Uzuri Foods Limited v Manzi (Appeal E078 of 2022)
[2025] KEELRC 2579 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2579 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E078 OF 2022

JW KELI, J

SEPTEMBER 26, 2025

BETWEEN

UZURI FOODS LIMITED ..... APPELLANT

AND

DANIEL NYAMAI MANZI ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. E.M. Kagoni (PM) delivered on 2nd June, 2022 in Nairobi in MCELRC Cause No. 267 of 2018)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. E.M. Kagoni (PM) delivered on 2nd June, 2022 in Nairobi in MCELRC Cause No. 267 of 2018 between the parties filed a Memorandum of Appeal dated the 20th June, 2022 seeking the following orders: -

    a. The Appeal be allowed and the Judgment and Decree of the Court in Chief Magistrate's Employment and Labour Relations Cause No. 267of 2018 be set aside.

    b. The costs of this Appeal be awarded to the Appellant.

Grounds Of The Appeal

2. The Honourable Magistrate erred in fact in failing to apprehend the context in which DW1 asserted that the Claimant was to prove that he worked on weekends and public holidays.

3. The Honourable Magistrate erred in fact and in law in failing to appreciate that the claimant's pleadings and evidence on the issue of working overtime and/or on weekends and public holidays was vague, devoid of particulars and was unsubstantiated.

4. The Honourable Magistrate erred in law and in fact in failing to appreciate that the Respondent's witness had sufficiently explained that if any overtime arose during the period of employment, the same was sufficiently compensated.

5. The Honourable Magistrate erred in law and in fact in disregarding the holistic evidence tendered by the Respondent's witness on the issue of overtime, public holidays and/or weekends and entirely found fault on the basis of one statement made by DW1 without considering context.

6. The Honourable Magistrate erred in law and in fact in failing to consider the submissions made by the Appellant that the Respondent was given assignments during working hours, 8am – pm, and was compensated for work done past the said hours and/or during public holidays, if any.

7. The Honourable Magistrate erred in law in awarding overtime and public holidays when they were not in any event specifically pleaded/proved.

Cross-appeal

8. The respondent, Daniel Nyamai Manzi, filed a cross-appeal dated 8th July 2022 seeking the following Orders –

    a. That judgement dated 2ndJune 2022 be enhanced as to include a favourable finding that termination was unfair hence an award of damages for unfair termination and notice be included and awarded in addition to what the Honourable Magistrate awarded.

    b. The respondent further prays that the appellants appeal be dismissed with costs.

Grounds of the cross-appeal

9. That the learned magistrate failed to consider the evidence and claimant's submissions as the circumstances and the law on termination as advanced by the claimant thereby in reaching law a wrong conclusion that the claimant was not terminated a reversible error both and fact.

10. That the learned magistrate failed to appreciate the requirements placed on the appellant with regard to section 41 of the *Employment Act*.

11. That the learned magistrate failed to appreciate the requirement that reasons for termination have to be substantively fair and the fact that the law requires the employer to demonstrate fairness. THAT the learned magistrate failed to interrogate the reasons for termination and whether the claimant could be culpable based on the reasons advanced by the appellant.

12. That the learned magistrate generally failed to consult express provisions of the Labour statutes in determining the matter resulting in a reversible error in both law and fact.

Background To The Appeal And The Cross-appeal

13. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 24th August 2018 seeking the following orders: -

    a. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural, and an infringement of his constitutional rights.

    b. Maximum compensation for wrongful dismissal.

    c. Special damages

i. One month pay in lieu of notice Kshs. 37,470.00

ii. Damages for wrongful dismissal Kshs. 449,640.00

iii. Unremitted NSSF deductions Kshs. 400.00

iv. Service of gratuity Kshs. 86,469.23

v. Unpaid public holidays Kshs. 118,292.00

vi. Overtime Kshs. 254,880.00

d. Interest on the total

e. Certificate of Service.

f. Costs of the cause.

g. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

pages 3-7 of Appellant's ROA dated 20th June 2022).

14. The Respondent filed his Verifying Affidavit, sworn on August 23, 2018, the list of witnesses dated August 24, 2018, the witness statement dated July 13, 2018, and the list of documents along with the bundle of documents attached, dated August 24, 2018 (pages 8-16 of ROA).

15. The claim was contested by the Appellant, who entered an appearance and submitted a reply to the memorandum of claim dated February 20, 2019 (pages 18-19 of ROA). They also submitted a list of documents with the attached bundle and a list of witnesses, both of the same date (pages 20-32 of ROA). The Appellant later filed a witness statement from Douglas Nyagaka dated March 5, 2019; an additional list of witnesses dated September 24, 2019; a witness statement from Absalom Orado dated September 26, 2019; an additional list of documents dated September 24, 2019; and a further list of documents dated February 19, 2021 (pages 33-48 of ROA).

16. The Respondent's case was heard on the 19th of May, 2021 where the Respondent testified in the case, relied on his witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Appellant, Mr. Kinoti (pages 10-12 of Supplementary ROA dated 17th March 2025).

17. The Appellant's case was heard on September 9, 2022, with the Respondent calling two witnesses: Douglas Nyagaka (RW1) and Absalom Orado (RW2) to testify on its behalf. They both relied on their filed witness statements as their primary evidence and produced the Respondent's documents. They were cross-examined by counsel for the claimant, Mr. Wetaba (pages 13-16 of Supplementary ROA).

18. The parties took directions on the filing of written submissions after the hearing. The parties complied.

19. The Trial Magistrate Court delivered its judgment on the 2nd June 2022 partially allowing the Claimant/Respondent's claim to the tune of Kshs. 1,994,338/- comprising of overtime and public holiday pay. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 18-30 of Supplementary ROA).

Determination

20. The appeal was canvassed by way of written submissions. Both parties complied.

Issues for determination

21. In their submissions dated 20th May 2025, the appellant identified one issue for determination, namely:-

    i. Whether the learned Magistrate erred in law in awarding overtime and public holiday payments when they were not in any event specifically pleaded or proved.

22 Conversely, the Respondent submitted generally on the grounds of appeal in his submissions dated 2nd June 2025.

23. The court, having perused the grounds of appeal and of the cross-appeal was of the considered opinion that the issues for determination in the appeal and cross-appeal were -

    i. Whether the learned Magistrate erred in law in awarding overtime and public holiday payments.

    ii. Whether the Learned Magistrate erred in finding the termination was fair.

Whether the learned Magistrate erred in law in awarding overtime and public holiday payments.

Appellant's submissions

24. The appellant submitted that there was a contradictory consideration by the learned magistrate in awarding the prayers for Overtime payment at Kenya Shillings One Million, Eight Hundred and Seventy Six Thousand and Forty Six (K.E.S. 1, 876,046/=) and Holiday Payment at Kenya Shillings One Hundred and Eighteen Thousand, Two Hundred and Ninety Two (K.E.S. 118,292/=) to the Respondent. The Judgment for the said amounts was entered based on the testimony of the 1st Appellant's witness, DW1, which called upon the Respondent to discharge his evidential burden of proof of working on weekends and on public holidays. The Appellant humbly submits that factually and evidentially, the Respondent herein failed to plead his case in the trial court on the issue of working overtime and/or on weekends and/or on Public Holidays and the same was inadvertently overlooked. (refer to page 6 of the Record of Appeal which is the Memorandum of Claim wherein the particulars of Public Holiday and Overtime worked as alleged were found to be unconvincing to the Trial court according to the lower court's Judgment at page 29 of the Supplementary record of appeal). For this argument, the appellant cited the case of KUDHEIHA Workers Vs Charles Waithaka Goka t/a Apple Bees Pub and Restaurant [2013] eKLR where the Court held that:-"There is a tendency for Claimants seeking overtime pay to just throw all the public holidays in a calendar, all the hours beyond the agreed working hours on the clock, and all the years served, in the face of the Court and hope they make a credible case for overtime. Claimants of overtime must make a greater effort in directing the mind of the Court to a mathematically defensible, legally justifiable and factually credible system of overtime pay. The Claimant did not do this to the satisfaction of the Court."

25. The burden of proof of the issue of overtime and holiday payment was squarely with the Respondent herein during the trial in the lower court and he failed to discharge this burden according to the Judgment at page 29 of the Supplementary record of appeal. On this point, the appellant cited the case of Trust Bank Limited -Vs- Paramount Universal Bank Limited & 2 Others, Nairobi [milimani] HCCC NO. 1243 OF 2021 where the court held that:-"It is trite that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact. In so doing, the party fails to substantiate its pleadings, In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaint against them is unconverted and therefore unchallenged." In the instant case, the appellant contended that the burden of proof had not shifted to the Appellant from the

Respondent, but on account of rebuttal, the Appellant had also discharged its burden in controverting the allegation of overtime payment and holiday payment due to the Respondent. It was therefore not necessary for the Trial Judge to invoke the provisions of Section 10 (7) of the *Employment Act* 2007 to hold the Appellant liable for failure to prove that Overtime and Holiday payments to the Respondent. For this argument the appellant relied on the case of Patrick Lumumba Kimuyu Vs. Prime Fuels(K) Limited [2018] eKLR the Court held that; "Whereas we appreciate that the *employment Act* enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked. On the other hand, we note that the respondent produced before court several receipts for allowances paid to the appellant, which given the paucity of evidence in support of the appellant's claim could as well have been payments for public holidays and/or Sundays worked." That in context of the above, the Respondent herein failed to satisfy the burden of proof for overtime and holiday payment that was awarded to him by the lower court. In the reply to the memorandum of claim, the Respondent had stated that the Claimant used to work during normal working hours. In the witness statement by Douglas Nyagaka, the witness stated that assignments would only be given during normal working hours. (reference to page 14 of the Supplementary record of Appeal which is the proceedings where the Claimant's Advocates cross examined the 1st Appellant's witness', Douglas Nyagaka who stated clearly to the court that the Claimant had to prove that he worked on weekends and on Public Holidays.) According to the Court proceedings, Douglas Nyagaka (DW1) also asserted that the payments for Overtime and Public Holidays were always reflected in the pays lip issued by the Appellant. That according to the pay slips of the Respondent as produced in pages 26, 27, 28 and 29 of the Record of Appeal, none of them showed in the years 2018,2017,2015 and 2016 respectively that the Respondent had ever received any payment on the head of Overtime and Public Holidays. On this point, the appellant cited the case of Mutie v KB Sanghani & Sons (Cause 100 of 2021) [2023] KEELRC 594 (KLR) where the court held at paragraph 17 that;"17. Likewise, the claim for overtime must fail and is declined. The Claimant did not plead particulars of the claim, and did not prove the same. It was held as follows in the case of Rogoli Ole Manadiegi vs General Cargo Services Limited [2016] eKLR:-"the burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The Claimant did not show in the trial Court when he put in excess hours, when he served on public holidays or even rest days. The evidence on record does not even separate normal overtime from overtime on rest days and public holidays. The rates of compensation are different. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulations of Wages (Protective Security Services) Order 1998. He correctly argues on application of the Order, but gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of ksh 222,350 claimed as the overall overtime."

26. The Appellant further submitted that the trial magistrate disregarded the Testimony of Douglas Nyagaka (DWI)(at page 29 of the Supplementary record of appeal)when he held that the Appellant had not substantiated the fact that the Respondent herein was not working on weekends and public holidays yet the Respondent's payslips were produced and the same is evident in the List of Documents and Exhibits in pages 20, 26, 27, 28, and 29 of the Record of Appeal and the same were also adduced in court during trial (as per page 14 of the Supplementary record of appeal) to show for it. In support of this argument, the appellant invited the court to examine the Memorandum of claim where the Respondent pleaded expressly that he always reported to work at 8am in the morning and left his workplace at 5pm in the evening. According to this statement, it was insufficient for the Trial Court

to find that the Appellant has not proven that the Claimant was not working on weekends and/or holidays when it had produced the pay slips of the Respondent to show that no overtime and/or Public Holidays payments had been made to the Respondent. It is also contradictory for the Trial Court to state that the Respondent has not proven its case with regards to Overtime and Holiday payment and later on make the decision that the Appellant is liable for failure to prove yet the evidence is on record. Therefore, It is the Appellant's humble submission that the Respondent was undeserving of the awards for overtime payment in the sum of Kenya Shillings One Million, Eight Hundred and Seventy Six Thousand and Forty Six (K.E.S. 1, 876,046/=) and Holiday Payment at Kenya Shillings One Hundred and Eighteen Thousand, Two Hundred and Ninety Two (K.E.Σ. 118,292/=).

27. In the memorandum of claim at paragraph 3 (e) and 3 (f), the Claimant pleaded as follows:

'3 (e); The Claimant used to report at eight in the morning and leave at 5 in the evening.

3 (f): At least three times a week the Claimant would travel long distance transporting goods for the Respondent and there was no overtime pay for the hours covered. The witness statement made a bare statement that;

That on a weekly basis I transported goods long distance at least three times a week and I was not paid overtime for the same". The appellant submitted that if the assertion was true, nothing would have been easier than for the Claimant to;

i) State to the court the dates when the long distance travel took place.

ii) The venues to which the goods were transported.

iii) The actual of departure and return to the workplace.

iv) The actual hours when he worked overtime. If it had indeed been true, nothing would have been easier than for the Claimant to give sufficient particulars of the claim. In any event, the appellant specifically pleaded in the reply and witness statement by Douglas Nyagaka that the Claimant only used to work during normal working hours. The normal working hours in the context of memorandum of claim at paragraph 3 (e) meant 8 AM to 5 PM. The Claimant did not file any document in reply to deny that the assertion of normal working hours was untrue. The claim for overtime and/or public holiday was unsubstantiated.

28. The appellant submitted that from the above submissions, authorities relied on and the pleadings herein, that the Appellant produced sufficient evidence in support of its case in contravention to the Respondent's claim for overtime and Public Holiday payments but it was not fairly considered in the final Judgment by the trial magistrate. Therefore. the Appellant is deserving of the orders sought in this appeal and it seeks for its Memorandum of Appeal dated 20th June 2022 to be allowed as prayed, with costs in the lower court and on appeal.

Respondent's submissions

29. At page 65 of the record of appeal is the respondent's submissions before the trial court where they submit; 'Your honour, the claim for unpaid public holidays and overtime is incongruous and should therefore fail. The claimant was a driver and would only be given assignments during normal working days and/or hours between 8 am and 5 pm. In the event the driver was caught outside working hours and/or requested to work during public holiday he was provided for an allowance.'' At page 11 of the record of appeal is cross examination of the claimant and respondent and no single question was put to the witness to challenge the overtime hours and the claim for public holidays. The claimant's evidence and the calculations as done by the claimant with regard to the hours worked and equally the days worked during public holidays. This court sitting as an appellate court must go through

the submissions as filed herein on behalf and ask whether the submissions made herein were made before the trial court. The authorities submitted before this court were equally not availed before the trial court on the question of overtime and public holidays. Was there credible evidence to dispute that the claimant a long-distance driver was working 36 overtime hours a week? The law is clear on documentation and production of Employment records and punishing the employee to the advantage of the employer over responsibility by law placed on the employer is respectfully miscarriage of justice and we pray that this court rectifies that. Section 10 (7) and 74 are clear as we will demonstrate when we tackle the burden of proof. The respondent relied on section 27 *Employment Act* on working hours- '27. Hours of work g. (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law." That the responsibility to govern working hours remains the responsibility of the employer and this can be done through issuance of a contract that ought to be clear on the issue of overtime. Herein the appellant testified that the claimant and now respondent only worked within the stipulated working hours but no such contract was issued to the claimant as to enable him realize he was working over and above the required hours and commence documenting and keeping parallel employment records. At page 14 of the supplementary record of appeal, the appellant's witness testifies as follows on cross-examination: The claimant was a long-distance driver and was always paid an allowance for the trip. On the question of whether the claimant would work overtime the witness at page 15 answers; Payments for overtime and public holidays were always reflected in the payslip. The claimant testified that he worked overtime and accompanied the same with computations in the memorandum of claim, which is equally evidence as per the rules, and the appellant concedes that the claimant would work overtime, but they would always pay, and the question now becomes where is that evidence. How were the appellants regulating the working hours for the long distance driver whom they would send off for the long distance errands three times a week which takes care of the return trips and eventually the entire week culminating in the 36 overtime hours the claimant would work. The court in AA v SGA Security Solutions Limited (Employment and Labour Relations Appeal E002 of 2022) [2022] KEELRC 1553 (KLR) (29 July 2022) (Judgment) In the absence of evidence by the Respondent to the contrary in terms of section 10(7) of the *Employment Act* and based on the above finding, I will set aside the trial court's finding on this item and replace it with a finding that there is evidence establishing a prima facie case that the Appellant was subjected to regular four (4) hours overtime for the duration of the contract. In the absence of rebuttal evidence as required under section 10(7) of the *Employment Act*, I award the Appellant overtime pay of Ksh. 551,480/= being the amount claimed based on four (4) hour overtime rate. The court in Mwanga v Metal Cans And Closures (K) Limited (Cause 2278 of 2016) [2022] KEELRC 1108 (KLR) (20 June 2022) (Judgment) On the claim for overtime, it submits that the Claimant never worked past the working hours as per his employment contract which is also clearly evidenced in the Attendance List which has been produced before the court. The Respondent submits that the Claimant has not brought any evidence to the contrary and is therefore not entitled to any payment for overtime. Whenever an employee is dispatched for an errand the dispatcher being the employer has copies of the records which they are mandated by law to avail whenever defending themselves in such proceedings of the issue of termination and the issue of leave but deliberately withheld records touching on overtime and public holidays. Section 74 places an obligation on the employer to keep records and proceeds to indicate the nature of records to be kept. . The burden to reduce an employment contract into writing is squarely on an employer and the particulars of which consists of the special damages herein are required to be in the contract. . To place the burden on an employee to prove the working hours when an employer deliberately refused to issue a contract is an injustice and we hope the burden will be placed where it is supposed to squarely on the employer. Justice Monicah Mbaru in Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018] eKLR holds;. '18. An employer should keep all work records for a period of 5 years even where employment has eased as such records may become

necessary and important particularly in proceedings such as these, Also, where legal proceedings are initiated by an employee, the law places the duty to produce he work records upon the employer. Where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. The employer therefore must serve justice and attend court and even where such attendance is not found necessary; the submission of work records is a legal requirement.' The burden to prove or challenge employment terms has been squarely placed on the employer pursuant to the express provisions of section 10(7) of the *Employment Act*. The custodian and the sole custodian for that matter of employment records remains to be the employer with the employee serving no role therein.

Decision

30. The role of appellate court has been pronounced in several decisions of the Court of Appeal and are as stated comprehensively in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

31. The claimant stated his work was from 8am in the morning to 5 in the evening. That at least three times a week he would travel long distance transporting foods without overtime. The claim for overtime was itemized under paragraph c (v) and (vi) of the claim (page 6 of ROA) as follows-

> 'V. Unpaid Public Holidays
>
> 2013(6 days).....KSH 12,672
>
> 2014 (12days).....KSH 25,344
>
> 2015 (12 days).....KSH 25,344
>
> 2016 (12 days).....KSH 25,344
>
> 2017 (12 days)...KSH 25,344
>
> 2018 (2 days)....KSH 4,244
>
> VI. Overtime 36 hours per week
>
> August 2013 April 2015..147.75 x 2 x 36x 24 wks).....KSH 254,880
>
> May 2015 April 2017....KSH 1,002,456..(165.75 x 2 x 36 x 84 wks)
>
> May 2017- March 2018.....(195.30 x 2 x 36 x 44 wks)

32. As per the witness statement the respondent was a driver. He stated that on a weekly basis he transported goods long distance at least three times a week and was not paid overtime. In response, the appellant admitted the respondent worked 8 -5 but added he had 1 hour lunch break. The respondent stated that the assignment were within the working hours. The appellant filed final dues payment in which the claimant stated he had checked and confirmed he agreed to the computation on dues (page 25 of ROA).

33. The claimant stated every week he travelled long distant to deliver goods and was not paid overtime. The claim was for 36 hours per week which is 12 hours overtime for 3 days every week. During cross-examination the claimant said he was paid Kshs. 6000 on dismissal and did not know what it was for. RW1 was Douglas Nyagaka. He told the court that the claimant was not working on public holidays and weekends. He was the custodian of employment records. The claimant was a long-distance driver and was paid an allowance for the trip. That it was for the claimant to prove the overtime. He told the court payment of overtime and public holidays would be reflected on pay slip. RW2 was Absolom Orado, who said the claimant was initially engaged as a turn boy paid weekly and later driver.

34. The trial court on the issue held- 'Lastly, is the issue of overtime and unpaid public holidays. DWI denied that the Claimant was working on weekends and public holidays, stating that, it was the Claimant to prove, he worked on weekends and public holidays, and was not paid. He however admitted that he was the custodian of the employment records. He further told the court that it is the Claimant to prove he worked overtime. Clearly, DWI does not appreciate the law's perspective on this issue. The burden rests not on the Claimant, but the Respondent. Denying that the Claimant was working on weekends and public holidays, without substantiating such allegations, when the person so alleging is the custodian of the records kept by the Respondent, was fatal. The prayers are merited in the absence of contrarian evidence, by dint of Section 10(7) of the *Employment Act* 2007."

35. The burden of proof of employment claims is as stated in section 47(5) of the *Employment Act* to wit- '47(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."

36. On issue of overtime, it is settled law the burden to prove extra hours worked is on the employee as held in Rogoli Ole Manadiegi vs General Cargo Services Limited [2016] eKLR:-"the burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The Claimant did not show in the trial Court when he put in excess hours, when he served on public holidays or even rest days. The evidence on record does not even separate normal overtime from overtime on rest days and public holidays. The rates of compensation are different. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulations of Wages (Protective Security Services) Order 1998. He correctly urges on application of the Order, but gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of ksh. 222,350 claimed as the overall overtime." Applying the decision the court holds that the Learned Magistrate erred in law in stating it was not the burden of the Respondent to prove his claim of overtime. On public holidays the claimant stated specific dates. The respondent did not produce the motor vehicle mileage record to controvert that the claimant/ respondent did not work on public holidays. I find no basis to interfere with the award by the Learned Trial Magistrate of Kshs. 118,292/- .

37. On the claim for overtime, the respondent stated he worked 8am to 5pm. His work was long distant driver. The appellant stated he was paid allowance while on the assignments. The respondent did not have a claim for such allowance which the court noted could have been for accommodation and food while away. The court noted the claim was for 12 hours every three days in a week. The court finds on a balance of probability the claim for overtime was exaggerated and not proved on a balance of probabilities. The award for overtime is set aside.

Whether the Learned Magistrate erred in finding the termination was fair under the Cross-appeal

Cross-appellant's submissions

38. At page 15 of the supplementary record of appeal the witness testified and told the court as follows- The claimant was given 24 hours to respond to the notice to show cause because he was aware of the issues. The notice to show cause does not refer to any particular incident. The dismissal letter does not refer to any particular incident. I do not know who authored the fuel consumption data. The cross-appellant asked- How does an employee respond to the Notice to Show cause without having a particular incident referred to? At page 23(ROA) is the notice to show cause which is worded as follows; ''It has been noted that each time you are going on route you are claiming that you have ran out of fuel and demand extra fuel. All the vehicles are fueled enough fuel to finish the trip. You have been given more than three warning but no improvement yet. This is not acceptable and indicates fuel theft or poor driving.'' Before asking the claimant to show cause the appellant states as follows; -We are not ready to keep you in our employment and thus ask you to show cause within 24 hours as to why we should not terminate your services. Did the claimant have any chance if the appellant had already indicated that they were not ready to keep him in their employment. Was the appellant calling the claimant a thief or a bad driver and is it possible for the claimant to show cause if the employer has no clue what the issue was. At page 24 of the record of appeal is the termination letter which has the following line; When you were given the show cause letter that is when you started giving excuses that your vehicle has been faulty. The cross-appellant opined that that before creating an offence on the basis of fuel consumption the employer must be able to tell what was the cause with regard to is it a theft issue or a motor vehicle issue. After establishing that the issue was a motor vehicle issue then one must ask is it mechanical or poor and bad driving skills. None of this was established.A notice to show cause shouldn't contain multiple choices as that incapacitates the employee from proper response. The appellant stated that it was either theft or poor driving then proceeds to insist on a response within 24 hours without availing the data to the claimant or giving the vehicle to another driver for evaluation purposes. Was the claimant siphoning fuel? At page 14 the answer from the appellants; We had no proof of fuel theft. They had no proof of theft but still proceeded to terminate along those lines. The court while dismissing the prayer for unfair termination took issue with our concentration on the mechanic but we ask how do you allocate blame on the driver and the claimant for that matter without a clean bill of health on the vehicle which could only be delivered by a professional. At page 16 the transport manager testifies as follows; The disciplinary hearing involved three employees. The name of mechanic is not indicated in the minutes. The fuel consumption data is for KBY 795 L. It does not indicate the name of the driver. Was the claimant a thief or a bad driver? The appellant was not able to answer that and the question remains how is it possible to terminate fairly if the reason behind the termination is unknown to the decision maker. The cross-appellant relied on the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR Ndolo J. held that- "However, for a termination of employment to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness." What was the justification if they did not know what was happening to the vehicle with regard to fuel usage. Further, relied on Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR, the Court of Appeal was authoritative that - S. "On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons

to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required." The notice was short and the charge was vague, with no particulars of when the alleged offence occurred. The respondent stated that- We were concerned because the driver who passed the exam is the one who sent the money.

39. Under Section 41 of the *Employment Act*, an employer is required to inform the employee of the reasons for contemplating termination in the presence of a fellow employee or a shop floor union representative of their choice. The employer should listen to the employee's representations and those of the person accompanying them to the disciplinary hearing. Additionally, the employer must observe the rules of natural justice by providing the employee with notice of the upcoming hearing and the grounds for it, allowing the employee to prepare their defense. The holding in Menginja Salimi Murgani vs. Kenya Revenue Authority [2006] eKLR states: 'It is clear too that the suspicions which led to the suspensions and termination of employment were not documented for the Plaintiff to respond to. Most of the time, the Plaintiff was not given an opportunity to face his alleged accusers, preventing an informed process to resolve differing views. I have considered the facts and conclude that they did not meet the requirements of a fair hearing," The charge was unclear, and the timelines were not suitable. . Why was the claimant terminated? Was he a thief or a bad driver? It could not have been both. Evidence of theft or bad driving was not presented to the court, so no justification for the termination was provided. Given the length of the claimant's service with the respondent and his otherwise impeccable record, except for the unresolved fuel issue that was not proven to be his fault, he deserves the maximum compensation. The way the complaint was raised, the short response time, and the lack of justification all indicate that maximum compensation is appropriate. The cross-appellant urged the court to award Kenya Shillings 37,470 as notice and maximum damages of Kenya Shillings 449,640.

Appellant 's response to the cross-appeal.

40. On the reason for the termination the appellant submitted- The cross-Appellant avers in his submissions starting from page 49 to 58 of the record of appeal that he indeed proved before the lower court that h was unfairly terminated by the Appellant. However, the Appellant disagrees with the cross-Appellant's preposition as advanced to this Appellate court and humbly submits that he failed to discharge his initial burden of proof that he was unfairly terminated from employment. The appellant invited the court to look at page 10 of the record of appeal(being the cross-Appellant's Witness Statement filed in the lower court). The cross-appellant avers that he was dismissed on the basis of informing the personnel in charge about unremitted deductions. However, on page 11 of the Supplementary record of appeal which contains the proceedings, the cross Appellant herein never testified about this alleged reason for termination from employment with the Appellant. The appellant referred to Trust Bank Limited Vs Paramount Universal Bank Limited &2 others, Nairobi (milimani) HCCC NO. 1243 OF 2021 where the court held that;

> " It is trite that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of facts. In doing so, the party fails to substantiate its pleadings. In the same vein, the failure to adduce evidence means that evidence adduced by the plaint against them is uncontroverted and therefore unchallenged." The appellant agreed with the lower court's finding on the issue for reasons that parties are bound by their pleadings and burden of proof still lay with the cross Appellant and the same was never acted upon. At page 24 of the Supplementary record of appeal which is the Judgment of the lower court where the Honourable court held that:"since the burden of proof is on the Claimant to prove that he was dismissed from work on account of raising an issue to the personnel, Mr. Douglas

Nyagaka, on the statutory deductions, that were not remitted. However, the evidence on record does not support this allegation. Firstly the Claimant's List of Documents dated 23.08.2019, and which list was adopted as exhibits, contained the Claimant's Payslips, a copy of the NSSF, a copy of the Demand Letter and the Claimant's Call log data. In my view this cannot substantiate the allegation that the Claimant was dismissed for raising an issue about the statutory deductions, that were not remitted." Therefore, the reason for the cross-Appellant's termination from employment was not proven to a balance of probability in his pleadings and evidence before the lower court and thus his reason was duly challenged and sufficiently proven by the Appellant to be Fair and was not satisfactory to its operations. The Appellant refers this Appellate Court to page 46 of the record of appeal which contains the cross-Appellant's Notice to Show Cause. The document indicated that the cross Appellant was to explain by accounting for the fuel usage on his assigned motor vehicle since asking for extra fuel was affecting the operational requirement of the Appellant negatively when all vehicles were always filled with enough fuel for every trip. That the cross-Appellant's reasons were very unsatisfactory. On this point, the appellant relied on its submissions to the lower court (in pages 61, 62 and 63 of the record of appeal) and directed the court specifically to paragraphs 15,16, 17 and 18 where we stated;"15. Substantive Justification deals with the reason for termination. Under Section 43 of the *Employment Act*, 2007 which provides as follows:43. Proof of Reason for Termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer shall fail to do so, the termination shall be deemed to be unfair within the meaning of Section 45

(2) the reason or reasons for termination of contract are the matters that the employer at the time of the contract genuinely believed to exist, and which are caused the employer to terminate the services of the employee."In Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR the Honourable court observed that;"Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be a valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a Notice, given a chance to be heard and the sanction decided by the Respondent based on the representation made by the affected employed... However, these reason or reasons must be addressed before the termination Notice is issued and subjected to a disciplinary hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent and validity of any reason or reasons an employer may have against the affected employee."

41. The appellant submitted that the reason for termination meets the threshold under section 45 of the *Employment Act* as it involved the employees conduct and it is based on the operational requirements of the employer. It is admitted that the Claimant's designated truck was consuming more fuel than the rest in the company and yet he cannot account for it. It is worth noting that the Respondent did proof this reason for termination. It outlined the same in its Notice to Show Cause dated 5th March 2018 and the Claimant responded unsatisfactorily. The Respondent had also issued several warnings to the Claimant for the said misconduct but all was in vain as he continued to ask for more and extra money to fuel the truck a situation that became untenable for the Respondent. That the appellant had a valid

reason to terminate the employment of the Claimant and the existence of this valid reason sparked the disciplinary measures taken against the Claimant.

42. That the lower court was subsequently persuaded and made this analysis in its Judgment present at pages 25 and 26 of the supplementary record of appeal as follows; ‘ I will thus dwell on the issues that came out at trial which is, why was the Claimant dismissed from work i.e., the justification the law requires.....’ The cross Appellant has argumentatively challenged the contents of the Notice to Show Cause particularly at pages 7 and 8 of his submissions by stating that the contents were not clear and was disadvantaged in responding to it by virtue that it seemed not to give him a proper opportunity to defend himself before and during the disciplinary hearing. However, the cross appellant admitted to have received the warnings as per the proceedings in page 11 of the Supplementary Record of Appeal documents and this clearly shows that he was well aware of the issue at hand before he was asked to show cause to account for fuel used in the respective destination assignments. We refer the court to pages 39, 40, 41 and 42 of the record of appeal which are the three warnings and the local purchase order for fuel issued by the Appellant. However, the cross Appellant did not account for his fuel usage as was expected in his response to the Notice To Show Cause which is present at page 46 of the record of appeal by either providing his communication to the management on the issue causing him to request for further disbursement of fuel and the name of the person he reported the matter of mechanical damage of his vehicle. It is also on the lower court proceedings at page 11 of the Supplementary Record of Appeal thai the cross appellant failed to file the Notice to Show Cause as his exhibit. This created a lot of doubt and caused the lower court to discern that the cross appellant herein was lying, and indeed a hidden agenda was behind this suit as seen in the lower court's dictum at page 27 of the Supplementary record of appeal as hereunder.....” "This court opines that, the Notice to show Couse was not filed as the same would have injured the Claimant's case, for the aforesaid reasons and also for the fact that, as the Claimant was approaching this court, his intention was to mislead this court, that his dismissal was owing to him, revealing and confronting the Respondent's personnel, that their (employees) statutory deductions, were not being remitted A false or inaccurate accusation as there is not any no evidence before this court of this, the Claimant admitted that, the NSSF for 2018 March was paid." The appellant submitted that based on those established facts, the lower court went further and found that the reason for the cross-Appellant's termination from employment was valid to his own detriment at page 27 as follows: "Again, as he was bringing this Claim, the claimant was well aware, what caused his dismissal on the allegations given for it. This is evidenced by the letter terminating his services, dated 10.03.2018. Why didn't he even plead what was in the termination letter? Why go for an allegation that he didn't even defend at trial or in his submissions? This court is not naïve and understand that, an employer may seek to settle an agenda.....’ That when the lower court asked itself these questions, it was keen to note that the cross Appellant was untruthful and cannot find a cure to his ailing case. He never adduced any evidence of a response which addressed the issue stated in the warning letters issued to him and present in pages 39, 40 and 41 of the record of appeal. There was no written communication or any witnesses to attest to his side of the story. The cross-appellant now disputes the contents of the Notice to Show Cause before the Appellate court herein. Had the cross Appellant responded to the issue as earlier as the warnings were issued to him by the Appellant, then he would have a credible defence during the disciplinary hearing but he utmostly failed in entirety consequent to the doctrine of equity which states that "Equity favors the Vigilant and not the Indolent" and now sitting as a court of equity, we beseech this Appellate court to disallow the cross Appellant's arguments on the burden of proof in pages 6,7,8,9 and 10 and affirm that indeed the Appellant had proved that the cross Appellant's termination was Fair substantially.

43. On procedural fairness, the appellant submitted as follows- the cross Appellant herein is inviting the Appellate Court to intervene on the conduct of the disciplinary hearing by the Appellant yet he is

guilty of failing to meet his burden of proof. According to his submissions in the lower court and in this cross appeal, The cross Appellant is sincerely dishonest and subsequently failed to show both the lower court and now this appellate court that he was indeed terminated from Employment by the Appellant without according him enough time to respond to the Notice to Show Cause, informing him of the exact charge against him and proceeding to dismiss him without determining whether he was a thief or a bad driver. On the other hand, we humbly submit that the cross-Appellant's failure to prove his demands for extra fuel in his trips became unjustified and then this led the Appellant to escalate the Notice to Show Cause issued to the cross Appellant to a Disciplinary Hearing since no improvement was forthcoming. With regards to the Procedural fairness advanced during the Disciplinary Hearing., we refer the Appellate court to pages 61, 62 and 63 of the record of appeal which are the Appellants' submissions in the lower court and direct it specifically to paragraphs 19 ,20, 21 and 22 where the Appellant stated as follows:

> " 19. Your Honour, as far as procedural fairness goes, section 41(1) of the *Employment Act* 2007 outlines the requirements for procedural fairness to be achieved as follows: -Notification and hearing before termination on grounds of misconduct
>
> (1) subject to Section 42(1), an employer, shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.In this present case, the Respondent observed the procedural fairness contemplated in the *Employment Act* in reaching the decision to terminate the Claimant, to wit;
>
> a) It issued the Claimant with a Notice to Show Cause dated 5th March 2018 requiring him to Show Cause why disciplinary measures should not be taken against him for misconduct;
>
> b) The Claimant replied to the said Show Cause Notice on 7th March 2018 but the explanation was unsatisfactory thus leaving the Respondent no choice but to proceed to hearing:
>
> c) Invited the Claimant to a Disciplinary hearing:
>
> d) Held the Disciplinary Hearing on 10th March 2018;
>
> e) The Claimant was explained to the reason for termination in the language he understood.
>
> f) It paid the Claimant's terminal benefits

44. The Appellant did not skip any step in the procedural requirements for a fair termination. In any event vis-à-vis the contention by the Claimant about the procedure used by the Appellant, these procedural requirements are not cast on stone and the meeting at the conduct of it may not be equated to a

hearing like we know them in the judicial process. In the case of Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University Of Agriculture And Technology 2014 eKLR the court observed that "... the practical application of the provisions of Section 41 of the work place will however take different formats depending on the nature of the offence and the institutional sophistication of the employer...I agree with Counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. "Similarly, we rely on this authority in support of the efforts made by the Respondent to accord the Claimant a fair procedure in dismissing him from employment.

45. The appellant submitted that from the above facts and authorities relied on, the present case was a fair case of termination. The Respondent rightfully followed the termination procedure as above discussed to take disciplinary action against the Claimant for gross misconduct. It is a fact that the Claimant's designated truck consumed more fuel than expected rates and he was unable to account for it. The Claimant was informed of these reasons(charges) and was allowed to respond to them in writing and a disciplinary hearing held thereto. The appellant urged that the claim for unlawful termination fails and be dismissed since the Claimant paid his rightful terminal dues. That according to his submissions to this cross appeal, the cross-Appellant expects the Appellate court to intervene on the disciplinary process that took place on 10th March 2018 and his subsequent summary dismissal yet he has not demonstrated any injustice that occurred. On this point, the appellant cited the case of Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others [2017] eKLR where the Court held that:"Due process is an internal disciplinary process to be exercised by an employer. The Court is not expected to enter into the boardrooms of the employers to micro manage their affairs.... The court will only interfere where there is breach of the process and even so, only with a view to setting the process right."Further, in the case of Judith Mbaya Tsisiqa v Teachers Service Commission [2017] eKLR it was held that courts will interfere with employer's internal disciplinary proceedings in exceptional circumstances where great injustice might result or where justice by any other means may not be attained. The cross respondent in his submissions on cross appeal makes it appear that there was indeed an injustice to the procedural fairness accorded to him but the same is not true. In the instant case, the cross appellant herein alleges he did not have more time to respond to the Notice to Show Cause and that no of fence was disclosed. No It is true that cross Appellant herein approached the lower court and now this appellate court of equity without full disclosure of reasons why he was terminated from the Appellant employment thereby disregarding the maxim of equity that states "He who comes to Equity must come with clean hands". The appellant agreed with the findings of the lower court at page 27 of the Supplementary record of appeal that the same was never pleaded in the Memorandum of Claim and parties are bound by their pleadings. For these reasons, the appellant urged the court which now sits as a court of equity, herein to disregard the arguments stated in the Cross- Appellant's submissions in the cross appeal at pages 7, 8,9,10 and 11of which are now mere allegations.

Decision

46. The ground of the cross-appeal were-

    a. That the learned magistrate failed to consider the evidence and claimants submissions as the circumstances and the law on termination as advanced by the claimant thereby in reaching law a wrong conclusion that the claimant was not terminated a reversible error both and fact.

    b. That the learned magistrate failed to appreciate the requirements placed on the appellant with regard to section 41 of the *Employment Act*.

    c. That the learned magistrate failed to appreciate the requirement that reasons for termination have to be substantively fair and the fact that the law requires the employer to demonstrate

fairness. THAT the learned magistrate failed to interrogate the reasons for termination and whether the claimant could be culpable based on the reasons advanced by the appellant.

d. That the learned magistrate generally failed to consult express provisions of the Labour statutes in determining the matter resulting in a reversible error in both law and fact.

47. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013] eKLR).

48. The reason for termination is to be justified by employer according to section 43 of the *Employment Act* to wit-' 43. Proof of reason for termination.

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."'

49. The letter of dismissal dated 10th March 2018 was produced by the appellant and stated as follows:-'In your response to our letter you were not able to convince us why we cannot terminate your services and yet you are not taking good care of our vehicles. Each time you go on deliveries you ask for additional fuel unlike other drivers. We have given you more than three warnings and we cannot keep giving you warnings without improvement. When you were given the show cause letter that is when you started giving excuses that your vehicle has been faulty. Why were you not bringing the issue to the management. We cannot keep you any more in our employment and thus dismiss you from our employment.."(page 24 of ROA) The claimant stated in his witness statement that he was at loss as to why the appellant chose to terminate his contract and believed it was simply because of the reason that employees had raised concerns about the conditions of work including non-remittance of statutory deductions and salary increment. On this issue the employer produced the NSSF statement which indicated remittances upto month of termination March 2018 (page 14). The trial court correctly found the allegations of the claimant were not true.

50. Prior to the dismissal letter, the cross-appellant had been issued with a show cause letter on the same issues to respond within 24 hours as to why the employer should not terminate his services(page 23 of ROA).The appellant produced the warning letters under list dated 27th September 2019 on same issues as of fuel usage(page 38 of ROA). During the hearing the cross-appellant admitted to have received the notice to show cause and the warning letters. He stated his defence at the committee was that the vehicle was consuming more fuel due to a mechanical problem and this was known by the manager.

The trial court agreed with the employer that this issue of faultiness was only brought up at the show cause yet the claimant had received 3 prior warnings on the issue and did not raise defence of faulty vehicle. The court finds no basis to fault the finding of the trial court on the reasons for the termination, taking all the foregoing into account (Mbogo v Shah).

Procedural fairness

51. On procedural fairness (under section 41 of the *Employment Act*) the ground of appeal was- THAT the learned magistrate failed to appreciate the requirements placed on the appellant with regard to section 41 of the *Employment Act*. Section 41 states – '41. Notification and hearing before termination on grounds of misconduct

    (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

    (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

52. The cross-appellant stated he attended the disciplinary hearing and when he got there he was informed that he had been dismissed. The claimant pleaded he was not afforded a fair hearing. The minutes were produced. It is apparent the cross-appellant was not afforded his right under section 41 of the *Employment Act* to be accompanied by employee of choice. The invitation to the hearing was not produced. The trial court did not address this issue. The court in the circumstances finds that the claimant was not accorded his right to be accompanied by a witness of choice at the time he was informed of the dismissal. That is the extent to which the decision of the lower court on the fairness is faulted and the claimant is awarded 1 month notice pay for lack of compliance with the procedure under section 41 of the *Employment Act*. The notice pay is as per the last payslip of March 2018 basic pay plus housing allowance only thus Kshs. 33544/-

Conclusion

53. The appeal is allowed. The award of overtime is disallowed and set aside. The cross-appeal is allowed on the procedure only being held as defective for failure to notify of the right to be accompanied by a fellow employee or a union representative under section 41 of the *Employment Act*.

    The Judgment and Decree of the Hon. E.M. Kagoni (PM) delivered on 2nd June, 2022 in Nairobi in MCELRC Cause No. 267 of 2018 is set aside and substituted as follows-

    Judgment is entered for the claimant against the respondent as follows:-

    I month notice pay for lack of procedural unfairness- Kshs. 33,544/-

    Public holiday back pay Kshs. 118,292/-

    Total award Kshs. 151,836/- plus costs of the suit with interest at court rate from date of judgment.

54. On costs of the appeal and cross-appeal, the two parties partially succeeded in their appeals. In the circumstances the court makes no order as to costs on the appeal and cross-appeal.

55. Stay of 30 days is granted.

56 . It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Macharia

Respondent - Wetaba