

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. E161 OF 2023

ELIZABETH AKHONYA MMBUKHA

APPELLANT

VERSUS

ALBERT ADOGO OSOTSITA RELIANCE CLEANING
SERVICES.....

RESPONDENT

(Being an appeal against the judgment of Honourable Lesootia Saitabau, (PM), in Nairobi EELRC No. E619 of 2020 dated 3rd August 2023)

JUDGMENT

1. Through the Memorandum of Appeal dated 1st August 2023, the Appellant appeals against the whole of the judgment of Honourable Lesootia Saitabau, PM.

2. The Appeal was based on the grounds that

- i. The Honourable Magistrate erred in fact and in law, and totally misapprehended the Appellant's suit to the Claim and thereby reached findings that were not based on the evidence adduced in the proceedings and the applicable law.*

ii. The Honourable Magistrate erred in fact and in law, in dismissing the Appellant's Claim, when the Appellant had discharged her burden of proof to the requisite standard.

iii. The Honourable Magistrate erred in fact and in law when he failed to find and hold that the Appellant having demonstrated that she was paid her wages principally in cash, and occasionally by Mpesa, the burden then shifted to the Respondent to demonstrate that the Appellant was not on his payroll.

iv. The Honourable Magistrate erred in law and in fact, and purported to apply the law in a manner that defeats the Legislature's intention in enacting Section 10(7) of the Employment Act, and he also allowed the Respondent to benefit from his procedural Commission to issue the Appellant with documents to show the employment relationship.

v. The Honourable Magistrate erred in law and in fact, and totally misguided himself when he attempted to suggest that the Appellant had sued the wrong party, contrary to the evidence that was adduced.

vi. The Honourable Magistrate erred in law in arriving at a decision that had no legal basis and which amounted to a travesty of justice against the Appellant.

3. The Appellant prayed that the Appeal be allowed with costs, the Honourable Court's judgment and Decree in MCELRC NO. E619 of 2020 be set aside and the Appellant's claim against the Respondent be allowed as prayed with costs.

4. The Appeal was disposed of by written submissions.

APPELLANTS SUBMISSIONS

5. The Appellant's Advocates Khayega Chival & Co Advocates filed written submissions dated 18th July 2025.

6. On the issue whether there was an employment relationship between the parties, counsel submitted that it was undisputed that the Appellant provided cleaning services for the Respondent as it could be deduced from the Appellant's pleadings, paragraph 4 of the Respondent's statement dated 23rd April, 2021 and paragraph 1 of the judgment. That what was in dispute was whether the Appellant was employed as a casual employee as alleged by the Respondent or under a contract of service as alleged by the Appellant.

7. Counsel submitted that the Appellant was employed under a contract of service and the contract was oral. That section 8 of the Act permitted oral contracts. Counsel also relied on the case of **Wanyoike v TransCentury Plc (Employment and Labour Relations Cause E961 of 2021/2025) KEELRC 153(KLR)** to submit that a contract of service can be oral and the fact that the employer has not reduced the contract into

writing did not render it non-existent and without force of law.

That the same could still be discerned from other evidence.

8. Counsel submitted that the Appellant pleaded that she was employed under an oral contract from February 2014 to June 2020 which was an aggregate period of 6 years and 3 months. Counsel submitted that even if the Respondent alleged that the oral agreement was for casual employment section 37 of the Employment Act provided for conversion of casual employment to term contract.

9. Counsel submitted that the Appellant testified that her salary was Kshs. 7,500/= per month which was later increased to Kshs. 8,000/= and was payable mostly in cash or occasionally via Mpesa when the Respondent was away from the work station. That the trial court noted the Appellant's testimony on the mode of payment at paragraph 7 of the judgment only to later depart from the same and hold at paragraph 16 that no evidence was led that the Appellant was paid in cash.

10. Counsel relied on Section 17 of the Employment Act 2007 to submit that cash is one of the recognized methods of paying salary and the Appellant could not have adduced any

documents or receipts to prove payment of wages in cash. That she could only rely on her evidence since she could not call co-workers who were under employ of the Respondent as they could not testify against their employer.

11. Counsel submitted that what was available as proof of wages was the Appellant's Mpesa statement for the years 2015-2020 for the few times the Respondent opted to pay via Mpesa while he was away from work station. This was illustrated as Claimant's evidence that the payments corroborate the Appellant's evidence that she was paid a salary of Kshs 7,500/= which was increased to Kshs 8,000/= with extra amount to account for transaction charges.

12. Counsel submitted that this being an employment issue which was a civil claim, what was required of the Appellant was to prove the existence of the employment relationship on a balance of probability and not beyond reasonable doubt.

13. Counsel submitted that the Appellant efficiently discharged the burden of proof and proved on a balance of probability that she worked as a cleaner for the Respondent and received wages for work and that such evidence was sufficient enough

to shift the burden of proof to the Respondent to prove the contrary.

14. Counsel submitted that the Respondent tried to rebut the Appellant's testimony by testifying that she was engaged as a casual employee which was an afterthought which was not pleaded in the Response to the Memorandum of Claim.

15. Counsel submitted that the assent only arose during the Respondent's oral testimony in variance with paragraph 3 of the Response to the Memorandum of Claim which expressly denied any employment relationship between the parties, whether casual or permanent.

16. Counsel submitted that the Respondent also denied at paragraph 4 of the Response of the Statement of Claim that the sums he paid vide Mpesa to the Claimant were her wages but did not plead any alternative purpose for which he sent her the money. The Respondent's testimony that the sums were for assistance in kind to the Appellant was therefore an afterthought and not pleaded and furthermore the Respondent did not adduce any iota of evidence of the said requests for assistance from the Appellant.

17. Counsel relied on the case of **Daniel Otieno Migore v South Nyanza Sugar Co Ltd [2018] eKLR** to submit that parties are bound by their pleadings and thus, all evidence led by the Respondent to the effect of proving the existence of a casual employment relationship and that the testimonies were advanced for other purposes other than the issues must thus be disregarded for not being pleaded. Counsel submitted that the trial court relied on the case of **Nyakundi Nyaberi v Mwakikar Agencies Limited [2017] eKLR** to arrive at a conclusion that the Appellant had not provided documents required to prove the employment relationship and issue a notice to produce the documents. That precedent above was inapplicable where a party has denied the existence of the employment relationship. There were no documents to be produced by the Respondent in the first place for denying the employment relationship.

18. On the issue of whether the Respondent terminated the services of the Appellant unfairly for an unlawful reason, counsel submitted that the Respondent verbally sent the Appellant on a compulsory leave period and at the end of her

compulsory leave, the Respondent informed her that her employment had been terminated.

19. Counsel relied on section 45 of the Employment Act to submit that the Respondent unlawfully and unfairly terminated the employment of the Appellant in that he did not notify the Appellant of the cause of termination, did not follow any procedure in terminating the employment, did not offer an audience to the Appellant, acted in bad faith and he dismissed the Appellant without a cause shown. Counsel relied on section 47(5) of the Employment Act to submit that the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer and no such justification had been tendered by the Respondent in response to the claim for unfair and unlawful termination of employment.

20. On the issue whether the Appellant was entitled to prayers sought in the claim, counsel relied on section 10(7) of the Employment Act to submit that the burden of disproving the items claimed for by the employee (the Appellant) upon the employer (the Respondent) where no written contract was issued. That no evidence was adduced by the Respondent to

disapprove the items prayed for and to discharge the above burden.

21. On the prayer for damages for unlawful termination Counsel relied on section 49(1) (c) of the Employment Act, on compensation not exceeding 12 months salary. Counsel further relied on the Regulation of Wages (General) (Amendment) Order, 2018, submitted that as at 2020, the year of dismissal, the minimum wage for a cleaner at Nairobi was Kenya Shillings 13,472.90 and the Appellant was entitled to the maximum compensation of Kshs. 161,674.80.

22. On the claim for salary for months of June and July, 2020 Counsel submitted that the Appellant had not been paid for the months of June and July 2020, a period within which she worked and was on compulsory leave and that the Respondent neither refuted nor tendered any proof of payment of the salary arrears hence the Appellant should be awarded the salary for the months of June and July, 2020 for the sum of Kshs.27,144.

23. On claim for underpayments over the years in the sum of Kshs.186,159.00/= counsel submitted that the Appellant's starting salary was Kshs. 7,500 per month in February 2014

which eventually increased to Kshs.8,000 per month in the year 2016 which were below the minimum wage under the applicable Regulation of Wages (Amendment Order) for the years 2015 to 2020. That the same could be ascertained from the mpesa payments schedule.

24. Counsel relied on **Section 48(a) and (3) of the Labour Institutions Act** to submit that the Appellant be awarded the sum of Kshs. 186,059 as a total difference between the actual salary that was paid and the salary that ought to have been paid under the applicable Wages Regulation Order at the time.

25. On the prayer for unpaid leave counsel relied on Section 28 of the Employment Act, 2007 to submit that for the whole employment period the appellant did not get leave save for the compulsory leave before termination of her employment hence the Appellant ought to be awarded the sum of Kshs.57,004.08 as a just compensation for her unpaid leave days.

26. On the claim for service pay counsel relied on section 35(5) of the Employment Act to submit that the Appellant was not a

member of any pension scheme and as such she was entitled to a severance pay of Kshs. 40,717/20.

27. On the claim for one Month's salary in lieu of notice counsel submitted that the Appellant was summarily dismissed from employment without notice and as such was entitled to one month's payment in lieu of notice under section 36 of the Act for the sum of Kshs. 13,752/00.

28. Counsel relied on Section 36 of the Employment Act to submit that the Appellant had worked for the Respondent for 6 years and was entitled to a certificate of service.

RESPONDENT'S SUBMISSIONS

29. The Respondent's Advocates S.J. Njoroge & Company Advocates filed written submissions dated 23rd July 2025.

30. On the issue whether the trial court erred in law and fact in failing to shift the burden of proof to the Respondent, counsel relied on section 107 (1) (2) of the Evidence Act to submit that it was trite law that he who alleges must prove and the

Appellant's failure to prove her case at the trial court was not the court's error.

31. Counsel submitted that the Appellant was required to prove that there was an employment relationship between her and the Respondent, the trial court reasonably found that there was no such contract between the parties. Counsel submitted that the Mpesa records that were produced did not indicate the purpose of the payments and there was no short message services (SMS) or any written proof that the payments were in respect of the alleged employment relationship.

32. Counsel submitted that the trial court relied on the facts and evidence given in court to support its determination and therefore the judgment was well reasoned and all factors considered thereon. Counsel further submitted that the Appellant in the memorandum of appeal was asking this Honourable Court to set aside the orders of judgment without specific prayers or the specific awards and/or a re-trial as an alternative and therefore the prayers prayed for as prayed would create a limbo.

33. Counsel relied on the case of **Casmir Nyakundi Nyaberi vs**

Mwakikar Agencies Limited (2016) eKLR in which the trial court relied on in arriving at its finding, to submit that it was the responsibility of the employer to document the employment relationship and in certain respects the burden of proving or disapproving a term of employment shifts to the employer this however does not relieve the claimant from the burden of proving their case.

34. Counsel submitted that the Appellant failed to lead evidence that she received monthly wages (in cash) other than the mpesa payment which were only made at least once in every year of alleged service

35. Counsel submitted that the Appellant failed to name the persons she named as her colleagues and or co workers. Since a litigant alleges, the burden of proof of such allegations to be true, shifts to him or her, which the trial court found out that the appellant failed to do and her intention was to use the Honorable court to raise a claim against the respondent. The claim was therefore incompetent, fictitious, fraudulent,

unavailable, bad in law and incurably defective and the trial court was justified to dismiss it.

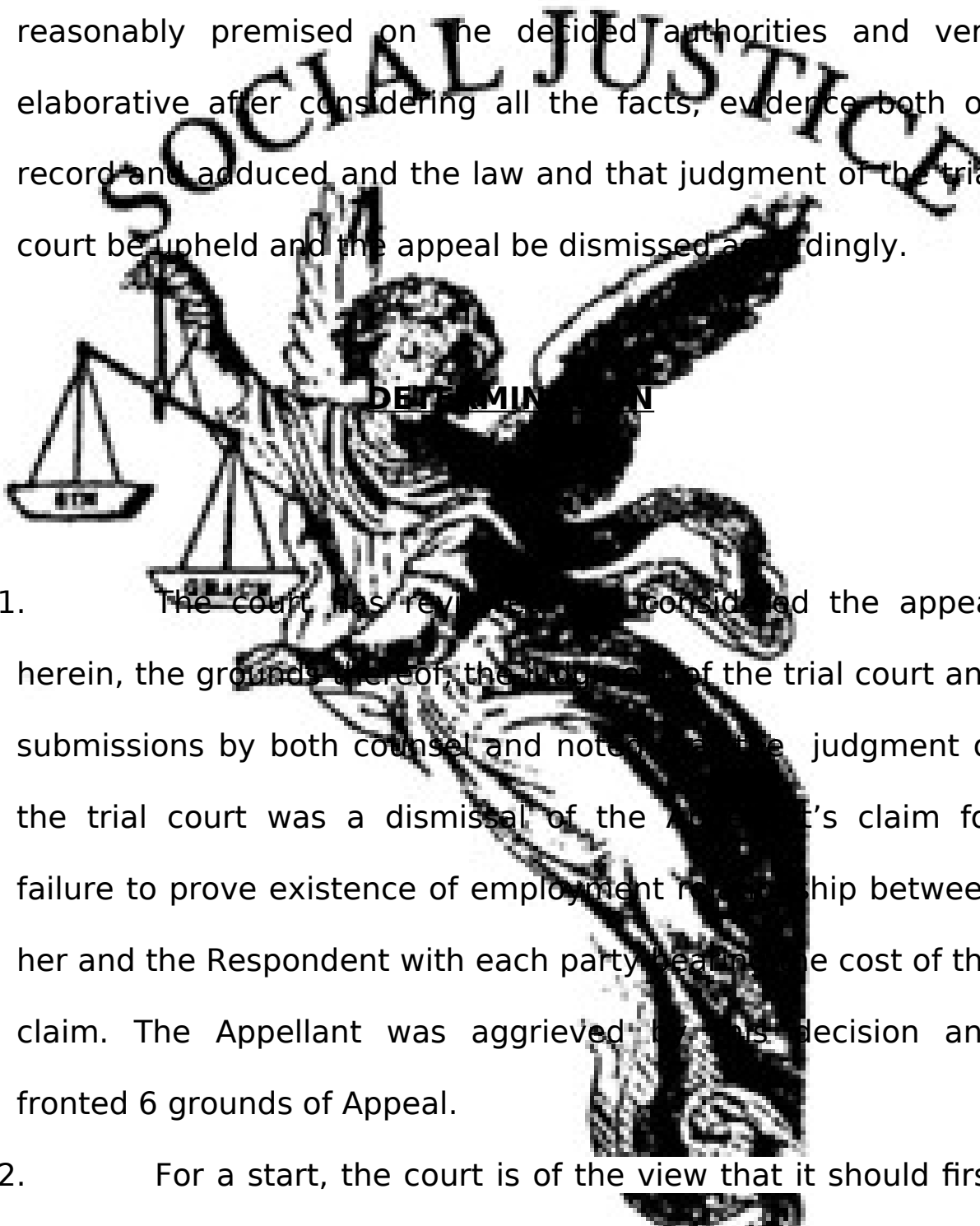
36. Counsel submitted that the Appellant failed to compel the Respondent to produce documents showing their engagement and the terms thereof if indeed she wanted the same from the Respondent or his cleaning services. It was also submitted that the Appellant was unable to identify documents if there were such.

37. Counsel submitted that the Appellant indeed found out that the Appellant was never employed by the Respondent under a contract as pleaded and alleged.

38. Counsel submitted that the Appellate court was a court of record and one's word against another without corroboration from an independent source cannot justify a finding not proven on a balance of probability.

39. Counsel relied on the Case of **Samuel Wainyabu Ndirangu vs 2NK Sacco Society Limited (2019)** eLR and section 2 of the Employment Act on definition of an employee as a person employed for wages or salary which includes an apprentice and indentured learner.

40. Counsel submitted that the judgment of the lower court was reasonably premised on the decided authorities and very elaborative after considering all the facts, evidence both on record and adduced and the law and that judgment of the trial court be upheld and the appeal be dismissed accordingly.



41. The court has reviewed and considered the appeal herein, the grounds thereof, the judgment of the trial court and submissions by both counsel and notes that the judgment of the trial court was a dismissal of the Appellant's claim for failure to prove existence of employment relationship between her and the Respondent with each party bearing the cost of the claim. The Appellant was aggrieved by this decision and fronted 6 grounds of Appeal.

42. For a start, the court is of the view that it should first determine if the trial court erred in finding that there was no employment relationship between the Appellant and the

Respondent as this would guide the court on the other issues pleaded by the appellant before the trial court.

43. The Appellant alleged that she was employed by the Respondent as a cleaner from 2014 to 2020 at a starting salary of Kshs 7,500/= which was enhanced to Kshs 8,000/=. That in June 2020 she was paid her salary arrears for the month of April and May of 15,000/= vide Mpesa and sent on compulsory leave only for her to resume at the end of July and be notified that her services were terminated with effect from 31st July, 2020.

44. The Appellant produced Mpesa statement for the six years which showed she received money from the Respondent almost once or so every year for the six years she claims she worked for the Respondent. The Appellant did not produce any other evidence as she claimed the co-workers who were still employed by the Respondent could not testify against their employer. She maintained that her contract of employment was oral and not in writing.

45. The Respondent on the other hand maintained that he engaged the Appellant on casual basis on need basis and the

money sent to her was to assist her in rent payments out of kindness. He denied any employment relationship with the Appellant. The trial court held that the Appellant did not prove existence of the employment relationship and dismissed the claim.

46. This court is awake to **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya** which provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

47. This was the position in **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court of Appeal held that:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is capture

48. The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in

law and the court must always satisfy itself on this account before proceeding any further.

49. This court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. It does not however release the Claimant from the duty of proving their case. Even in cases where an employment contract is oral in nature, the Claimant must still add some evidence whether documentary or *viva voce* to corroborate their word. More importantly, where an employee alleges that the employer has in its possession some documents which would support the case of the employee, that employee is obliged to serve a production notice.

50. The burden of proof in civil cases is on a balance of probability. Lord Denning J. in **Miller vs Minister of Pensions (1947) 2 ALL ER 372**, discussing that burden of proof held that that degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case.

51. Further in the case of **Transport Workers Union v Euro Petroleum Products & Another [2019] eKLR**, the court stated that -

The Respondents on their part did not produce any documents to prove that the grievants were neither their employees nor engaged on casual basis. However, the Claimant ought to have at the least established that there was an employment relationship between the grievants and the Respondent(s) before the respondent would be called upon to produce records.

52. This court therefore is tasked to find if the Appellant proved on a balance of probability that there existed an employment relationship. This court notes the Mpesa messages sent almost once every year for the six years the Appellant claims to have worked for the Respondent. The Appellant alleged that she would be paid in cash and by Mpesa when the Respondent was away.

53. The court appreciates that the law recognizes oral contracts under section 8 of the Employment Act and it is the duty of the employer to reduce such contracts in tot writing.

54. The Respondent alleged that the amounts sent were to assist the Appellant out of kindness for her rent. The Appellant alleged she was paid in cash which is accepted means of payment under section 17 of the Act. It is almost impossible to

prove cash payments but the Mpesa messages were attached. This court finds it curious and suspicious how for 6 years the Respondent could be seen sending money to the Appellant which corresponds to the Appellant's assertions that she used to be paid Kshs 7,500/= which was enhanced to Kshs 8,000/= per month around 2016.

55. The trial court expressed that the Appellant should have called the co-workers but the court appreciates that it may have been difficult for a serving employee would be willing to testify against their employer without fear of losing their job as well. It is also stretching overboard to expect the Appellant who was engaged orally to require the Respondent produce documents. This court therefore finds and holds that the Appellant proved at the trial reasonably proved the existence of employment relationship between herself and the Respondent.

56. The Respondent's assertion that the Appellant was hired on casual basis was also defeated by the law which under section 37 converts a casual employee to term employee after working for a continuous period of 3 months. Through this provision

then the Appellant became the Respondent's employee.

Section 37(1) of the Employment Act which provides as follows:

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(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

57. The Court in the case of **Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others [2017] eKLR** defined the different engagements as follows: -

"The Employment Act recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment...The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer."

58. The Appellant who worked for at least six years for the Respondent without any written contract and could not be said to be a casual employee unless the Respondent could illustrate she was on piece rate engagement which was recognized by the Act. The casual engagement then converted to term

contract under the above provision. The trial court therefore erred in finding that there was no employment relationship between the Appellant and the Respondent.

59. The court after finding there existed employment relationship between the parties proceeds to determine if the Appellant was unfairly terminated and the remedies available.

60. The Appellant alleged that she was sent on compulsory leave in June 2020. She was paid her salary dues for the month of April and May and on resuming work at the end of July 2020 she was advised that her services were never needed with effect from 31st March 2020. The Respondent apart from denying employment relationship did not address the issue of unfairness of the Appellant's termination. The Court however having established that the Appellant was an employee of the Respondent, she was entitled to protections under the Employment Act. She could only be terminated with notice and with a fair and valid reason under section 43 of the Act. Failure to align a termination to the provisions in the Act leads to the conclusion that the termination is unfair within the meaning of section 45 of the Act.

61. The Respondent was bound to give the Appellant a fair hearing before termination as required under section 41 of the Act. Since the Respondent never illustrated to this court that he had a reason to terminate the Appellant or that a fair procedure was followed when terminating the Appellant hence the termination was unfair.

62. Section 47(5) of the Act places the legal burden of proof on the employee to show that a termination which is unfair has occurred, the evidentiary burden then shifts to the employer to justify the grounds for termination. Since the Appellant's engagement was oral, and she illustrated that she was told her services were no longer needed then she discharged her burden and it was upon the Respondent to justify the grounds.

63. On the remedies available to the Court having found that the appellant was unfairly terminated, she is entitled to damages for unfair termination provided for under section 49 of the Act. Taking in to account the provisions under section 49(4) such as the period of service and nature of termination which in this case the Appellant had served for

around 6 years and nature and circumstances of her termination, the Court awards her 3 months' salary as compensation for unfair termination.

64. In assessing the quantum of compensation, the court will base its computation on the last salary which the Appellant ought have been paid with the underpayment which is Kshs 13,752.00/= per month.

65. On the claim for salary for the months of June and July 2020 since there was no production of the same and the fact that the claimant was present in court except in Mpesa when the respondent was away. Besides the respondent sent the claimant on compulsory leave.

66. On the claims for underpayments on leave pay the same ought to be claimed within 12 months of cessation as continuing injuries as per section 90 of the Act. In this case the Appellant was terminated in July 2020 and filed her claim in August 2020 hence within the timelines.

67. On the claim for underpayment the Appellant alleged that she was paid Kshs 7,500/= which was increased to Kshs 8,000/= in 2016. That the same were below the prescribed

minimum wage under Regulation of wages (Amendment Order) for the years 2015 to 2020. The Appellant claimed Kshs 186,159.00/= as underpayment which is also granted as prayed.

68. On the prayer for unpaid leave days, the court notes that this is an entitlement under section 34 of the Act. Save for the compulsory leave before termination, the appellant stated that she never went on leave. The prayer is therefore allowed.

69. On the claim for service which is an entitlement under section 35 of the Act, since the Appellant was not a member to NSSF or any pension scheme, she will be awarded the same. On the claim for one month's salary in lieu of notice which is an entitlement under section 36 of the Act since no notice was given to the Appellant she is entitled to the same.

70. The Appellant is also entitled to receive date of service as provided for under section 51 of the act.

71. **In the upshot the Appeal is found merited and is hereby allowed with costs to the Appellant as follows: _**

- i. One month's salary in lieu of notice.....Kshs 13,752/=**

ii. Eighty Month's salary as compensation for unfair terminationKshs

110,016/=

iii. Salary for months of June and July

2020.....shs

27,244/=

iv. UnderpaymentsKshs

186,159/=

v. Unpaid leaveKshs

47,503/=

vi. Service PayKshs

40,717/=

TO KSHS

425,291/=

72. It is so ordered.

Dated at Nairobi this 9th day of October 2025

Delivered virtually this 9th day of October 2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

