



REPUBLIC OF KENYA



KENYA LAW

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**Hamisa v Karisa (Appeal E066 of 2023)
[2023] KEELRC 3461 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3461 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E066 OF 2023
M MBARŪ, J
DECEMBER 19, 2023**

BETWEEN

FARAZ HAMISA APPELLANT

AND

DAVID HARE KARISA RESPONDENT

*(Being an appeal from the judgment of Hon. T. A. Sitati in
Lamu CMELRC No. E031 of 2021 delivered on 4 July 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered in 4 July 2023 in Lamu CMELRC No. E03 of 2021. The background of the matter is that; the respondent herein was the employee of the appellant as a security guard employed on 2 June 2019 with duties to guard the appellant's premise in Mombasa County at a wage of Kshs. 8,000 per month. The respondent worked until 8 November 2021 when his employment was terminated. He claimed that this was unfair, he was being underpaid and the appellant failed to follow the due process. He claimed the following terminal dues;
 - a. Notice pay Kshs. 13,572.90;
 - b. House allowance at 15% of the basic wage for 29 months Kshs. 59,042.12;
 - c. Unpaid leave for 2 years Kshs. 27,430.20;
 - d. Underpayments for 29 months Kshs. 161,614.10;
 - e. Compensation Kshs. 162,874.80;
 - f. Overtime pay for one (1) hour daily for 29 months Kshs. 105,531;
 - g. Unpaid NHIF of 500 x 29 months Kshs. 14,500;



- h. Service pay for 2 years Kshs. 6,786.45;
 - i. Costs of the suit.
2. In response before the lower court, the appellant's denied employment relationship between the parties and that there was no underpayment as alleged or that employment was unfairly terminated on 8 November 2021. The appellant testified that he had not employed the respondent in his personal capacity.
 3. The learned magistrate in the judgment made a finding that although the respondent was employed by Fayaz Bakery Limited, he had lifted the corporate veil and the appellant who was making wage payments was responsible as the employer and hence liable to pay notice, underpayments, house allowances, leave, overtime, compensation and service pay with costs.
 4. Aggrieved by the judgment, the appellant filed this appeal on the grounds that the findings by the trial court that the respondent was employed at Mtwapa and not Mombasa as pleaded was in error. The lifting of the corporate veil of Fayaz Bakery Limited to find the appellant liable was erroneous as such company was not party to the suit. The appeal is also on the grounds that the awards by the trial court are not justified, the judgment should be set aside with costs.
 5. Both parties attended and agreed to address the appeal by way of written submissions.
 6. The appellant submitted that there was no proof of an employment relationship between the parties. The employee must prove his case even where the employment contract is oral as held in *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR. The respondent alleged that he was employed as a day guard on oral terms and would be paid Kshs. 8,000 per month through Mpesa, but statements were not produced. That the mpesa payments would be sent through Shukri Khalif who would make a withdrawal and pay him as the agent of the company that had employed him. That the respondent admitted he was employed by the company and not the appellant.
 7. The appellant submitted that the respondent was the employee of Fayaz Bakery Limited and produced the letter of appointment dated 2 May 2015 and with this evidence, he was the wrong party to be sued as held in *Zarika Adoyo Obondo v Tai Shunjun & another* [2020] eKLR. It was not necessary to lift the corporate veil and the findings that the appellant was liable to pay the respondent employment terminal dues should be set aside.
 8. The respondent submitted that he was the employee of the respondent and he called Lenox Kalu Kiti as his witness who confirmed that he was indeed employed by the appellant. The assertions that employment was by Fayaz Bakery Limited did not stop the appellant from employing the respondent. The learned magistrate made a proper finding that there was an employment relationship between the parties. The burden of proof was on the appellant to demonstrate that employment terminated fairly and within the due process as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR. Employment was terminated unfairly and the awards by the lower court should be confirmed.
 9. This being a first appeal, the court is called to re-evaluate the record and findings and make own conclusions but take into account that the lower court had the opportunity to hear the parties in evidence.
 10. The appellant in response to the claim by the respondent denied the employment relationship. This then became a core and relevant issue to address as with its determination, other matters rested on its desistence.



11. In his evidence, the respondent testified that he had no written contract with the appellant upon employment as a day guard. He would be paid Kshs. 8,000 via mpesa monthly. The money would be paid through his supervisor Shukri Khalif or through one of the Somali guards.
12. Upon cross-examination, the respondent testified that he was hired by Shukri. He was tasked to guard the Mtwapa farm and the claim that he was stationed at Mombasa is not correct. All wages were paid through his supervisor, Shukri and I agree that I have wrongly sued Fayaz. Fayaz never paid me directly. ... Fayaz owned the company. It is called Fayaz Bakery...'
13. The appellant also testified that he is the operations manager of Fayyaz Bakery Limited and he did not employ the respondent or terminate his employment as alleged. He had no employees. He produced the employment letter dated 2 June 2015 with regard to the respondent as the employee of Fayyaz Bakery Limited.
14. The question of the employment relationship hence became imperative to address.
15. The lower court made a finding that the respondent was paying wages indirectly through Shukri to the respondent and that the appellant was acting on behalf of Fayyaz Bakery Ltd should be held personally responsible for these illegalities. ... Shukri while hiding behind the company name which happens to share his name, the court finds on substance that the claimant had pieced the corporate veil of Fayyaz Bakery Ltd to reveal that the respondent was the real force behind the company in spite of his occupying the Operations Manager position as per R.Ex.1. ...
16. Upon an employee filing a claim, the employer has the duty to submit work records in terms of Section 10(6) and (7) of the *Employment Act*, 2007. These work records are primary and lawful. Once produced, unless negated by any other evidence to the contrary, they form part of the legal requirements on the part of the employer to produce.
17. The letter of appointment dated 2 June 2015 then became a core record in the proceedings before the lower court. Employment was not oral. Even where the respondent asserted that his employment was oral from 2 June 2019, with the employer producing the letter of appointment dated 2 June 2015, such record became a necessary record to interrogate.
18. Even where such was not the case, where indeed the appellant denied ever employing the respondent and that he was an employee of Fayaz Bakery Limited, such became material for investigation. In his evidence and cross-examination, the respondent admitted that he was aware of the company and the employer but opted to focus on the appellant. Indeed, his wages would be paid by Shukri as his supervisor. He was never paid by the appellant. The nexus between the respondent and the appellant within an employment relationship is lost.
19. Where indeed the respondent was under the supervision of Shukri, who was the principal?
20. Upon the appellant filing its response and denying there was no employment relationship, on the letter of appointment dated 2 June 2015, he ought to have taken the cue and amended his pleadings to include Shukri and the noted employer, Fayaz Bakery Limited. To move along against the appellant as the employer, without establishing an employment relationship, to proceed and assert rights within a corporate by lifting the veil was premature. Such motions were far removed at that stage. A finding of employment relationship was necessary before invoking execution proceedings by lifting the corporate veil.
21. So fundamental was such a question that, without establishing the employment relationship, this was not a proper case for the trial court. It lacked jurisdiction to enter into an employment claims over



a matter where there was no employment relationship and should have downed its tools with such findings.

22. To proceed and assess the claims made in terminal dues against a non-suited party in an employment relationship was in error.
23. For this reasons, this appeal must succeed. An employment relationship not established, the judgment in Lamu CMELRC No. E031 of 2021 is hereby set aside in its entirety. For this appeal and proceedings before the lower court, each party to bear own costs.

Delivered in open court at Mombasa this 19th day of December 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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