



**Kamau v Nyakio Plant Operations & Driving School (Appeal  
E070 of 2021) [2022] KEELRC 4027 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4027 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E070 OF 2021**

**M MBARŪ, J  
JUNE 30, 2022**

**BETWEEN**

**MOSES KAMAU ..... APPELLANT**

**AND**

**NYAKIO PLANT OPERATIONS & DRIVING SCHOOL ..... RESPONDENT**

*(An appeal against the judgement of the Chief Magistrates Court at Milimani Nairobi  
by Hon A M Obura delivered on February 12th , 2021 in CMC CMEL No 1159 of 2019)*

**JUDGMENT**

1. The appellant filed the appeal herein following judgement delivered on February 12, 2021 in CMC CMEL No 1159 of 2019 and dissatisfied he appealed on 6 grounds which can be summarised that the learned trial magistrate erred and misdirected herself in law and in fact by finding the case against the respondent was not sufficiently proved on a balance of probabilities consequently dismissed his case, there was disregard to the evidence and the court failed to the appellant's evidence to the effect that he served the respondent for 4 years and if he was a drunkard, absented himself and was a nuisance he was retained for 4 years.
2. The appeal is also that the court misdirected itself when she held that the claimant was called to a meeting on April 8, 2019 while the he never received any invitation letter for the disciplinary meeting and in dismissing the case on allegations of drunkenness, absenteeism and nuisance such as without evidence. The judgement of the trial court be set aside and judgement be entered in terms of the orders sought in the claim before the trial court with costs.  
  
Parties agreed to address the appeal by way of written submissions.
3. The appellant submitted that he was employed by the respondent who dismissed him from his employment and he filed suit seeking pay for terminal dues of Ksh 534, 000 which arose from notice pay, service pay and compensation for unfair termination of his employment.



4. The trial court heard his case and in judgement dismissed his case and aggrieved has filed the appeal seeking to review and have the judgement set aside.
5. The trial court failed to apply the evidence submitted before it and despite finding that there was employment between the parties and in his evidence, the appellant explained his situation and he called a witness who testified that she worked with him. The court made a finding that the appellant was a causal employee and was not entitled to notice pay. The claim for leave pay was not addressed despite working for 4 years and service pay was due since his NSSF dues were never paid.
6. The evidence that the appellant had been drunk, absent and a nuisance while at work was not supported by any evidence leading to erroneous findings which should be set aside.
7. In response, the respondent submitted that the appeal is filed out of time contrary to rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. There was no enlargement of time to allow the appellant file his appeal out of time. The appeal filed with delay and without any plausible reasons should be dismissed as held in *Andrew Kiplagat Chemaringo v Paul KipKorir Kibet* [2018] eKLR.
8. The respondent has since moved on after the judgement of the lower court and after time lapsed for filing of any appeal and should not be taken back over matters already settled. The appeal herein is a mere afterthought as held in *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR and the appeal should be dismissed with costs.

#### **Determination**

9. The respondent has questioned the essence of the appeal on the grounds that it is filed out of time. Such matter was addressed through ruling herein delivered on November 4<sup>th</sup>, 2021.  
The respondent has not addressed the grounds of appeal at all.
10. This being a first appeal, the court is mandated to re-evaluate the evidence and arrive at own findings but take into account that it had no chance to hear the oral testimony of the parties.
11. On the record before the trial court was the appellant's case that in January, 2015 he was employed by the respondent as a mechanic at a wage of ksh 30,000 per month. He worked until May 18<sup>th</sup>, 2017 when the respondent terminated his employment without notice or a hearing or payment of his terminal dues. The appellant was claiming the following dues;
12.
  - a. One months' notice pay ksh 30,000;
  - b. Leave pay for 4 years ksh 84,000;
  - c. Service pay for 4 years Kshs 60,000; and
  - d. Compensation for unfair termination of employment.
13. The appellant made his case and testified he was an employee of the respondent from the year 2015 and evidence is payment of his wages through Mpesa and he filed the Safaricom statements. The respondent accused him of being a thief and a drunkard but there was no evidence. That while in the employment of the respondent he was not allowed to take his annual leave for 4 years and his statutory dues to NSSF and NHIF were not paid and is therefore entitled to service pay. That termination of employment was without notice or hearing leading to unfair termination of employment and compensation s due.



14. To support his case, the appellant called Margret Wanjiku Gatehi who testified that he was employed by the respondent and she found the appellant as an employee and worked together with 4 years. No written contracts were issued. Her NSSF and NHIF dues were not paid just like the case for the appellant.
15. In response, the respondent's case was that the appellant had been engaged as a casual employee on needs basis and such engagement ended with each day and depending on availability of work. Despite being employed as a casual, the appellant would delegate allocated work to third parties and then claim the due wages. His work ended up being unsatisfactory forcing the respondent to hire qualified mechanic to redo his work. The claims made are without justification, the claimant was a known drunkard and monies paid to him were meant to assist and rehabilitate him and his case should be dismissed.
16. In evidence the respondent called Medrine Wanjeri a supervisor and worked with the appellant who never signed any employment contract and he was not a mechanic as claimed since the respondent had 4 permanent mechanics. The director would occasionally call him to source for a mechanic when there was need. The appellant filed an Mpesa statement and the monies paid to him were due to sourcing for workers and he would be paid. Occasionally he was sent to buy spare parts and paid through his phone.
17. The respondent also called David Munene Kahoya the director and who testified he was a friend to the appellant who approached him for a job as a broker and used to deal in used cars. He would send him to Nairobi to buy spare parts and avail receipts and paid through Mpesa transactions. He was engaged on humanitarian grounds but would report to work intoxicated which became embarrassing and unbearable.
18. In judgement, the trial court made a finding that the appellant was not an employee but only engaged as a broker on short time basis and cannot be defined as an employee and in this regard there was no unfair termination of employment and the claims made for leave, NSSF and NHIF dues were not justified and dismissed the case.
19. On this analysis, section 47(5) of the *Employment Act*, 2007 allow an employee to lodge a complaint of unfair termination of employment; the employer has the burden of justifying the grounds for termination of employment.
20. The rationale is section 47(5) of the *Employment Act*, 2007 (the Act) that where there is unfair termination or wrongful dismissal, the burden of proving the ingredients of unfairness and wrongfulness lies with the employee.

Section 47(5) states:

- (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.
21. To support his case that there was employment, before the trial court, the appellant submitted various work records and these included;
    - a. A warning letter on alleged unacceptable conduct by a casual labourer dated April 4<sup>th</sup>, 2019;
    - b. A warning for unacceptable conduct by a casual labourer dated May 17<sup>th</sup>, 2019; and
    - c. the Mpesa statements which show one David Munene paying the claimant various amounts; on July 1, 2015 he was paid ksh 13,200; on June 26, 2015 he was paid Ksh 2,200; 25<sup>th</sup>



June, 2015 he was paid Ksh.2,000;19<sup>th</sup> June, 2015 he was paid ksh.1,500;On December 22, 2015 he was paid ksh 16,000;On December 18, 2015 he was paid ksh 12,000;On December 15, 2015 he was paid Ksh 13,200;On the same day he was paid ksh 6,500;On December 10, 2015 he was paid ksh 10, 200.

22. These records do not speak to employment at all. Despite the warnings issued to the appellant with regard to his unacceptable conduct, the cash transactions addressed cumulatively do not speak to payment of a wag of ksh 30, 000 per month. The respondent's evidence that he was a broker and would be sourced on a needs basis to secure mechanisms or be sent to Nairobi to but spare part is more plausible.
23. The payments statement analysed further, each month, the appellant did receive over and above ksh 30, 000 or less. There is no claim for underpayments or an unpaid wages.
24. The findings of the learned magistrate though for different reasons cannot be faulted in view of the fact that there was no employment relationship. The remedies sought cannot issue.
25. Accordingly, the appeal herein is found without merit and is hereby dismissed. the judgement and findings by the trial court in CMEL No.1159 of 2019 is affirmed. costs to the respondent.

**DELIVERED IN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**M MBARU**

**JUDGE**

In the presence of:

Court assistant: Peter Kigotho

..... and .....

