



**Ondieki v Lapton TAT EA Limited (Appeal E020 of 2024)
[2024] KEELRC 2810 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2810 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E020 OF 2024
M MBARŪ, J
NOVEMBER 14, 2024**

BETWEEN

KENNEDY ONDIEKI APPELLANT

AND

LAPTON TAT EA LIMITED RESPONDENT

*(Being appeal from the judgment of Hon. L Sindani delivered
on 8 February 2024 in Mombasa CM ELRC No. E033 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 8 February 2024 in Mombasa CM ELRC No. E033 of 2022. The appellant is seeking the judgment be set aside and judgment be issued in favour of the appellant and with costs.
2. The appellant filed a claim before the trial court on the basis that he was employed by the respondent as a mechanic on 5 March 2015 and assigned duties in Mombasa. His wage was Ksh.30, 000 per month. He worked until 28 June 2021 when his employment was terminated unfairly and without payment of his terminal dues. He claimed that, for the duration of his employment, he was not allowed to take annual leave, he worked overtime without pay, he was not paid a house allowance and no statutory remittances were made. He claimed the following;
 - a. Notice pay Ksh.30,000;
 - b. House allowance for 76 months Ksh.342,000;
 - c. Leave pay for 6 years ksh.126,000;
 - d. 12 months compensation ksh.360,000;
 - e. Unpaid overtime of one hour each day for 76 months ksh.359,328;



- f. Unpaid NHIF for 76 months Ksh.38,000;
 - g. Service pay for 6 years ksh.90,000;
 - h. Costs of the suit.
3. The respondent filed a response and denied ever employing the appellant through contract, subcontract, or engagement at any plant. The respondent company was not incorporated or in existence in 2015, so it could not have had any affiliation with the appellant. The response also stated that the suit was scandalous and abused the court process.
 4. The matter proceeded for formal proof on 17 October 2023.
 5. Judgment was delivered on 8 February 2024 and dismissed, with a finding that no employer-employee relationship was proved and that the remedies sought were not due.
 6. Aggrieved, the appellant filed this appeal on the basis that;
 1. The learned magistrate erred in law and fact in shifting the burden of proof to the appellant who had proved his case on the balance of probability that he was employed by the respondent and dismissed unfairly from his employment.
 2. The learned magistrate erred in law and fact in finding that the appellant was not an employee of the respondent despite the respondent failing to attend court and defend his allegations as contained in the memorandum of response dated 30 March 2021.
 3. The learned magistrate erred in law and fact in failing to appreciate that the respondent was the custodian of all documents regarding the appellant's employment and bore the high responsibility if producing the same other than transferring the same responsibility to the appellant.
 4. The learned magistrate erred in law and fact in finding that the appellant failed to produce any document yet the law recognizes oral contracts in which documents may not be available.
 5. The learned magistrate erred in proceeding on wrong principles in arriving at the finding that the appellant was not an employee of the respondent.
 6. The learned magistrate disregarded the overwhelming evidence tendered by the appellant to prove that he was entitled to terminal dues upon unlawful dismissal from work.
 7. The learned magistrate disregarded the submissions made by the appellant.
 7. The appellant did not file any appearance. On 24 March 2024, Burugu Advocate attended court and applied for more time to come on record and this was allowed but there was no further attendance.
 8. The appellant filed written submissions.
 9. The appellant submitted that he was an employee of the respondent from 5 March 2015 as a mechanic and would repair its vehicles within Mombasa. He worked until 28 June 2021 when he reported to work but the manager, Mr. Ali informed him that his services were no longer required. No reasons were given or payment of terminal dues.
 10. The appellant submitted that the respondent filed a response and denied there was no employment between the parties. No witness statement was filed or attendance at the hearing.



11. In *Kenya Refuse Handlers Ltd v The City Council of Nairobi Civil Case No.731 of 2008* and *CMC Aviation Ltd v Crusair Ltd [1987] KLR*, the court held that pleadings in a suit are not evidence. Hence, the appellant's case was not challenged.
12. Following unfair termination of employment, the remedies sought should be issued with costs.

Determination

13. This is a first appeal and the court is allowed to review the record and make an assessment and conclusions.
14. The claim was filed on 22 January 2022.
15. The response was filed on 1st April 2022.
16. The matter proceeded for formal proof on 17 October 2023.
17. Despite the respondent filing a response on 1st April 2022, its advocate attended court on 24 January 2023 and applied to cease acting. The appellant had no objections and a hearing date was allocated.
18. There is no formal application made by the respondent's advocate about withdrawing from these proceedings or whether there was service upon the client/respondent of this fact. This record is omitted.
19. Fundamentally, upon the respondent entering appearance and filing a response, it was imperative under the Employment and Labour Relations Court (Procedure) Rules to inform the client/respondent directly of the proceedings in court. The fact that there was formal proof proves that no appearance or response was filed.
20. Even though formal proof is not defined under the Court Rules, this should relate to a case that is not controverted through a response. This is appreciated in the case of *Gitobu Imanyara, Njehu Gatabaki & Bedan Mbugua v Attorney General [2016] KECA 557 (KLR)* to mean;
21. The fact that the respondent admitted liability ab initio does not in any way shift the burden of proof from the appellants. It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.
22. In this case, the employment relationship was denied. The respondent further responded that in the year 2015, it had not been registered.
23. The core of the claim was challenged. The claimant had no standing in court without the appellant establishing the employment relationship.
24. Further, the fact that the respondent was not registered by the year 2015 invited the appellant to introspection. Well represented by his advocates, this was an invitation to inspect the record and Company Registry to establish this basic fact of the entity sued as the respondent. Without having a legal standing in court, the foundation of the claim was lost.
25. In the case of *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others [2023] KECA 80 (KLR)* the Supreme Court held that the basis of any claim before



the Employment and Labour Relations Court is the establishment of the employment and labour relationship. Hence, where the employment relationship is challenged, this being a jurisdictional question, the parties must stop all else and address it.

26. Where jurisdiction is challenged, it is determined based on pleadings before the substantive merits of the case are considered.
27. In the case of Republic v Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party) [2022] KEHC 10 (KLR) the court in addressing the question of jurisdiction relied on the South African Constitutional Court which held in Vuyile Jackson Gcaba v Minister for Safety and Security First & others case CCT 64/08 [2009] ZACC 26 that;

Jurisdiction is determined based on the pleadings,...and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would lack jurisdiction...

28. In this case, the trial court needed to consider the issue of the challenged employment relationship instantly. The appellant had the duty to reply to the response as filed to address this jurisdictional question and the entity of the respondent based on the pleadings filed.
29. The learned magistrate identified the issues for determination as whether there was an employer-employee relationship between the parties. Based on the pleadings, this was imperative.
30. The findings thereof that the appellant had not discharged this burden cannot be faulted.
31. To support his case, the appellant filed two (2) Delivery notes from Lapton TAT (E.A.) Co. Ltd. One dated 9/not clear/2020 serial No.302 and the other is undated but bearing the same serial No. 302.
32. These cannot be proper records to confer employment relationship.
33. The findings by the learned magistrate are proper and are hereby confirmed.
34. Appeal against the judgment in Mombasa CM ELRC No.E033 of 2022 is without merit and is hereby dismissed. No orders on costs.

DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

