



**Kenya Society for the Protection and Care of Animals v Mwalimu (Employment and Labour Relations Appeal E216 of 2022) [2023] KEELRC 3134 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3134 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E216 OF 2022**

**NJ ABUODHA, J  
NOVEMBER 20, 2023**

**BETWEEN**

**KENYA SOCIETY FOR THE PROTECTION AND CARE OF  
ANIMALS ..... APPELLANT**

**AND**

**FIDELIS MUNYAO MWALIMU ..... RESPONDENT**

*(Being an appeal from the Ruling and order of Hon. P. ACHIENG (SPM) issued in Chief Magistrate's Court at Ngong CMEL No. E008 of 2021 between Fidelis Munyao Mwalimu v Kenya Society for the Protection and Care of Animals issued on 10th November 2022)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 8<sup>th</sup> December, 2022, the Appellant appeals against the Ruling and order of Honourable P. Achieng (SPM) delivered on 10<sup>th</sup> November 2022) in Ngong CMEL No. E008 of 2021 (Fidelis Munyao Mwalimu v Kenya Society for the Protection and Care of Animals).
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in law and in fact in failing to recognize that she was exercising a special jurisdiction governed by the *Employment and Labour Relations Court Act* and subsidiary legislations and not the ordinary civil jurisdiction conferred upon the magistrates Courts.
  - ii. The Learned Magistrate erred in law and in fact by finding that the Respondent was terminated and his termination was unfair and unlawful.



- iii. The Learned Magistrate erred in law and in fact in failing to apply the provisions of the Employment and Labour Relations (Procedure) Rules, 2016 in giving the impugned ruling and orders.
  - iv. The Learned Magistrate erred in law and in fact in entertaining an objection to the production of documents yet pretrial procedures had been concluded in line with Rule 14 and 15 of the Employment and Labour relations court (Procedure) Rules 2016.
  - v. The Learned Magistrate erred in law and in fact in entertaining an objection to the production of documents yet the Claimant had closed his case after testifying, being cross examined and re-examined on the same documents.
  - vi. The Learned Magistrate erred in law and in fact in entertaining an objection to the production of documents which were executed by the Respondent and which have also been annexed to the statement of claim.
  - vii. The Learned Magistrate erred in law and in fact in ordering that the Respondents documents be produced by the makers and admitting similar evidence as part of the Claimant list of Documents.
  - viii. The Learned Magistrate erred in law and in fact in ordering that the maker of the statement annexed as document No. 4 the minutes of the Disciplinary Meeting, annexed as Document No. 5 and print outs annexed as Document No. 7 must be presented to court to testify and produce the said statements yet these documents were produced at or from the disciplinary proceedings and form part of the employment records which the Appellant is mandated to keep on account of section 74 of the *Employment Act, 2007*.
  - ix. The Learned Magistrate erred in law and in fact in failing to recognize that the Respondents witness would be testifying as an employer within the meaning of section 2 of the *Employment Act, 2007* and therefore she is authorized in law to produce all the employment records maintained by the Respondent pursuant to the *Employment Act*.
  - x. The Learned Magistrate erred in law and in fact and has prejudiced the Appellant by ordering production of evidence by makers yet the burden of proof as per the *Employment Act* is placed on the Respondent.
  - xi. The Learned Magistrate erred in law and in fact in failing to consider the issues raised in the Appellant's submissions made in court.
3. The Appellant prayed that the appeal be allowed and the Judgment and decree of the Subordinate court be set aside and suit against the Appellant proceed to defence hearing on the basis of the documents on record.
  4. The Appeal was disposed of by written submissions.
  5. The Appellant in its submissions dated 8<sup>th</sup> September, 2023 submitted on the issue of whether the Honourable Magistrate exercised her jurisdiction properly pursuant to the special jurisdiction granted in legal Notice No. 6084 of 2018 that the magistrates can entertain matters where employee's gross monthly pay does not exceed Kshs 80,000 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules 2016.
  6. The Appellant therefore submitted that the procedure to be applied was in regards to those procedure rules and this removes the application of civil procedure in the proceedings. That the purpose was to



remove technicalities that often accompany proceedings in a strict civil environment as per Rule 21 and 25 of the Employment and Labour Relations Court (Procedure) Rules 2016. It was the Appellant's submission that once documents are filed they are deemed properly on record and part of evidence such that the suit may be summarily determined by the court even suo moto. It was his submissions that the Magistrate erred when it made a finding as if it was considering a normal civil dispute instead of an employment and labour relations dispute.

7. The Appellant further submitted that the court's reliance on *Evidence Act* alone was an error as it failed to recognize that *Employment Act* places the burden of proof on the employer and requires the employer to maintain employment records pursuant to section 74 of the *Employment Act*. Therefore, to find that the documents must be produced by the maker yet they are kept by the employer was an error.
8. It was the Appellant's submission that the decision of the magistrate was not properly reached for failing to consider the right provisions of the law hence the appeal should be allowed.
9. On the issue of whether the Honourable magistrate erred in entertaining an objection in the course of hearing it was the Appellant's submission that this matter was certified ready for hearing on 26<sup>th</sup> August, 2019 and by the time the objection was raised by the Respondent regarding the Appellant's documents, the Respondent had already given his testimony to conclusion on 16<sup>th</sup> December, 2021. It was his submission that the Respondent referred to the same documents that they later raised an objection to and confirmed she had signed some of documents such as the disciplinary minutes.
10. It was its submission that the objection was raised too late in the day which had effect of compromising the Appellant's defence in the course of hearing. The documents complained of had been in the court record since the matter begun hence the court ought not to have considered the objection in the circumstances and relied on the case of *Amunya v Tamarind Management Limited (Cause 1564 of 2016) (2023) KEELRC 212 (KLR) (31 January 2023) (Ruling)* that the delay in raising the objection until after he had given his evidence was fatal and the Honourable Magistrate erred in considering and allowing the objection.
11. It was his submissions that the magistrate erred by considering the objection yet pretrial proceedings had been carried out and there was no objection raised at that time and relied on the case of *Mary Maina Nandeka (Suing as the legal Representative of the estate of the late George Nzuiko) v Monicah Mwenga Manthi & 3 others (2022) eKLR* that if no objection on production of documents is raised on pretrial the same cannot be raised during the main hearing. The Respondent was estopped from raising the objection on production of documents during trial when he never raised at pretrial.
12. On the issue of whether documents in question constitute employment record retained by the employer as per section 74 of the *Employment Act* and the witness could produce the said documents as she fits the description of employer as provided for at section 2 of the *Employment Act, 2007* it submitted that the documents in question form part of the documents that an employer is required to maintain. The disciplinary records including statement of complaint and other statements or documents relied on by employer are properly within the custody of the employer and therefore cannot be construed as belonging to an individual employee.
13. It was its submission that any person could produce the said documents with the authority of the employer on its behalf in this case the Executive Director was the right person to produce the documents. It placed reliance on the case of *Amanya* above. It was the Appellant's submission that the decision by the Magistrate was an error as it barred the production of employment records by its custodian which would prejudice the Appellant's right to fair hearing and its burden of proof set out in the *Employment Act*. The Respondent could not require the then Executive Director to attend court.



14. The Appellant therefore prayed that the lower court's ruling and order to be set aside and the suit proceed to defence hearing based on the documents on record.
15. The Respondent on the issue of whether the Appeal is merited submitted that section 3 of the *Employment and Labour Relations Court Act*, Rules 14(5),15,25(3),38 of the Employment and Labour Relations Court procedure Rules 2016 and relied on the case of Malindi Civil Appeal 117 of 2019; Kazungu Fondo Shutu & Another v Japhet Noti Charo & Another where the court stated the importance of Sections 20A of *Evidence Act* in connection with Rule 14(5) of the ELRC Procedure Rules 2016.
16. The Respondent also relied on the cases of Mombasa Civil Appeal 64 of 2020; PN Mashru Ltd v Ojenge and Meru suit 17 of 2018; Justus Kibaara Kibai v Mt.Kenya East Farmers Co-op Limited
17. The Respondent also relied on Amunya's case relied on by the Appellant to submit on distinction of individual's documents and institutions documents. It was the Respondent's case that having being served with a fresh witness statement by the Appellant two days to the hearing he could not raise any objection but concentrate on the hearing.
18. On the interrogation of the Documents objected to, the Respondent submitted that the same did not bear letter head of the Appellant. For example document 4 is a statement of Dr. Diana Onyango, Document 5 and document 7 print out of messages exchanged between the said Dr. Diana and one Aziz who was not a witness in the case. It was his case that the same could not be Appellant's documents as they were never signed, stamped by the institution or the company seal affixed to claim ownership.
19. It was his submissions therefore, that these were personalised documents which required the makers to testify and the magistrate did not make any error. It was his position that even though the Appellant challenged the objection as coming late in the day the Respondent did not have time to raise this until after his hearing on 16<sup>th</sup> December,2021 when the Appellant served his advocates with a fresh witness statement. It was his case that he objected to the fresh witness statement after close of its case on 16.12.2021 and he was ready to meet Dr.Diana Onyango and not the new witness.
20. On the second issue of relevance of case law cited by the Appellant the Respondent submitted that there should be similarity in facts and law, legal provisions of the law and factual accounts to the cause under consideration.
21. On Amunya's case, it was his case that it was the Appellant who was guilty of filing fresh witness statement on 14<sup>th</sup> December,2021 which witness statement was served on the Respondent's advocates on record way after 2 pm of the same day dated the same day 1 ½ days to the Hearing of the main suit.
22. That the witness statement was introduced without notice to the Respondent and no leave of the court was sought giving rise to objection dated 1<sup>st</sup> February,2021 filed by the Respondent. He submitted that Rule 14(5) does not expressly state that an objection must be filed at pretrial stage. That Rule 38 of the rules is express that the court may regulate its own procedure.
23. The Respondent submitted that the second case of Mary Maina Nandeka relied on by Appellant was Environment and Land Court while the subject matter herein was Employment and Labour Relations Court. That if any delay, it was the Appellant who filed its Witness statement 4 years and 8 months since institution of the suit.
24. The Respondent submitted that the case laws relied on by the Appellant were therefore irrelevant both in facts and law.



25. On the issue of who should bear the costs of the Appeal the Respondent submitted that section 27 of the *Civil Procedure Act* provided that costs should follow the event. He submitted that the Appeal ought to be dismissed with costs to the Respondent.

### **Analysis & determination**

26. The duty of a first appellate court was well stated in the Court of Appeal in *Selle vs Associated Motor Boat Company Limited* [1968] E.A 123 thus:
- “An appeal to this court from a trial by the High Court is by way of 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 ... or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
27. In determining the Appeal herein, this Court shall similarly seek to re-analyze the evidence tendered before the Trial Court vis-à-vis the court’s conclusion and disposition.
28. In this case, the Ruling of the trial court issued on 10<sup>th</sup> November, 2022 was basically calling the makers of the documents to testify and be cross-examined on the same.
29. From the grounds in the memorandum of Appeal and pleadings of the parties three major issues arise for determination. The Issues for determination are: -
- a. Whether the documents in question were personalized documents or Employment Records hence requiring the makers of the same to testify or not.
  - b. Whether the objection could be raised during hearing.
  - c. Who bears the costs of this Appeal?

### **Whether the documents in question were personalized documents or Employment records hence requiring the makers of the same to testify or not.**

30. The documents in question are document No. 4 the statement by Dr. Diana Onyango dated 20.1.18 on what transpired, document 5 on meeting held on 23.1.2023 with Dr. Diana being in attendance and document 7 on the messages exchanged between Dr. Diana and Aziz Kana.
31. These documents in essence involve Dr. Diana Onyango hence why the Respondent felt uncomfortable proceeding with the new Executive Director who was not involved but introduced in the last minute.
32. The Respondent alleged that the said documents did not have the Appellant’s letter head, stamp or seal so as to constitute employer records under section 74 of the *Employment Act*.
33. This calls for a closer examination of whether those documents were then personalised. I have looked keenly on the documents in question and even though the same do not have the Appellant’s letter head or stamp or seal, I note that the documents were done by the Executive Director of the Appellant in connection with the Respondent’s conduct herein. Section 74 of the *Employment Act* entails the employer to keep employee’s records which includes the misconduct and disciplinary records. In this case the said documents outline the records of the Respondent and I do not find them to be personal



documents but employment records. The Respondent was aware the lower court did not object to the substitution of the Appellant's witness statement.

34. Section 20 of the E&LRC Act is the main law governing presentation of evidence before the Court. It provides that in any proceedings to which this Act applies, the Court shall act without undue regard to technicalities. This legislation has strong anchorage under Article 159 of *the Constitution*.
35. I do agree that there is no strict requirement in proceedings of this Court, that documents must be produced by their authors as such provision would offend the above provisions which are against any technicality.
36. Rule 21 of the E&LRC [Procedure] Rules, 2016, allows the Court on its own motion, or with the concurrence of the Parties, to determine matters relying entirely of the pleadings, affidavits, documents and submissions made by the parties. This means therefore a court can hear and determine a matter based on filed documents and pleadings without calling witnesses or the authors of the same.
37. Rule 25 [3] similarly extends discretion to the Court, on receiving of evidence. Evidence may be given orally, or if the Judge so orders, by affidavit, or a written statement. The Court may at any stage require the attendance of a deponent or an author of a written statement. There is wide discretion in the hands of the Court, on admission of evidence. The discretion is underscored by Rule 38, which states that subject only to the Rules, the Court may regulate its own procedures.
38. Section 35 of the *Evidence Act*, allows documents to be produced in Court by other Witnesses other than their makers, where for instance, the maker is dead or cannot be readily available. This was the position in the case quoted by the parties of *Amunya v Tamarind Management Limited (Cause 1564 of 2016) [2023] KEELRC 212 (KLR) (31 January 2023) (Ruling) Neutral citation: [2023] KEELRC 212 (KLR)*.
39. The reason for the substitution was a valid one since the said Dr. Diana Onyango had left employment with the Appellant and the successor had to take charge of the matters pending in court. In any case if the new Executive Director was unable to answer questions during cross examination this could cause damage to the Appellant's case without injuring the Respondent's case.
40. Parties have relied on the case of *Amunya* above which provides as follows: -

The Respondent has explained that its previous Human Resource Manager left employment. The documents subject of the Claimants' objection, are proposed to be exhibited by the successor Human Resource Manager. These are employment records, in the custody of the Human Resource Office, rather than an individual Employee. They are corporate documents, not any individual's documents. The serving Human Resource Manager, or her designate, would always be the relevant Officer to bring those employment records to Court, on behalf of the Employer.

... The current Human Resource Manager is the custodian of these documents if not their author, and fair administration of justice demands she is not inhibited, in bringing these employment records before the Court.

30. There is no good ground shown by the claimants to compel any witness to attend court and present the documents filed by the respondent, or to bar the Human Resource Manager from producing those documents. Production does not mean the contents have been established to be true. If the Witness cannot vouchsafe the truthfulness of the documents upon cross-examination by the claimants' Advocate, that can only damage the respondent's case, who under the *Employment Act*, is required to justify termination.



41. Taking in to account the above case it is clear that the said documents were not individual documents and there was no reason to bar the current Executive Director producing the documents and be cross-examined. If any harm at all, it would injure the Appellant's case and no harm on the Respondent's case who had already testified and closed their case.
42. In conclusion the documents in question were employment records and not individual documents hence no need to call the makers of the documents.

**Whether the objection could be raised during hearing.**

43. I note that all was well until the Respondent was served with the substituted witness statement on 14<sup>th</sup> December, 2021 two days to the hearing of the main suit. It was also clear that the Respondent's action of objecting the documents was based on the change of Dr. Diana Onyango who was the central person to be cross-examined. I note that the Respondent did not have a problem with the production of the documents the only issue was the documents to be produced by the makers when the Appellant changed its witness.
44. I agree that an objection should be raised at pretrial stage as was held on the above case of Amunya but the court is awake to the fact that all was well until the Appellant changed its witness. The Court is always awake to the circumstances of each case. It is never cast on a stone.

**Who bears the costs of this Appeal?**

45. It is true that costs follow the events. In this case the appeal partly successful hence each party should bear its own costs of this appeal.
46. In conclusion the Court hereby allows the Appeal in part as shown below: -
  - a. The objection on production of documents could be raised during the Appeal.
  - b. The Documents in question were employment documents and the current Executive Director could produce them.
  - c. The Suit to proceed to defence hearing with the documents on record.
  - d. Each party to bear their own costs of this Appeal.
47. It is so ordered

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023**

**DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2023**

**ABUODHA NELSON JORUM**

**JUDGE**

