



**Nyagonchoga v Lavington Security Limited (Appeal E203 of 2023)  
[2025] KEELRC 2647 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2647 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E203 OF 2023  
JW KELI, J  
SEPTEMBER 26, 2025**

**BETWEEN**

**SAMUEL MOMANYI NYAGONCHOGA ..... APPELLANT**

**AND**

**LAVINGTON SECURITY LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. Opande S.A  
(PM) delivered on 20th September, 2023, Nairobi in MCELRC E1475 of 2020)*

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. Opande S.A (PM) delivered on 20<sup>th</sup> September, 2023 in MCELRC E1475 of 2020 between the parties filed a Memorandum of Appeal dated the 12<sup>th</sup> October, 2023 seeking the following orders: -
  - a. An order allowing the Appeal;
  - b. An order that the decision of the Honourable and learned Magistrate dated 20 09 2023 dismissing the claims for underpayment, annual leave and public holidays is set aside;
  - c. Costs of the appeal; and
  - d. That this Honourable court do issue such orders and directions as it may deem fit and just to grant to meet the ends of justice.

**Grounds Of The Appeal**

2. That the Honourable Magistrate erred in law and in fact by dismissing the Claimants claims on underpayments, unpaid annual leave days and unpaid public holidays against the applicable law, the *akn ke act 2007 11 employment Act 2007* procedures and against the weight of evidence presented before the Court.



3. That the learned Magistrate erred in law and in fact in dismissing the Claim for underpayment as a blank prayer with no indication as to how the figure claimed was arrived at, yet the Claimant's pleadings, and witness statement dated 15 10 2020 which was adopted by the Court as the Claimant's evidence had elaborate and detailed calculations of all the Claims, including that of underpayments.
4. That the Court erred in law and in fact by finding that the Claimant lied in his Memorandum of Claim when he told the Court that he did not go on leave and that when cross examined he told the Court he did go on leave and filled leave forms (referring to the leave forms produced by the Respondent) and dismissed the claim for leave on the further ground that the Claimant at various stages in the course of Employment with the Respondent received various salaries and had a duty to show how he arrived at the lump sum of Kshs. 317, 785.32 and that in the absence of a clear methodology being shown the blank prayer for leave was dismissed, yet the Claimant stated in Court that he never went for leave between 2000 to 2004, and did not sign any leave application forms for those years
5. That the Honourable Court erred in law and in fact in dismissing the claim for payment in lieu of notice, public holidays and found that the prayer for public holidays is dependent on the salary an employee earns since it is from such salary that the daily rate is acquired, and that though the Claimant was paid various salaries throughout his employment with the Respondent, but however he used a daily rate of 679.02 from September 2000 - March 2020, which was irregular and that the figures used by the Claimant are not accurate, and yet there was a clear demonstration, as per the law and calculations on how the figure of Kshs. 679,02 (daily rate) and the sum of Kshs. 335,435.88 (lump sum) was arrived at.

### **Background To The Appeal**

6. The Claimant Appellant filed claim against the Respondent vide a memorandum of claim dated the 15<sup>th</sup> October, 2020 seeking the following orders:-
  - a. A declaration that the Claimant was terminated and that the termination of the Claimant by the Respondent was unfair and unlawful;
  - b. An order compelling the Respondent to pay the Claimant his terminal benefits amounting to Kshs. 1,626,211.77;
  - c. Costs of the suit; and
  - d. Interests on a), b) and c) above at court rates from the date of filing of suit till payment in full.
 (pages 4-6 of Appellant's ROA dated 20<sup>th</sup> November, 2024).
14. The Claimant filed his witness statement, list and bundle of documents together with the bundle of documents attached, all dated 15<sup>th</sup> October, 2020 (see pages 8-81 of ROA).
14. The claim was opposed by the Respondent who entered appearance and filed a Statement of Response dated 1<sup>st</sup> March, 2022 (pages 82-85 of ROA). They also filed a bundle of documents of even date; List of witnesses and witness statements of Samuel Obanda, Kennedy Kiprotich and Josphine Wambua all dated 1<sup>st</sup> March, 2022 (pages 86-118 of ROA).
14. The Claimant Appellant's case was heard on the 30<sup>th</sup> March, 2022 where the claimant 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 Respondent Mr. Kwamboka (pages 166-168 of ROA).



14. The Respondent's case was heard on 6<sup>th</sup> July, 2022 with the Respondent calling one (1) witness, Samuel Obala, to testify on its behalf. He relied on his filed witness statement, and produced the Respondent's documents. He was cross-examined by counsel for the claimant Mr. Rakoro (pages 169- 173 of ROA).
14. The parties took directions on filing of written submissions after the hearing. The parties complied.
14. The Trial Magistrate Court delivered its judgment on the 20<sup>th</sup> September, 2023, partly in favour of the Claimant awarding the claimant Appellant a tune of Kshs.121,884 - comprised of 6 months' salary as compensation for unfair termination, and one(1) month salary in lieu of notice (judgment at pages 177-183 of Appellant's ROA).

### **Determination**

14. The appeal was canvassed by way of written submissions. The Appellant complied.  
Issues for determination
14. The Appellant submitted generally on the grounds of appeal in its written submissions dated the 24<sup>th</sup> January, 2025.
14. The court finds the issue for determination is whether the trial court erred in fact and law in its finding on the issue of underpayments, leave and public holidays.  
Appellant's submissions
14. The dismissed claims the subject matter of this appeal are;
  - 1) Underpayments
  - 2) Leave
  - 3) Public Holidays
14. The appellant relied on the decision of Lady Justice Mbaru said in the matter of Mkoba v Coast Agency Limited (Appeal E007 of 2022) [2023] KEELRC 1199 (KLR) (18 May 2023) (Judgment), that;"Part of the benefits due were payment of a minimum wage in terms of Section 26 of the Act, taking of annual leave in terms of Section 28 of the Act and termination of employment in accordance with fair procedure and reasons in terms of Section 35, 41 and 45 of the Act."
14. The appellant agreed with the court that parties are bound by their pleadings. However disagreed that the Appellant did not indicate how the figures claimed were arrived at. That witness statements are pleadings as per Rules 7, 24, 29, 32 and 35 of the Employment and Labour Relations 9Procedure) Rules, 2024.

In the Memorandum of Claim dated 15 10 2020 under paragraph 8 the Appellant pleaded the reliefs sought.(Page 5 of the Record of Appeal). In his Witness Statement dated 15 10 2020, the Appellant calculated his claims and said;

"I was thus dismissed from work without any reason, without process or paying my terminals dues. This termination was unfair.

My Claims are;

1. 1 month's salary in lieu of notice Kshs. 17,654-74
2. (Kshs 15,141.95 + (15 x 15,141.95) 2,271.29) 2. 21 days annual leave x 18yrs



Kshs.317,785.32

3. Service-18 days x 20 years Kshs. 24,4450.25

4. Public Holidays -220dys x 12x2 x 13655 =... ..Kshs 720,980.00

5. Underpayments..... ..Kshs. 333,759.58

2000-2001-9 9 2000-5 6 2001- 8 months (Kshs 3,008+ (15 x 3,008) 451.20 = 3,459.20  
3,459.20-2,400 = 1,059.2 x 8 = Kshs. 8,473.6

2001-2002-5 6 2001-7 6 200- 12months (Kshs 3,668+ (15 x 3,668) 550.2 = 4,218.20

4,218.20-2,400= 1,818.2 x 18 = Kshs. 21,818.4

2002-2004-7 6 2002-28 5 2004-24months (Kshs 3,925+ (15 x 3,925) 588.75-4.513-75  
4,513-75-2,400 2,113.75x 24 Kshs. 50,730.00

2004-2005-28 5 2004-20 5 2005-12months (Kshs 4,836+ (15 x 4,836)725-40- 5,561.40  
5,561.40-2,400= 3,161.40 x 12 = Kshs. 37,936.80

2005-2006-20 5 2005-20 5 2006-12months (Kshs 5,175+ (15 x 5,175)776.25= 5,951.25  
5.951.25-5,600= 351.25 x 12 = Kshs. 4,215.00

2009-2010-22 5 2009-1 5 2010-12months (Kshs 6,839+ (15 x 5,796)1,025.85= 7,864.85  
7,864.85-5,600 2,264.85 x 12 = Kshs. 27,178.20

2013-2015-1 5 2010-1 5 2015-24months (Kshs 10,911+ (15 x 7,523)1,309.32=12,220.32  
12,220.32-10,300= 2,264.85 x 24 = Kshs.46,087.68

2015-2017 1 5 2015-1 5 2017-24months (Kshs 12,221.10 + (15 x 12,221.10)1,833.17  
14,054.27 14,054-27-13,500-554-27 x 24 = Kshs.13.302.48

2017-2018-1 5 2017-1 5 2018-12months (Kshs 14,420.90+ (15 x  
14,420.90)1,730.51=16,151.41 16,151.41-13,500= 2,651.41 x 12 = Kshs.31,816.896

2018-2020-1 5 2018-2 3 2020-22months (Kshs 15,383.45+ (15 x 15,383.45)2,307.52=  
17,690.97 17,690.97-13,500-4,190.97 x 22 Kshs.92,201.2

6. Compensation - 12 months salary ..Kshs. 211,856.88"(Pages 9-10 of the Record of Appeal)

14. That when the suit came up for hearing at the lower Court the Appellant testified that;"I am Samuel Momanyi, I have sued the Respondent. I filed a written statement on 15 10 2020. I wish to adopt it. I have brought documents - exhibit 1 - 8, exhibit 11, 12 and '13"(See Page 165 Record of Appeal). In the case of Kenya Union of Commercial Food Allied Worker v Fralet Agencies (Employment and Labour Relations Claim 29 of2023) [2023] KEELRC 2208 (KLR) (22 September 2023) (Judgment), it was stated that;"The court found that the claim for public holidays was only in the reliefs and not supported by the witness statement. He who alleges must proof. In this case the claimant had burden to lay basis of the claim for at the least in the witness statement which was adopted as evidence in chief. The claims for public holidays and rest days was not pleaded to enable the respondent reply. The claims are disallowed."

14. On Underpayments- Kshs 333.759.58.-The Appellant pleaded, calculated and proved underpayments of total Kshs. 333,759.58 and particularised in the claim. Under his submissions dated 9 9 2022, the Appellant submitted on the Claim of Underpayments (Pages 137-138 of the Record of Appeal) as follows:



Underpayment- Kshs 333.759.58. The Claimant was employed as a night watchman. His salary was as follows: 2000-Kshs. 2,400 2005 - Kshs. 5,600 2011 Kshs. 10,300 2016-2020 - Kshs. 13,500. This is largely confirmed by the Claimant's staff employment history aforesaid. The Claimant was clearly being underpaid contrary to the Regulation of Wages (General) (Amendment) Orders 2000 Exhibit 8 – on pages 20 – 80 of Memorandum of Claim) (Pages 23-81 of the 2018. (Refer to claimant's Record of Appeal) The computation is as follows;

2000 – 2001 – 9 9 2000 – 5 6 2001 – 8 months (Kshs 3,008 + (15 x 3,008) 451.20 = 3,459.20  
3,459.20-2,400 = 1,059.2 x 8 = Kshs. 8,473.6

2001-2002 – 5 6 2001-7 6 200 – 12months (Kshs 3,668+ (15 x 3,668) 550.2 = 4,218.20  
4,218.20-2,400= 1,818.2 x 18 = Kshs. 21,818.4

2002 - 2004-7 6 2002-28 5 2004 – 24months (Kshs 3,925+ (15 x 3,925) 588.75-4,513-75  
4,513.75-2,400= 2,113.75x 24 = Kshs. 50,730.00

2004 - 2005 - 28 5 2004-20 5 2005-12months (Kshs 4,836+ (15 x 4,836)725-40= 5,561.40  
5,561.40-2,400= 3,161.40 x 12 = Kshs. 37,936.80

2005 – 2006 – 20 5 2005–20 5 2006–12months (Kshs 5,175+ (15x5,175)776.25- 5,951.25  
5,951.25-5,600= 351.25 x 12 = Kshs. 4,215.00

2009 - 2010 - 22 5 2009-1 5 2010-12months (Kshs 6,839+ (15 x 5,796)1,025.85= 7,864.85  
7,864.85-5,600= 2,264.85 x 12 = Kshs. 27,178.20

2013 - 2015 -1 5 2010-1 5 2015- 24months

(Kshs 10,911 + (15 x 7,523)1,309.32= 12,220.32 12,220.32-10,300-2,264.85 x 24 = Kshs.46,087.68

2015-2017 1 5 2015-1 5 2017-24months (Kshs 12,221.10 + (15 x 12,221.10)1,833.17-14,054-27  
14,054-27-13,500-554.27 x 24 = Kshs.13,302.48

2017-2018-1 5 2017-1 5 2018-12months (Kshs 14,420.90+ (15 x 14,420.90)1,730.51= 16,151.41  
16,151.41-13,500 2,651.41 x 12 = Kshs.31,816.896

2018-2020-1 5 2018-2 3 2020-22months (Kshs 15,383-45+ (15x15,383-45)2,307-52-17,690.97  
17,690.97-13,500= 4,190.97 x 22 = Kshs.92,201.2

On leave- The appellant to buttress his case relied on the matter of *Wanyonyi v Skyman Freighters Limited* (Appeal E079 of 2021) [2023] KEELRC 1261 (KLR) (27 April 2023) (Judgment), the court said; "A claim for underpayment once made by the employee, the burden of prove that the same was paid to the employee for the position held and based on the minimum wage or based on the written contract of service vests in the employer. The legal duty extends to the requirement that the employer should file such work records in court once suit is filed pursuant to Section 10(7) of the Act cited above" The appellant submitted that the Respondent did not discharge this burden employer must ensure the employee protected in law enjoys such annual leave with full pay or is paid in lieu thereof. Upon filing suit, the duty is upon the employer to submit work records and evidence that annual leave was allocated or paid for in terms of Section 10(6) and (7) of the Act. Without any proof that the appellant was allowed time off in annual leave, Section 28(2) allows him payment for 18 months of annual leave based on the last basic wage due at Kshs. 12,926 for 21 days and 11 days prorated total 23 days 14 and this is assessed at Ksh. 14,218.60." The Appellants calculations had already indicated that when he exited employment in 2020, his Gross Salary as per the 2018, Wages (General) (Amendment) Order, was; (Kshs 15,383.45+ (15 x 15,383.45)2,307.52= 17,690.97)The Appellant, during the hearing said on more than one occasion that " I did not go on leave, List of documents (Def) Page 10 –19)I did not sign the date; I did not go on leave"(Page 167 of the Record of Appeal)The Appellant was clear, and



categorical that he did not go on leave and he did not sign the leave application forms exhibited by the Respondent. Under his submissions dated 9 9 2022, the Appellant submitted on the Claim of Annual Leave (Pages 136 of the Record of Appeal) as follows: Annual leave= 126 days =Kshs. 85,557.58. From the documents annexed by the Respondent, the Claimant did not proceed on leave from the year 2000 2004, 2007, 2008 and 2014 So that is 21 days x 6 years which is totaling to 126 days (17,654-74 26 days = Kshs. 679.02) x 126 days = Kshs. 85,557.58. This is pursuant to Section 28 (1) (a) of the *akn ke act 2007 11 Employment act 2007*, the Act allows 21 days per year. In Kenya Union of Commercial Food Allied Worker v Fralet Agencies (Employment and Labour Relations Claim 29 of 2023) [2023] KEELRC 2208 (KLR) (22 September 2023) (Judgment), the court said;

“ Claim for leave arrears

The grievant's engagement having converted to contractual the court find he was entitled to payment in lieu for annual leave for the period proved as having been in employment relationship with the respondent that is, February 2014 to April 2017. The court awards statutory annual leave payment in lieu for 3 years thus 21 30x15000x 3 award of Kshs. 31,500 =”In Kenya Union of Commercial Food Allied Worker, *supra*, it was also said

“ Annual leave is a right secured under Section 28 of the Act and ..... when such employee was hired, his terms of service and related particulars. Where an employer fails to do so, it gets to the disadvantage of such employer to disprove allegations by an employee concerning their terms of service. The respondent in this particular case never produced any evidence to rebut the allegations by the claimant that he was hired by them in 2013 and not 2017. The Court will therefore believe the claimant that he was hired in 2013.

Section 74 of the *akn ke act 2007 11 Employment Act* confers responsibility on the employer to keep employee records. Failure by the respondent to keep up to date records of the claimant, worked to its disadvantage.”

14. On Public Holidays – Sept 2000 and March 2020-Kshs. 335,435.88. The common public holidays are: New year day, Good Friday, Easter Monday, Labour day, Makadara day, Huduma day, Mashujaa day, Eid - ul Fitr, Jamhuri day, Christmas day and boxing day, 2 Muslim holidays and Diwali making a total of 13 holidays per year, which makes a total of 247 days x Kshs. 679.02 = Kshs. 167,717.94 x 2 = Kshs. 335,435.88. It was not proved that the Appellant did not work during public holidays. The Respondent did not produce a muster roll or attendance register to show that the Appellant did not attend to work during public holidays
14. The Appellant also claims costs of the Appeal and Cross Appeal and interest at court rates from the date of filing of the appeal till payment in full.

## Decision

14. This being a first appellate court, it was held 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.”

14. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

On claims for leave and public holidays

14. The Respondent in the statement of response stated that the claims for leave and public holidays were time-barred and without merit, and produced as Appendix 2, payslips and cash vouchers, and Appendix 3, leave application forms. That the claimant had utilised all his leave days by time he absconded duties. That from 2004 to 2020 when the suit was filed is over 2010 hence the claim for leave accruals was time barred under section 90 of the *Kenya Employment Act 2007*. That the claimant did not work on public holidays and did not specify the days not worked. ( statement of response at pages 82-85 of ROA and The leave forms were at pages 104-114 of ROA)During cross-examination before the trial court, the appellant told the trial court that he worked 6pm to 6 am and on public holidays and had no evidence. The appellant told the court he filled the leave forms. That he did go on leave.(page 167 of ROA) strangely it is also recorded that the claimant told the court he did not sign the date and he did not go on leave. At page 5 of the judgment, the trial court stated that the claimant told the court he went on leave and filled the leave forms. The trial court held that the claim of leave was a lie. I cautioned myself that the trial court had benefit of seeing and hearing the witness(Selle) and concluded that I had no basis to interfere with the finding of the trial court on leave.
14. On public holidays, the trial court held as follows- ‘the decision of *Julius Arisi & 90 others v Research International East Africa Limited* [2019] eKLR Justice Maureen Onyango declined the request for annual leave, public holidays and overtime since the Claimant had not shown how he arrived at those figures. [See also the decision of *Boniface Muhatia v Uba Kenya Bank Limited* [2021] eKLR].

The Claimant also claimed service in his Memorandum of Claim. However, in his submissions at page 16, under the claims he submitted were proved, the prayer was not amongst those the Claimant deemed pleaded and proved, and for this reason i.e., the Claimant’s own cognisance, I find the prayer has not been proved.” The claimant in the witness statement did not give details of the particular holidays he worked. In the matter of *Wafula v Gurdit Singh Shop* (Cause 47 of 2018) [2022] KEELRC 15 (KLR) (9 May 2022) (Judgment), the court stated that it was the responsibility of the employer to keep record of employment and failing to do places burden on the employer to disprove the allegations.

In the written submission of the appellant before the lower court (page 136) on the public holidays the appellant submitted- ‘Public Holidays - between Sept 2000 and March 2020- Kshs. 335,435.88The common public holidays are: New year day, Good Friday Easter Monday, Labour day, Makadara day, Huduma day. Mashujaa day, Eid – ul Fitr, Jamhuri day, Christmas day and boxing day, 2 Muslim holidays and Diwali making a total of 13 holidays per year, which makes a total of 247 days x Kshs. 679.02 = Kshs. 167,717.94 x 2 = Kshs. 335,435.” The court finds that the figure sought in the submissions was different from the claim. The court finds on balance of probabilities the appellant did not prove his claim on public holidays so as to pass the burden on the respondent. The court found no basis to fault the decision of the trial court on the same.



14. On the under payment claim the appellant submitted -The Claimant was clearly being underpaid contrary to the Regulation of Wages (General) (Amendment) Orders 2000 Exhibit 8 – on pages 20 – 80 of Memorandum of Claim) (Pages 23-81 of the 2018. (Refer to claimant's Record of Appeal)The computation is as follows;

2000 – 2001 – 9 9 2000 – 5 6 2001 – 8 months (Kshs 3,008 + (15 x 3,008) 451.20 = 3,459.20  
3,459.20-2,400 = 1,059.2 x 8 = Kshs. 8,473.6

2001-2002 – 5 6 2001-7 6 200 – 12months (Kshs 3,668+ (15 x 3,668) 550.2 = 4,218.20  
4,218.20-2,400= 1,818.2 x 18 = Kshs. 21,818.4

2002 - 2004-7 6 2002-28 5 2004 – 24months (Kshs 3,925+ (15 x 3,925) 588.75-4,513-75  
4,513.75-2,400= 2,113.75x 24 = Kshs. 50,730.00

2004 - 2005 - 28 5 2004-20 5 2005-12months (Kshs 4,836+ (15 x 4,836)725-40= 5,561.40  
5,561.40-2,400= 3,161.40 x 12 = Kshs. 37,936.80

2005 – 2006 – 20 5 2005–20 5 2006–12months (Kshs 5,175+ (15x5,175)776.25- 5,951.25  
5,951.25-5,600= 351.25 x 12 = Kshs. 4,215.00

2009 - 2010 - 22 5 2009-1 5 2010-12months (Kshs 6,839+ (15 x 5,796)1,025.85= 7,864.85  
7,864.85-5,600= 2,264.85 x 12 = Kshs. 27,178.20

2013 - 2015 -1 5 2010-1 5 2015- 24months

(Kshs 10,911 + (15 x 7,523)1,309.32= 12,220.32 12,220.32-10,300-2,264.85 x 24 = Kshs.46,087.68

2015-2017 1 5 2015-1 5 2017-24months (Kshs 12,221.10 + (15 x 12,221.10)1,833.17-14,054-27  
14,054-27-13,500-554.27 x 24 = Kshs.13,302.48

2017-2018-1 5 2017-1 5 2018-12months (Kshs 14,420.90+ (15 x 14,420.90)1,730.51= 16,151.41  
16,151.41-13,500 2,651.41 x 12 = Kshs.31,816.896

2018-2020-1 5 2018-2 3 2020-22 months (Kshs 15,383-45+ (15x15,383-45)2,307-52-17,690.97  
17,690.97-13,500= 4,190.97 x 22 = Kshs.92,201.2

14. In the matter of Wanyonyi v Skyman Freighters Limited (Appeal E079 of 2021) [2023] KEELRC 1261 (KLR) (27 April 2023) (Judgment), the court said;"A claim for underpayment once made by the employee, the burden of prove that the same was paid to the employee for the position held and based on the minimum wage or based on the written contract of service vests in the employer. The legal duty extends to the requirement that the employer should file such work records in court once suit is filed pursuant to Section 10(7) of the Act cited above" In written response the Respondent on reliefs did not specifically deny the claim of underpayment of wages (paragraph 12 at pages 92-93 of ROA) . The respondent did not cross-examine the appellant on the issue. The trial court appears not have addressed the issue of underpayment of salary. The claim of underpayment having not been denied in the response and being supported by the relevant minimum wages is allowed as pleaded in the witness statement of the claimant (page 10 of ROA). An employer ought to comply with regulated wages under section 26 of the *akn ke act 2007 11 Employment Act* –'26. Basic minimum conditions of employment-

- (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
- (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Employment and Labour Relations



Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.” Regulation 3 of The Regulation Of Wages (General) Order, 1982 states- ‘3. Basic minimum wage

- (1) No person to whom this Order applies shall be employed at a basic minimum wage less favourable to him than that which is applicable to him under the First or Second Schedule, having regard to his age and to the circumstances of his employment by reference to columns 2, 3 and 4 thereof and to the nature of his occupation, as listed in column 1 thereof to be determined by reference to the definitions contained in the Third Schedule.” The Court for the foregoing reason and law finds basis to fault the trial court and sets aside its decision and awards the underpayment as sought being a continuing injury filed within 12 months of the termination. The underpayment is awarded as back pay for the sum of Kshs. 333,759.58 as sought in the claim.

## **Conclusion**

14. In conclusion, the appeal is held as successful only on the issue of underpayment of wages. The Judgment and Decree of the Hon. Opande S.A (PM) delivered on 20<sup>th</sup> September, 2023, Nairobi in MCELRC E1475 of 2020 is set aside and substituted as follows-

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

- a. The Claimant’s termination was unlawful and unfair
  - b. The Claimant is awarded one month in lieu of notice at Ksh. 17, 412
  - c. The Claimant is awarded six months compensation at Ksh. 104, 472.20
  - d. The claimant is awarded underpayment backpay for Kshs. 333759.58
  - e. The Claimant’s prayers for , service, annual leave and public holidays are dismissed.
  - f. The Claimant is awarded the costs of the suit
  - g. Interest is awarded on items (b), (c) (d) and (f) above at court rates from the date of Judgment.
14. The appellant is awarded costs of the appeal.
  14. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant – Kataghai h b Rakoro

Respondent - Asule h b Kwamboka

