died and in the year 2016 had promised to transfer the business to her. However, the appellant's witness Halimabai Saleh Mohamed testified that she met the respondent while engaged in the family business by the mother. Upon the demise of the mother, she was retained for services at the domestic level since she did not own any tailoring business as alleged. The work allocated would include stitching and sewing clothes and would be paid through Mpesa or cash. Due to low volumes of work, the appellant was unable to assign the respondent any work and it was agreed that she would be contacted once a week once work was available. The appellant was surprised to be summoned by the Labour Officer over alleged unfair termination of employment and non-payment of terminal dues.
  8. The appellant submitted that there was no employment relationship between the appellant and the respondent. Employment was by the deceased and the wages paid were through mpesa for work done. In the case of Apex International Limited & Anglo-leasing and Finance International Limited v Kenya Anti-Corruption Commission [2012] eKLR, a court lacks jurisdiction if the proper party is not sued.
  9. The appellant submitted that his right to a fair hearing was violated which prejudiced his response and participation in the suit. On 1<sup>st</sup> November 2023, the advocate made an oral application to call the appellant to confirm the employment relationship but this was declined. This was prejudicial to his



case as held in the case of Martha Wangari Karua v IEBC Nyeri Civil Appeal No.1 of 2017 that the rules of natural justice demand that each party be given a fair hearing. Article 50 of *the Constitution* gives the right to a fair hearing.

10. The appellant submitted that there exists no employer and employee relationship between the parties to justify the claim herein as held in the case of Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR. The respondent testified that she was employed by the appellant's mother, Parin Sameja as a tailor and who paid her wages. The respondent did not file any work records to prove the claims made as held in Kenya Union of Commercial Food & Allied Workers v Mwana Black Smith Limited [2013] eKLR. The respondent's work was based on hours worked and there was full payment thereof as held in the case of Kenya Hotels & Allied Workers Union v Alfajiri Villas (Magufa Limited) [2014] eKLR.
11. The appellant submitted that without any employment relationship, the conversation of casual employment to permanent employment under Section 37 of the *Employment Act* was in error. In Rashid Mazuri Ramadhani & 10 Others v Doshi & Company (Hardware) Limited & another [2018] eKLR the court held that without proof of employment, an employee cannot claim the protection of Section 37 of the *Employment Act*. The court must look at the circumstances of each case. Without proof of employment, the claim by the respondent failed to meet the threshold under Section 47(5) of the *Employment Act* and the appellant had no basis to justify termination of employment. The appeal should be allowed by setting aside the judgment of the trial court with costs.
12. The respondent submitted that she was a salaried employee of the appellant having been employed by the mother and the family. Upon the mother's demise, she was retained in the family until her employment was terminated unfairly by the appellant as the administrator of the estate of the deceased. She was never issued with an employment contract and worked continuously protected under Section 37 of the *Employment Act*.
13. The respondent submitted that the learned magistrate analyzed the claims correctly and the judgment should be affirmed by this court with the dismissal of the appeal with costs.

### **Determination**

14. This is a first appeal. The court must review, re-evaluate, reassess the entire record and arrive at a conclusion. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first-hand.
15. In the case of Mbogo and Another v Shah [1968] EA 93, the court held that;  

...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
16. At the core of the appeal is the question of whether there was an employment relationship between the parties and whether the remedies sought and awarded were justified.
17. In the pleadings and written submissions, the appellant has admitted that the respondent was employed by the family matriarch, his mother, Parin Sameja who died in the year 2018. The appellant called Halimabai Saleh Mohamed in evidence who confirmed that the respondent continued to be engaged in domestic duties by the family including the appellant. Indeed, in the written submissions,



the appellant has demonstrated that they continued to engage the respondent in domestic services but work was reduced and they asked the respondent to attend weekly when work was available. She would be paid through Mpesa or in cash.

18. Under Section 2 of the *Employment Act*, an employer is defined to include the following;

employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;
19. An employer includes the agent, manager or factor of such person and hence, in this case, the appellant having enjoyed the services and labours of the respondent cannot extricate from the employment relationship. The employment within the family admitted, there existed an employment relationship.
20. The trial court analyzed the record, and the evidence applied the law and found that the respondent was engaged continuously and for work not likely to be completed within a day and hence protected under the provisions of Section 37 of the *Employment Act*. Such protection gave the respondent the rights and benefits under the *Employment Act*. On this basis, the respondent is the employee of the appellant, and the analysis and findings by the learned magistrate in this regard cannot be faulted.
21. The respondent was not issued with a written contract of employment. Under the protections available under Section 37 of the *Employment Act*, the respondent was entitled to notice before termination of employment and payment of terminal dues thereof.
22. However, without any written contract giving terms and conditions of employment, the wage due is the minimum published by the Minister. The respondent did not submit any record that she was certified as a seamstress. There was no evidence that she was employed in such a position. The appellant’s evidence is that she last served under general domestic duties. The wage due is that of a general worker. The last wage paid was ksh.12, 000 per month.
23. The respondent submitted her Mpesa statement for payments over time. A sample of these payments reveals the following;

On 28 September 2020, she was paid Ksh.400;  
On 22 October 2020, she was paid Ksh.200;  
27 October 2020 she was paid Ksh.827;  
15 November 2021 she was paid Ksh.427;  
17 November 2021 she was paid Ksh.2, 827.47;  
20 November 2021 she was paid Ksh.400;  
16 December 2021 she was paid Ksh.2, 352.36;
24. On 26, 27 and 25 January 2022, she was paid Ksh.427 respectively.
25. Without any written contract, the applicable wage is the minimum. This will be applied in assessing the terminal dues claimed.
26. The respondent pleaded in the Memorandum of Claim that employment commenced in the year 1994 at a wage of Ksh.6, 000. The exact date and month of employment is not stated. A wage of Ksh.6, 000 well compensated her as a general employee based in Mombasa.



27. The particulars given are that the wage underpayments are from January 2013 to December 2018 at Ksh.4,602.85 and from January 2019 to January 2022 at Ksh.11,309.40 in underpayment.
28. For January 2013, a general employee employed in Mombasa had a minimum wage of Ksh.9, 780.95.
29. Indeed, the respondent in her evidence and witness statement dated 7 November 2022 testified to the fact that upon employment in the year 1994, her wages were increased over time and by the year 2001, the wage had been increased to Ksh.12,000 per month.
30. On the minimum wage due, in the year 2013 the appellant paid ksh.12, 000 monthly, there was no underpayment.
31. The minimum wage was reviewed by the Minister from 1<sup>st</sup> May 2015 to ksh.10, 954.70 per month. The appellant paid Ksh.12, 000 per month. There is no underpayment.
32. On 1<sup>st</sup> May 2017, the minimum wage was reviewed to Ksh.12, 926.55. The minimum wage remained the same until 1<sup>st</sup> May 2018. The wage paid was Ksh.12,000 per month. The minimum wage should have been paid with a 15% house allowance being Ksh.1, 943.50 gross wage due to being Ksh.14, 869.55.
33. The underpayment for the 12 months is ksh.2, 869.55 x 12 total Ksh. underpayment 34,434.60.
34. On 1<sup>st</sup> May 2018, the minimum wage was reviewed to Ksh.13,572.90 and the due house allowance at 15% at Ksh.2, 035.90 and gross wage Ksh.15, 607.90. This wage remained constant until 1<sup>st</sup> May 2022. For the period of 1<sup>st</sup> May 2018 to March 2021 the underpayment was for 33 months, the underpayment is Ksh. 3, 607.90 total underpayment is Ksh.119, 060.70.

**Total underpayment Ksh.154, 494.70.**

35. The claims for house allowances are addressed above together with the due underpayments.
36. On the claim for accrued leave days for 27 years, under the provisions of Section 90 of the *Employment Act*, a continuing injury should be addressed within employment. Where such a work injury is not redressed, under the provisions of Section 28(4) of the *Employment Act*, the accumulation of leave days should not go beyond 18 months. The employee has to apply for annual leave and where such leave is denied, the same can be claimed as a continuing injury since upon cessation of employment, the provisions of Section 28(4) come into effect. Where an employee has placed an application for taking annual leave but the employer rejects such an application, such rejection can be used to claim for all owing annual leave days at the end of employment.
37. In this case, the respondent has not demonstrated what efforts were applied to take her due annual leave. Under the law, she is only entitled to 33 days. On the last basic wage due at ksh.13, 572.90 the leave pay due is Ksh.14, 930.19.
38. On the claim for compensation due, the appeal is that the learned magistrate erred in making an award of a maximum of 12 months' compensation. The court reading of the award allocated is that this is premised on 4 months' gross wage save the tabulation was for the claimed wage of Ksh.23, 309 per month. The award of 4 months is with reasons as required under the law, the discretion to award the 4 months is not challenged and the court finds no justified reasons to disturb the same.
39. However, the multiplier is Ksh.15, 607.90 and the total compensation is Ksh.62, 431.60.
40. Termination of employment without due process is found not justified and the respondent is entitled to notice pay as awarded by the trial court. This is due at the last due wage of Ksh.15, 607.90.



41. Service pay is due to the employee when the employer fails to remit statutory dues to the statutory body. There is no evidence submitted by the appellant that there was compliance under Section 35(5) and (6) of the *Employment Act*. The award due is correctly assessed by the trial court save, the application wage is Ksh.15, 607.90 as the last due wage. For the 27 years of service, 15 days' wage for every year, the total due in service pay is Ksh.210, 906.65.
42. In the penultimate, a certificate of service should be issued at the end of employment. This was correctly assessed and awarded by the trial court.
43. On costs, the appeal is partially successful as outlined above. The appellant has built clarity on the issues before the trial court and each party should meet its costs for this appeal. The award of costs by the trial court shall remain as awarded.
44. Accordingly, the appeal is partially successful, the judgment in Mombasa CMELRC No.E629 of 2022 is hereby reviewed in the following terms;
  - a. There was an employment relationship between the parties;
  - b. Employment terminated unfairly;
  - c. Compensation awarded at ksh.62,431.60;
  - d. Notice pay Ksh.15,607.90;
  - e. Underpayment of wages and house allowance Ksh. 154,494.70;
  - f. Leave pay Ksh. 14,930.19;
  - g. Service pay 210,906.65;
  - h. Certificate of service be issued;
  - i. On the appeal, each party is to bear its costs and for proceedings before the trial court, the award of costs as allocated.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 1ST DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

