



**Kitema v Perfect Scan Limited (Appeal E039 of 2025)  
[2025] KEELRC 2682 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2682 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E039 OF 2025  
M MBARÚ, J  
OCTOBER 2, 2025**

**BETWEEN**

**JOHN KILONZO KITEMA ..... APPELLANT**

**AND**

**PERFECT SCAN LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. G. Sogomo delivered  
on 28 February 2025 in Mombasa CMELRC No. E056 of 2024)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 28 February 2025 in Mombasa CMELRC No. E056 of 20254.
2. The appellant filed his claim before the trial court because on 21 June 2016, he was employed by the respondent in its premises in Mombasa as a night guard. He worked until 25 December 2023, when his employment was unprocedurally terminated without due process or payment of his terminal dues. At the time, he was earning a basic wage of Ksh. 6,900 per month, contrary to the minimum wage of Ksh. 16,959. There was no house allowance paid or payment of statutory dues. He claimed the following:
  - a. Notice pay Ksh. 6,900;
  - b. Underpayments from July 2016 to June 2022 for 72 months Ksh.593,420;
  - c. Underpayments July 2022 to December 2023 for 18 months Ksh. 181,062;
  - d. House allowance for 90 months at 15% Ksh.93,150;
  - e. Unpaid leave for 6 years Ksh.102,526;
  - f. 12 months compensation Ksh.82,800;



- g. Unpaid overtime for 90 months Ksh.254,967;
  - h. Unpaid NHIF for 90 months Ksh.45,000;
  - i. Service pay for 6 years Ksh. 20,700;
  - j. Costs of the suit.
- 3 In response, the respondent admitted that the appellant had been employed as a security guard since 17 June 2016. He resigned from his employment through a letter dated 30 November 2023, which was submitted on 4 December 2023. He stated that his doctor had advised him to take a rest from work and promised to return to work by 25 December 2023. On 19 January 2024, parties agreed to tabulate terminal dues at Ksh. 46,054 to be paid in monthly instalments of Ksh. 10,000. The first instalment was paid on 24 January 2024. There was no termination of employment; instead, it was a resignation. The claims for underpayment are time-barred under section 90 of the *Employment Act*. The claim for notice pay and compensation is without merit. Statutory payments are not due to the appellant.
  - 4 In the counterclaim, the respondent pleaded that the appellant failed to issue a one-month notice and hence should pay Ksh 15. 141.95.
  - 5 The learned magistrate heard the parties and held that a discharge voucher had been executed by the appellant, agreeing to be paid Ksh 46. 054 in instalments. This settled the claim, and hence, it was the only entitlement. A sum of Ksh.10, 000 had already been paid. The claim was allowed to this extent, and the counterclaim dismissed.
  6. Aggrieved by the judgment, the appellant argues that the learned magistrate erred in finding that the appellant resigned from his employment through notice dated 30 November 2023, which was not true. No expert witness was called to authenticate the resignation notice. The trial court hence erred in failing to find that there was unfair termination of employment devoid of due process in the absence of proof of resignation.
  7. The appeal is that the trial court failed to address the claim for underpayments of a night guard paid KSh. 6,900 per month, contrary to the law, or to assess the unpaid leave, service pay or statutory payments. The appeal is that the judgment should be set aside and the claims allowed with costs.
  8. The appellant submitted that employment and wages paid are not disputed. The alleged resignation letter by the appellant was denied, and the trial court did not call any expert witness to authenticate it. The respondent did not accept the resignation.
  9. The appellant submitted that the claim was proved to the required standard as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR that under section 47(5) of the *Employment Act* (the Act), the employee bears the burden of proof while the employer must justify the reasons for termination of employment under section 43 of the Act. In this case, the appellant did not resign as alleged but suffered unfair termination of his employment. The allegations in the resignation letter were unsubstantiated. The claims made should have been assessed on merit.
  10. The respondent submitted that employment was terminated through resignation. He who alleges must prove, and in this case, the appellant failed to prove his case, as required under section 47(5) of the Act. In *Josephine M. Ndungu & Others v Plan International Inc.* [2019] eKLR, the court held that the burden of proving unfair termination of employment lies with the employee. This threshold was not met. The respondent was satisfied with the resignation, and the terminal dues were calculated, resulting in the discharge voucher being signed by the appellant. The learned magistrate correctly assessed the



matter and arrived at a proper conclusion. The appeal is without merit and should be dismissed with costs.

### **Determination**

11. This is a first appeal. The court must review, reassess and make its conclusions.
12. The hearing of the matter before the trial court was through written submissions. Through a consent on 19 February 2025, the parties applied Rule 59 of the ELRC Rules and filed written submissions.
13. Save for the records, the written submissions, the trial court had no chance to see the witnesses.

### **How did the employment of the appellant terminate?**

14. The appellant asserts that the respondent unprocedurally terminated his employment on 25 December 2023. The respondent claims that, through a notice dated 30 November 2023, the appellant tendered his resignation, effective 25 December 2025. He executed a discharge voucher and agreed to be paid terminal dues at Ksh. 46,054 and has since been paid Ksh. 10,000 through cheque No. 001100 dated 24 January 2024.
15. The respondent filed a letter dated 30 November 2023. There is the discharge voucher dated 19 January 2024.
16. Where the appellant disputed the letter of resignation, there is no reply to the response attaching these records. No evidence was called to challenge the response, the documents, or the requirement to call expert witnesses to authenticate the resignation letters.
17. At the point of taking consent to file written submissions on the claim, the records filed were not challenged.
18. The fact that the discharge voucher was not challenged also adds to the credibility of the resignation letter. The appellant accepted the tabulation of his terminal dues and has since received partial payment. This is not challenged.

### **Employment terminated through resignation.**

19. The appellant gave notice of one month. The claim for notice pay and compensation is not justified. The counterclaim seeking payment in lieu of notice is without merit, as the registration notice was submitted to the administrator on 4 December 2023. The appellant worked until 25 December 2025.
20. The importance of a discharge voucher is discussed extensively in the case of *Star Publications Ltd v Simiyu* [2023] KECA 23 (KLR). A significant reference was made to the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, and the court held that;

We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.

Whilst section 119 of the *Evidence Act* entitles a court to presume certain facts; what is involved is no more than presumption of fact, not presumption of law. The court cannot shut its mind to the fact that the presumption of fact can be rebutted. To rigidly presume a state of facts in all and sundry cases without willing to consider whether the presumption



has been rebutted is erroneous. We find the suggestion that the court treats all cases involving discharge vouchers the same way a bit alarming. The industrial court is a court of law and in each case where the validity of a discharge voucher is in issue, evidence has to be led to support or disprove its validity. The court cannot abdicate its responsibility by adopting a general presumption and applying it rigidly in each and every case without considering whether the presumption has been rebutted or not. That may suggest a firm and closed mind-set which a court of law cannot afford to have.

21. Indeed, under Section 35(4) of the Act, where an employee is entitled to terminal dues prescribed by law, a discharge voucher cannot be used to negate such rights.
22. The trial court should have weighed the discharge voucher in relation to the claims and the lawfulness under the Act.
23. In the case of *Musungu v Syka Manpower Services Limited* [2025] KEELRC 2307 (KLR), the court held that the application of the discharge voucher does not negate the employee's rights under section 35(4) of the Act. The lawfulness and fairness of the employment termination in question must be examined despite the discharge voucher; the employee cannot be prevented from accessing the court, as held in *Nation Media Group Limited v Munene* [2025] KECA 114 (KLR) and the case of *Kiget v Majani Mingi Group of Companies* [2023] KECA 1269 (KLR).
24. Regarding the claim for underpayments from July 2016 to June 2022, these claims, which are subject to the provisions of section 90 of the Act as continuous injuries, should have been addressed within 12 months from the date of cessation, as held in *Corrugated Sheets Limited v Ngao* [2025] KEELRC 2322 (KLR).
25. The appellant filed his claim in January 2024. Claims dating back to June 2022 are time-barred.
26. Regarding the claim for underpayments from July 2022 to December 2023, based on the payment statement, the appellant's last recorded basic wage was Ksh. 6,900 per month.
27. In the counterclaim, the respondent claimed notice pay of Ksh. 15,141.95.
28. A night security guard working in Mombasa in December 2022 earned a basic wage of Ksh 16,959 per month. The house allowance owed is Ksh 2,543.85, making the total gross wage Ksh 19,502.85.
29. In this case, the wage is paid at Ksh 6,900 per month, resulting in an underpayment of Ksh 12,602.85.
30. Under section 90 of the Act, referring back 12 months from December 2022 to December 2023, the underpayment of wages amounts to Ksh. 151,234.20.

**This is a right secured through the Wage Orders.**

31. On the claim for unpaid leave days, no evidence was submitted regarding how the leave days were allocated. Under section 28(4) of the Act, the appellant is entitled to up to 33 leave days, all calculated based on the basic wage of Ksh. 16,959. The total amount due is Ksh. 18,654.90.
32. On the claim for house allowances, this is factored into the assessed underpayments.
33. On the claim for overtime, the pleadings are devoid of particulars on how the work hours were utilised and how overtime accrued.
34. On the claim for unremitted statutory dues, these are not allocated to the employee but to the statutory body.



35. Regarding the claim for service pay, as per the Regulation of Wages (Protective Security Services) Order, 1998, the appellant, being a night security guard, is entitled to his service pay for the years he worked. This is in addition to the requirements for payment of statutory dues, unlike employees in other sectors, as held in *Hatari Security Guards Limited v Oduor* [2025] KEELRC 1112 (KLR).

36. From June 2016 to December 2023, the appellant worked for a total of 7 years.

37. The last gross wage due at Ksh. 19,502.85 for 7 years, with 15 days each, amounts to Ksh. 68,257 in service pay.

On the claim for costs, the appeal being successful, costs are due.

38. Accordingly, the appeal has merit, and the judgment in Mombasa CMELRC E056 of 2024 is hereby set aside; the following orders are issued.

- a. Employment terminated through resignation with effect from 25 December 2023;
- b. Underpayments Ksh. 151,234.20;
- c. Leave pay Ksh. 18,654.90;
- d. Service pay Ksh. 68,257;
- e. The dues above (b), (c), and (d) shall be paid less what is paid under the discharge voucher at Ksh. 46,054.
- f. Costs of the appeal and lower court proceedings are awarded.

**DELIVERED IN OPEN COURT AT MOMBASA, THIS 2<sup>ND</sup> DAY OF OCTOBER 2025.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

