**Njogu v Director D Light Solars Co Ltd (Cause E412 of 2022)**
**[2025] KEELRC 2805 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2805 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE E412 OF 2022**

**JW KELI, J**

**OCTOBER 16, 2025**

**BETWEEN**

**CYNTHIA NJERI NJOGU ..... CLAIMANT**

**AND**

**DIRECTOR D LIGHT SOLARS CO LTD ..... RESPONDENT**

## JUDGMENT

1. Vide a memorandum of claim dated the 2nd of June 2022, the Claimant sued the Respondent and sought the following Orders:-

    a. The refusal to pay the Claimant herein final dues by the Respondent was unfair, unlawful, illegal hence null and void.

    b. The Respondent herein pays the Claimant herein the sum of Kshs. 841,549.83 as tabulated in the memorandum of claim paragraph 16(1) to (17) above.

    c. The Respondent herein pays interest on the total amount at court rates.

    d. The costs of this suit be provided by the Respondent.

    e. Any other and further relief deemed fit to grant be granted

2. The Claimant in support of the claim filed her list of witnesses dated 2nd June 2022, witness statement of even date; and list of documents of even date with the bundle of documents attached.

3. The Respondent entered appearance through the law firm of G & A Advocates LLP and filed a statement of response dated 5th February 2025. In support of the said statement of response, the respondent filed a witness statement of Angela Nyoike dated 17th March 2025; list of witnesses of even date; and list and bundle of documents with the bundle of documents attached, also dated 17th March 2025.

4. The Claimant filed a Reply dated 19th March 2025 to the Respondent's statement of response.

**Hearing and evidence**

5. The claimant's case was heard before me on June 24, 2025, where the claimant testified under oath, adopted her witness statement dated June 2, 2022, as her evidence in chief, and presented documents listed in her list of documents dated June 2, 2022, as C-exhibits 1-6. The claimant was cross-examined by counsel for the respondent, Kitala, and re-examined. The respondent's case was heard on the same day. The RW1 was Angela Nyoike, who testified under oath and stated that she was in charge of Human Resources for the Respondent. RW1 adopted her witness statement dated March 17, 2025, as her evidence in chief and produced the Respondent's bundle of documents as R-exhibits 1-8 (Page 8 of the brief). RW1 was cross-examined by counsel for the claimant, Ochieng, and re-examined.

**The Claimant's case in summary**

6. The Claimant's case is that she was employed by the Respondent on 13th February 2020 as a Territory Retention Executive Staff earning a Kshs 12,000/- basic salary per month. The Claimant states that she was not provided with housing accommodation or house allowance in addition to her salary. The Claimant's reporting hours were 8:45 am to 9:00 pm, meaning that she worked for 12 hours and 45 minutes daily, but she was never paid any overtime. Further, outside of the stated working hours, the Claimant worked online serving the Respondent's clients, but again, she was not paid any extra money other than her stated salary. She also performed duties for several roles, namely, those of general clerk, telephones operator, receptionist, and sales person on the same monthly salary, which according to her was a gross underpayment by the Respondent. The Claimant avers that that she worked during public holidays but she did not receive holiday pay. When she attempted to request for the same, she was shut down by the Human Resource Manager. The Claimant states that she had 19 untaken leave days for the years 2020 and 2021, and requests leave pay for the same.

7. The Claimant admits that she terminated her employment with the Respondent on 3rd February 2022 due to the difficult working conditions, but complains about the Respondent's refusal to remit her terminal dues.

**Respondent's case in brief**

8. The Respondent admits that the Claimant is their former employee, having been employed as a Territory Retention Executive vide the Employment Contract dated 12th February 2020. They clarify that the Claimant's employment contract was for a fixed term from 12th February 2020 to 31st December 2020, but was subject to renewal based on the Respondent's business needs and/or the Claimant's performance on the job. Some terms of the employment contract were that the Claimant earned a consolidated, cumulative, and guaranteed monthly salary of Kshs.20,500, consisting of a basic salary of Kshs.12,000.00 plus transport and communication allowance of Kshs.8,500.00; and also earned a monthly collections commission in addition to the stated salary.

   It is the Respondent's case that the Claimant's consolidated salary of Kshs. 20,500.00 included a house allowance, hence the Claimant was not entitled to a separate house allowance.

9. As a Territory Retention Executive, the Claimant reported to the Territory Retention Manager. She was generally responsible for tracking down clients with overdue debts; and negotiating and collecting the outstanding payments, with the aim of reducing the delinquency numbers for the Respondent's business. The Claimant's specific duties and roles inter alia included: monitoring accounts to identify outstanding debts; investigating historical data for each debt or bill; planning a course of action to

recover outstanding payments; locating and contacting the debtor's clients to arrange debt payoffs; loan restructuring; repossession of units from customers who were unable to make payments despite all the support offered; supporting all the Respondent's clients on Warranty/ After-Sales and Token concerns; supporting and closing Non-Warranty concerns from the Respondent's clients; handling fraud or tampered unit cases as per the Respondent's policy; taking action to encourage timely outstanding debt payments; resolving billing and customer credit issues; negotiating payoff deadlines or payment plans; handling questions or complaints; investigating and resolving discrepancies; updating account status records and collection efforts; and reporting on collection activity and accounts receivable status.

10. According to the Respondent, the Claimant was also responsible for undertaking other duties as necessary to support the Respondent's business needs and could be assigned to any location/region countrywide as required, per her contract of employment.

11. The Claimant was required to report for duty from 8:00 a.m to 5:00 p.m on weekdays. She was not required to work overtime or during public holidays.

12. Vide a letter dated 5th January 2021, the Respondent extended the Claimant's employment for a period of one (1) year from 2nd January 2021 to 31st December 2021. All other terms remained the same as the Claimant's initial Employment Contract dated 12th February 2020. The Claimant accepted the above extension of employment on 7th January 2021 and continued working for the Respondent.

13. Vide her letter dated 3rd February 2022 addressed to the Respondent, the Claimant issued the Respondent with a one-month notice of termination, citing domestic problems that she was experiencing as the reason for termination. Through the resignation letter, the Claimant's employment with the Respondent was terminated effective 3rd March 2022. The Respondent acknowledged receipt of the Claimant's resignation letter and accepted her resignation. They then instructed the Claimant to commence the handover procedure, including by returning all property belonging to the Respondent that may have been in her possession or control. The Respondent also proceeded to tabulate the Claimant's final dues and paid them to the Claimant, and no issue was raised by the Claimant that required resolution.

**Determination**

**Issues for determination**

14. The claimant outlined the following as the issues for determination-

    1. . Whether Director of D.light Solars Co. Ltd is properly sued as employer.

    2. Whether the Claimant is entitled to payment for service pay, overtime, public holidays, underpayment, leave, house allowance and compensation for unfair termination.

15. Conversely, the respondent stated the following as the issues for determination in the dispute-

    i. Whether there is a misjoinder of the Respondent in the proceedings;

    ii. Whether the Claimant's claims are merited;

    iii. Whether the Claimant is entitled to the reliefs sought; and

    iv. Who should bear the costs of the suit.

16. The court found the parties were in agreement the issues for determination in the dispute were as follows-

a. Whether there was a misjoinder of the respondent in the proceedings.

b. Whether there was unfair termination of employment.

c. Whether the claimant was entitled to relief sought.

**Whether there was a misjoinder of the respondent in the proceedings**

**Claimant's submissions**

17. Whether Director of D.light Solars Co. Ltd is properly sued as employer - During the Claimant's cross examination, the Respondent questioned the Claimant on who was her employer between the Director D.Light Solars Co. Ltd and D.Light Solars Co. Ltd. The impression is that according to the Respondent, the Director was not the Claimant's employer. 8. Under Section 2 of the *Employment Act* the term 'employer' is defined as follows: "... any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;" 9. Going by the above definition, the Claimant submits that the Director, being the principal agent, manager and or factor of the Company, was still her employer. In fact, the Respondent defended the Claim and in the Pleadings it has not been denied that the Respondent (Director D.Light Solars Co. Ltd) was the Claimant's employer. The question arising during the cross examination was thus an afterthought aimed at deliberately causing confusion. 10.Whereas it would have been ideal to sue the Company as the Respondent, mentioning the Director is not fatal under the above provision of the law. Furthermore, Article 159 of *the Constitution* of Kenya urges the Honourable Court to focus on substance rather than technicalities. 11.My Lady, we implore upon the court to find that the Director is properly sued within the meaning of the above provisions. No objection was ever raised by the Respondent or the witness.

**Respondent's submissions**

18. The Respondent has been improperly joined to these proceedings. The Claimant instituted the instant proceedings against the Director D. Light Solars Co. Ltd, the Respondent herein. However, from the testimony during the hearing and the documents on record, particularly the Employment Contract dated 12th February 2020 and the Letter dated 5th January 2021, marked as the Respondent's Exhibit 1 and 3 respectively, the Claimant was employed by D.Light Limited. Therefore, it is evident that the Claimant's employment relationship was with the Company, D.Light Limited, and not with any individual director or officer of the Company. It is trite law that a company is a separate legal entity from its directors or shareholders as established in the celebrated case of Salomon v A. Salomon & Co. Ltd [1897] AC 22. Directors are not personally liable for the obligations of the company unless exceptional circumstances are shown to justify piercing the corporate veil, none of which have been pleaded and/or proven in this case. The Claimant has not provided any justification for lifting the corporate veil or for holding the director personally liable for the alleged employment claims. There is no allegation of fraud, misrepresentation, or abuse of the corporate form that would warrant the personal liability of the director. Accordingly, it is our submission that the Respondent, being a director and not the contracting employer, has been wrongly sued. Further, in response to the Claimant's assertion that the Respondent is properly sued under Section 2 of the *Employment Act*, we submit that the Claimant has misapprehended the provision. The section defines "employer" broadly to include an agent, manager, or factor of a company only for the purpose of imputing liability to the company, and not to create personal liability for such individuals. It does not override the foundational principle of corporate personality, nor does it make directors personally liable for employment obligations, in the absence of fraud, misrepresentation, or abuse of the corporate form. Additionally, the Claimant's argument

that Article 159 of *the Constitution* of Kenya, 2010 should be invoked to avoid technicalities is misplaced. Misjoinder of a party who has no contractual or legal relationship with the Claimant is not a technicality. It is a substantive legal defect. It is also pertinent to note that this Honourable Court can, at any stage of the proceedings, strike out a party who has been improperly joined Accordingly, misjoinder warrants the Court's intervention to ensure that only proper parties are before it, and the improper joinder of the Respondent herein is a substantive defect that calls for correction by this Honourable Court. We further submit that the Claimant's suggestion that the Respondent did not deny being the employer in the pleadings cannot cure this fundamental defect. It is well established that pleadings do not constitute evidence, and the absence of a denial in the pleadings does not relieve the Claimant of the burden to prove their case on a balance of probabilities. The burden remained on the Claimant to establish the existence of an employment relationship with the Respondent. The documentary evidence before this Honourable Court clearly identifies D.Light Limited as the employer and not the director. The Claimant has also failed to demonstrate any legal or factual basis for suing the director in their personal capacity. We refer to the decision in Thaithi v Eldoret Express Company Limited (Employment and Labour Relations Cause 15 of 2022) [2023] KEELRC 385 (KLR), where the Court held as follows: "20. In the absence of any other documentation to justify the Claimant's engagement with the respondent, this court cannot ascertain if indeed such a relationship existed after the expiry of the 1- year contract period between 2003 October and 2004 October. 21. Having found that employer employee relationship was not established, it therefore follows that no legal claim in respect of the termination of the Claimant's employment can stand against the respondent and as such this Claim is dismissed with costs." [Emphasis Ours] In view of the foregoing, we respectfully urge this Honourable Court to find that there has been a misjoinder of the Respondent and to strike out the proceedings as against the named Respondent with costs

**Decision**

19. The claimant in paragraph 2 memorandum of claim dated 2nd June 2022 described the respondent as the Director and owner of D.O Light Ltd. In the statement of response dated 5th February 2025, paragraph 2 admitted the content of paragraphs 1 and 2 of the claim. The court then finds that from the pleadings, the employer was not in dispute. I appreciated the jurisprudence on company law as stated in Salomon v A. Salomon & Co. Ltd [1897] AC 22 cited by the respondent. I find no basis to delve further into the issue. The claimant was clear that he was suing the Director as owner of D.O. Light Ltd and the Respondent admitted the description. The court is guided by section 20 of the *Employment Act* to wit –'20 (1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.'' No prejudice has been suffered by the respondent, who admitted the employee-employer relationship and responded substantially. The court considered the employer as the one described in paragraph 2 of the claim hence the claim of rejoinder as a ground to strike out the claim was not merited.

**Whether there was unfair termination**

**The claimant's submissions**

20. It is the Claimant's submission that the Respondent constructively dismissed her and she claims compensation. The claimant terminated her services with the Respondent vide her Exhibit 2 'a copy of notice of termination' dated 3rd February 2022. The letter is brief and to the point that the services are being terminated due to domestic problems. During trial, the Claimant testified that her resignation was instigated by the unfavorable conditions of work. She explained that due to the inhuman conditions of work she was subjected to by the Respondent she had domestic problems at home and she could not continue working because the conditions were not addressed. For instance,

she stated that the long working hours from 8.45am to 9pm without pay including on public holidays made her have domestic problems. She stated that she had small babies whom she could not attend to properly and the non-payment of the overtime also made it difficult for her to pay bills. She was not paid house allowance too. These reasons amount to constructive dismissal which is unfair termination. Rule 3 of the Employment (General) Rules prohibits forced labour as follows: "No employer shall subject an employee to working under undue threat or inhuman conditions or to any form of slavery." The Claimant submits that the Respondent subjected her to inhuman conditions and slavery by making her to work for long hours without paying overtime. Other than not paying overtime, the Respondent made the Claimant to work for extremely long hours totaling 147 hours every 2 consecutive weeks contrary to Paragraph 6(3)(b) of the Regulation of Wages (General) Order (supra) which provides that a person should not work for more than 116 hours inclusive of overtime in any given consecutive weeks. Additionally, the Respondent deliberately failed to pay the Claimant house allowance or provide her with accommodation which is illegal and inhuman. The Claimant firmly testified that she and her colleagues raised these issues and they were flatly ignored. The grievances were raised orally. Lastly, even at the point of resignation when the Claimant gave the Respondent 1 month's notice, the Respondent furthered the inhumane treatment by sending the Claimant on forced leave for 21 days on allegations that the Claimant was underperforming. No evidence was tabled on such underperformance. No show case was issued or hearing scheduled even though the Claimant was still at work. The Black's Law Dictionary (Tenth Edition) defines 'constructive dismissal or discharge' as follows: "An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit." In Nathan Ogada Atiagaga versus David Engineering Limited (2015) eKLR, the Court explained constructive dismissal as follows: "Constructive dismissal, occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge." In Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR the Court found that the Claimant was constructively dismissed from employment and held at para 39 as follows: "Based on our independent re-evaluation of the evidence and the context in which the letter dated 16th June, 2009 was written we are satisfied that the letter of termination by the Respondent was not voluntary. In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or may terminate the contract with notice, or no notice the departure must be within a reasonable time and the employer's conduct must be effective cause of leaving or termination..." The claimant urged the court not to turn a blind eye on the inhumane conditions and slavery meted on the Claimant to the point that she had to leave work unceremoniously. The Claimant implores upon the Honourable Court to award her 12 months' salary at the rate of Kshs.20,500 as compensation/damages for her unfair termination through constructive dismissal. The total claim under this head is therefore Kshs.246,000.

**Respondent's submissions**

21. The Claimant alleges that she was constructively dismissed by the Respondent and as a result, seeks compensation equivalent to twelve (12) months' salary at the rate of Kshs. 20,500 per month. This claim is made as damages for unfair termination arising from the alleged constructive dismissal. The Respondent asserts that the above claim for constructive dismissal is without merit, factually unsupported, and untenable. As established by the Court of Appeal in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR), the legal principles relevant to

determining constructive dismissal include the following: a. What are the fundamental or essential terms of the contract of employment? b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. d. An objective test is to be applied in evaluating the employer's conduct. e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved. f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination. g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach. h. The burden to prove repudiatory breach or constructive dismissal is on the employee. i. Facts giving rise to repudiatory breach or constructive dismissal are varied. The Respondent submits that the Claimant's resignation from employment was voluntary and not precipitated by any conduct amounting to a repudiatory breach of the Employment Contract. The Claimant's own Termination Letter, marked as the Respondent's Exhibit 4, clearly attributes her resignation to "domestic problems," with no reference to any alleged inhumane working conditions or breach of contract by the Company. During the hearing, the Claimant further testified that she voluntarily resigned from her employment and expressly indicated that her decision to resign was informed by the domestic problems she was experiencing. The Claimant also testified that her employer provided her with adequate resources and support to fulfill her obligations effectively. The Claimant's attempt to retrospectively attribute her resignation to alleged unfavourable working conditions is not supported by contemporaneous documentation or credible evidence. No formal complaints or written grievances were submitted during the subsistence of her employment to substantiate claims of long working hours or non-payment of overtime. The Respondent reiterates that the Claimant was scheduled to work from 8:00 a.m. to 5:00 p.m. on weekdays only, and was not required to work overtime or on public holidays. The Claimant's reliance on oral grievances and unsubstantiated testimony falls short of the evidentiary threshold required to establish constructive dismissal. As affirmed in Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga (Supra), the burden of proof lies squarely on the employee to demonstrate a fundamental breach of contract by the employer. The Claimant has not discharged this burden. 107. Additionally, the Claimant's assertion that she was subjected to "inhuman conditions" and "slavery" is not only hyperbolic but also unsupported by any credible and cogent evidence. The Respondent further submits that the Claimant's placement on leave during her notice period was a standard administrative measure and not indicative of any punitive or retaliatory conduct. Notably, the Claimant did not raise any protest or objection to being placed on leave during her notice period, thereby reinforcing the Respondent's position that the measure was routine and not adverse in nature. In light of the foregoing, the Respondent respectfully urges this Honourable Court to find that the Claimant has failed to establish the legal and factual basis for constructive dismissal. We further place reliance on the case of Kikaya v Afrodip Limited (Cause E083 of 2023) [2024] KEELRC 13317 (KLR), where the Court held as follows: "53. As regards constructive dismissal, the Claimant appears to be saying that since she wrote the resignation letter at the instigation of the Respondent's Human Resource Representative and feared loss of benefits it amounted to a constructive dismissal. 54. The Respondent relies on the resignation letter to urge that the Claimant voluntarily resigned from employment. ... 64. The Claimant has neither pleaded that Suzan Muiruri misrepresented facts, unduly influenced her or forced her to write the resignation letter dated 2nd June, 2024. 65. In sum, there is nothing discernible to suggest that the Claimant did not write the resignation letter voluntarily. 66. The Claimant has not adduced evidence to prove that the Respondent's conduct, if any, amounted to a repudiatory breach of the contract of employment. The tenor of the letter is self-explanatory. 67.

Flowing from the foregoing, it is the finding of the Court that Respondents account of the events appears more credible. 68. In the upshot it is the finding of the Court that the Claimant has failed to prove on preponderance of probabilities that she was constructively dismissed from employment by the Respondent." [Emphasis Ours] Without prejudice to the foregoing, the respondent submitted that the Claimant accepted, waived, acquiesced to, or conducted herself in a manner that estops her from pleading constructive dismissal. The Claimant alleges that she was subjected to long working hours, including working on public holidays, and denied overtime pay and house allowance throughout her entire employment duration with the Respondent. However, the Claimant continued in employment for a period of two years without resigning or even raising any formal grievance regarding the alleged unfavourable working conditions. Her continued service, despite claiming to have endured excessive working hours and non-payment of entitlements, amounts to acceptance and acquiescence. In line with the principles articulated in Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga (Supra), an employee who fails to act within a reasonable time or who conducts herself in a manner inconsistent with repudiation may be estopped from asserting constructive dismissal. By failing to act within a reasonable time or to terminate the employment relationship in response to the alleged breach, the Claimant conducted herself in a manner that estops her from asserting constructive dismissal. Her resignation, when it eventually occurred, was expressly attributed to domestic problems and not to any repudiatory conduct by the Respondent. Consequently, the claim for compensation equivalent to twelve (12) months' salary is without merit and should be dismissed in its entirety.

**Decision**

22. The claimant resigned by issuance of a letter dated 3rd February 2022 titled- '' One month notice to terminate service'' . The content of the letter was as reproduced below in part- '' Due to Domestic problem i hereby write this letter as a notice to terminate the service.....thanking you in advance for your understanding. ''(emphasis given).In the claim, the claimant stated that due to difficult life of underpayment and working for long hours without overtime she opted to terminate her services. The respondent stated that the reason given for termination was domestic problem, the claimant stated she was experiencing.

23. The claim of unfair termination in this case is based on the common law doctrine of constructive dismissal which has not been legislated by Kenyan statute but is now accepted in our jurisdiction. The concept was restated by the Court of Appeal in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR relied on by both parties where the Court found that the Claimant was constructively dismissed from employment and held at para 39 as follows: "Based on our independent re-evaluation of the evidence and the context in which the letter dated 16th June, 2009 was written we are satisfied that the letter of termination by the Respondent was not voluntary. In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or may terminate the contract with notice, or no notice the departure must be within a reasonable time and the employer's conduct must be effective cause of leaving or termination..." The Court of Appeal further set out the applicable legal principles in constructive dismissal claims as follows- 'a. What are the fundamental or essential terms of the contract of employment? b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. d. An objective test is to be applied in evaluating the employer's conduct. e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved. f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination. g. The employee must not have accepted, waived, acquiesced or conducted himself to be

estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach. h. The burden to prove repudiatory breach or constructive dismissal is on the employee. i. Facts giving rise to repudiatory breach or constructive dismissal are varied." A key factor in the doctrine of constructive dismissal is that the employer's conduct must be an effective cause of the leaving or termination of employment. The court need not go further than the letter of termination of the employment in the instant case. The claimant stated it was due to a domestic problem that she terminated the employment. A domestic problem, without any further elaboration, is a personal challenge. To the mind of the court, a purely domestic problem by any imagination cannot be attributed to the conduct of the employer. If it were a case of overtime payment, nothing would have been easier for the claimant than to state so in the letter. The burden to prove the claim for constructive dismissal lay with the claimant (Ligaga Case, above) and the same was not proved on a balance of probabilities. The court found no case of unfair termination.

**Whether the claimant was entitled ed to relief sought**

**Claimant's submissions**

24. Service Pay. -The Claimant submits that as at the time of filing the suit, she did not have legal representation. Now, having secured legal representation the Claimant abandons this claim for reason that during her employment with the Respondent she was a member of the National Social Security Fund. The Claimant is now up to speed with Section 35(6)(d) of the *Employment Act* which precludes service pay entitlement to an employee who is a member of NSSF.

25. Underpayment -The Claimant drops this claim. Whereas it was pleaded that the Claimant earned a basic salary of Kshs.12,000 which is below the minimum wage of Kshs.18,319.50 stipulated for an employee performing duties similar to those of the Claimant under the Regulation of Wages (General) (Amendment) Order 2018, It is admitted that the total guaranteed pay during the Claimant's employment with the Respondent was Kshs.20,500 which was made up of Kshs.12,000 basic pay and Kshs.8,500 transport and communication allowance. The Claimant agrees that the guaranteed pay of Kshs.20,500 meets the threshold for minimum basic pay under the Regulation of Wages (General) (Amendment) Order,2018.

26. Overtime 1-section 27(1) of the *Employment Act* mandates an employer to regulate working hours of an employee in accordance with the Act and any other written law. Paragraph 5(1) of the Regulation of Wages (General) Order provides as follows on hours of work:

> "(1) The normal working week shall consist of not more than fifty-two hours of work spread over six days of the week." On overtime, Paragraph 6 states:
>
> > "(1) Overtime shall be payable at the following rates—
> >
> > (a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;
> >
> > (b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.
>
> (2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee's basic minimum monthly wage.

(3) Notwithstanding subparagraph (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks—

(a) one hundred and forty-four hours for employees engaged in night work;

(b) one hundred and sixteen hours for all other adult employees." the Claimant's testimony is that the Respondent made her to work from 8:45am to 9pm without overtime pay. That her duties were such that he was required to continue working at home up to 9pm. The duties are as per the Respondent's Exhibit 2 'Claimant's job description'. 20.Although captured as 12 hours and 45 minutes per day in the pleadings, the accurate hours worked per day translate to 12 hours 15 minutes. According to RW1, Angela Nyoike, the Claimant worked from 8am to 5pm and never worked on weekends or overtime as per paragraph 8 of the witness statement. This sharply contradicts paragraph 14 of the Statement of Response which acknowledges overtime only that it is contended that where the Claimant worked overtime she was compensated by either additional time away from work or pay. No such evidence was produced though. RW1 produced 'Claimant's work records' as Respondent's Exhibit 7 to prove her testimony above. However, the document only shows starting time of 'first shift' as 8am but does not state exit time. Equally, RW1 produced 'Employment contract dated 12th February 2022' as Respondent's Exhibit 1 but the same does not make provisions for working hours. At cross examination, RW1 stated that they usually maintain overtime records which was not produced despite overtime forming part of the claim. Under Section 74 of the *Employment Act*, it is the duty of the employer to keep such records and produce them when required. This would be such instance when records ought to be produced. The Claimant testified that these records were kept by the Respondent. The failure to produce overtime records (showing when the Claimant worked or did not work overtime and how she was compensated as alleged by the Respondent) tilts in favour of the Claimant's claim for overtime. The Claimant resolutely submits that she worked 12 hours 15 minutes per day during her employment with the Respondent as stated above. This translates to 72 hours 90 minutes spread over 6 days of the week which in turn translates to 73.5 hours per week. We submit that, pursuant to the provisions above quoted, the Respondent owes the Claimant Kshs.305,585.28 overtime for 2 years (24 months) from 13th February 2020 to 3rd March 2022 as calculated below: Weekly overtime: 73.5hrs – 52hrs = 21.5hrs Basic hourly rate: monthly guaranteed pay X 1/225 20,500/- X 1/225 = 91.11/- Weekly Overtime pay: 91.11 X 1.5 X 21.5 = 2,938.30/- Daily Overtime pay: 2,938.30/- / 6 days = 489.72/- Monthly Overtime pay : 26 days X 489.72/- = 12,732.72/- Overtime due for 24 months: 12,732.72/- X 24 = 305,585.28/= 27.

27. The Claimant places reliance in the case of Meshack Kiio Ikulume v Prime Fuels Kenya Limited [2013] KEELRC 921 (KLR) where the court stated as follows: "But the substantive law does not give much support to the thrust of the Respondent's submissions. Within the employment relationship and statutory framework created by section 10(3) and (7) of the *Employment Act*, it is incumbent upon an employer to furnish an employee with particulars of his entitlement to public holidays and holiday pay so as to be capable of precise calculation and to prove or disprove in the context of this particular case that the Claimant was paid or was not entitled to be paid for public holidays worked. Further it is the duty of an employer to keep certain employment records including hours of work and produce the same in legal proceedings. I am not aware of any practice or policy within the employment relationship

requiring employees to keep records of attendances and hours/days worked. Within the factory settings it is always the responsibility of the employer to keep muster rolls though with advancement in technology records can be captured biometrically or through electronic cards."

28. On Public Holidays- Paragraph 8 of the Regulation of Wages (General) Order recognizes the 11 public holidays below per Fourth Schedule as holidays with full pay: New Year's Day, Good Friday, Easter Monday, Labour Day, Madaraka Day, Iddul-Fitr Day, Kenyatta Day, Independence Day, Christmas Day, Boxing Day, and Moi Day. 29.Under Paragraph 6(1)(b) of the Regulation of Wages hereinabove quoted, the rate payable for work done on a public holiday is at twice the normal hourly. The Claimant submits that in her 2 years of service, she worked during 6 public holidays. The amount due for the 6 days is Kshs.13,393.17 as calculated below: Basic hourly rate: monthly guaranteed pay X 1/225 20,500/- X 1/225 = 91.11/- Holiday Pay due for 6 holidays: 12.25hrs/day X 6 holidays X 91.11/- X 2 = 13,393.17/- .

29. House Allowance-.Paragraph 4 of the Regulation of Wages (General) Order states: "An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the First or Second Schedule, be paid housing allowance equal to fifteen per cent of his basic minimum wage." Even though the Respondent argued that the salary paid to the Claimant in her 2 years of service was a consolidated salary comprising house allowance, the documentary evidence on record shows that the Claimant was not paid a consolidated salary. On the contrary, the Claimant was paid a guaranteed salary of Kshs.20,500 per month comprising of Kshs.12,000 basic salary and Kshs.8,500 allowance for communication and transport. She also earned commission allowance depending of collected debts but DID NOT earn house allowance. (See Respondent's Exhibit 1 'Employment contract dated 12th February 2022' at clause 4 showing guaranteed pay and no consolidated salary; Claimant's Exhibit 5 'pay slip for December 2021 showing no payment for house allowance; and, Respondent's Exhibit 8 'final dues' showing no payment for house allowance in February 2022). Whereas the monthly basic salary of Kshs.12,000 is below the minimum monthly wages of an employee performing duties similar to those of the Claimant under the Regulation of Wages (General) (Amendment) Order, 2018; the Claimant concedes that the guaranteed pay of Kshs.20,500 per month which she got monthly is sufficient pay under the Regulation of Wages (General) (Amendment) Order, 2018. House allowance is therefore calculated at the rate of 15% of the guaranteed monthly salary of Kshs.20,500. The Claimant accordingly submits that the Respondent owes her Kshs.73,800 for house allowance as calculated below: Monthly house allowance: 20,500 X 15% = 3,075/= Unpaid house allowance for 24 months: 3,075/= X 24 = 73,800/= .

30. Leave -Annual leave is provided for under Section 28 of the *Employment Act*. 36. The Claimant submits that she is entitled annual leave balance of 19 days. The Claimant firmly testified that at the time of tendering a termination notice on 3rd February 2022 she had 40 days of annual leave. However, the Respondent decided to send her on forced leave for 21 days leaving a balance of 19 days which she was not paid. 37. The amount due and owing on account of leave balance is Kshs.14,980 calculated as below: Leave balance: 20,500/- /26 X 19 days = 14,980/- 38.RW1 equally admitted that the Claimant had 40 days leave balance and that they sent her on compulsory leave when she resigned due to underperformance. No show cause letter was produced to evidence claims of underperformance or that the Claimant was given a chance to give reasons for the alleged underperformance. Equally, there was no performance evaluation forms to back these allegations. The upshot is that the compulsory leave was unfair from the onset and it led to the Claimant losing a huge chunk of her accrued leave. (See Respondent's Exhibit 4 'Acceptance of Claimant's Resignation' showing leave days as 40)

**Respondent's submissions**

31. Whether the Claimant's claims are merited - Without prejudice to our foregoing submission that the Respondent has been improperly joined to these proceedings, it is our humble submission that the Claimant's claims lack merit as they are misconceived, baseless, and/or unsupported by credible evidence. The Respondent shall, in the paragraphs that follow, address each of the Claimant's claims individually and demonstrate that they are unmerited.

32. Service Pay -. The Claimant has made a claim for service pay of 15 days for each completed year of service for two years. This claim is misconceived and untenable. Section 35 (5) and (6) of the *Employment Act*, Chapter 226 Laws of Kenya, provides as follows with respect to service pay: (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. This section shall not apply where an employee is a member of— (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*; (b) a gratuity or service pay scheme established under a collective agreement; (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and (d) the National Social Security Fund. 67. Accordingly, the Claimant is not entitled to service pay for each completed year of service as she is a member of the National Social Security Fund (NSSF), to which the Respondent had been remitting funds on her behalf during the period of her employment. The Claimant's payslips, marked as the Claimant's Exhibit 5 and the Respondent's Exhibit 8, demonstrate that a deduction of Kshs. 200/- per month was made from the Claimant's salary and applied towards her NSSF contributions. We refer to the case of Muthomi v Brinks Security Services Limited (Employment and Labour Relations Cause 1590 of 2017) [2024] KEELRC 1715 (KLR) (28 June 2024) (Judgment), where the Court held that: "46. The Claimant's pay slips for February 2016 and March 2016 demonstrate that a deduction of Kshs. 200/- per month was made from the Claimant's salary and applied towards his NSSF contributions. He is therefore excluded from pursuing the benefit of service pay under Section 35 (6) aforesaid." . Further, in her submissions, the Claimant has expressly abandoned her claim for service pay, having conceded that during her employment she was a registered member of the NSSF.

33. On Salary Underpayment- The Claimant alleges that during her employment with the Company, she was earning Kshs. 12,000.00 as her monthly salary, which was below the minimum wage in Legal Notice No. 2 of May 2018. The Claimant has neither provided a copy of the said Legal Notice nor specified the exact wage category under which she claims to fall. In particular, she has failed to demonstrate whether her role fell under any defined classification in the Regulation of Wages Orders or what minimum wage threshold would apply to her specific position. The Court is, therefore, left to speculate on the appropriate standard, which we respectfully submit it should not be called upon to do. 73. We humbly make reference to the decision in Muthomi v Brinks Security Services Limited (Supra), where the Court held that: "42. The claim for salary underpayment is pegged on the fact that the Regulation of Wages (General)(Amendment) Order 2015 capped the basic minimum monthly salary for a security guard at Kshs. 10,954/-. The Claimant avers that he was underpaid between 1st May 2015 and 1st March 2016. In seeking the relief, the Claimant seems to have lost sight of the fact that a station of work of an employee and to be specific the town, is a crucial factor in matters minimum wages. The Claimant didn't mention at all where his station of work was, the Court was left to speculate, but I am not ready to. A cursory perusal of the Regulation of Wages (General) (Amendment) Order 2015 reveals that the basic salary for a security guard working in Nairobi, Mombasa and Kisumu was Kshs. 10,954.70; the basic salary for an employee working in All former municipalities and Mavoko, Ruiru and Limuru Town councils was Kshs. 10,107.10; and the basic salary for employees working in All Other Areas was Kshs. 5, 844.20. Minus the evidence I have alluded to hereinabove, It is not possible

to justly determine whether or not there was an underpayment. I therefore decline to grant the prayer for underpayment." [Emphasis Ours] Be that as it may, it is our humble submission that the Claimant was not underpaid. The Claimant's own tabulation suggests that she ought to have been earning a minimum monthly salary of Kshs. 18,319.50. The Claimant was earning a consolidated, cumulative, and guaranteed monthly pay of Kshs. 20,500, with Kshs. 12,000.00 being the basic pay and Kshs. 8,500.00 being transport and communication allowance. The Claimant was also earning monthly collection commissions in addition to the above pay. Consequently, the Claimant's remuneration exceeded the alleged minimum wage figure. Indeed, the Claimant has, in her submissions, expressly agreed that she was earning above the minimum wage, under the Regulation of Wages (General) (Amendment) Order, 2018, thereby reinforcing the Respondent's position and negating any claim grounded on alleged underpayment.

34. Overtime and Public Holidays Worked- The Claimant alleges that she was required to report for work at 8:45 a.m. and leave at 9:00 p.m. Consequently, she alleges that she worked for 12 hours and 45 minutes daily and was not paid for overtime. In her submissions, the Claimant asserts that the hours worked per day were 12 hours and 15 minutes, contrary to the 12 hours and 45 minutes stated in her pleadings. The Claimant also alleges that she worked on public holidays and submits that, during her two years of service, she worked on six public holidays. The foregoing allegations lack merit and are unfounded and baseless. The Claimant was only required to report for duty from 8:00 a.m to 5:00 p.m on weekdays. Furthermore, the Claimant was not required to work overtime or expected to work on public holidays. During the hearing, the Claimant confirmed that she was required to report to work at 8:00 a.m. on weekdays. She alleged, however, that she would occasionally work beyond 5:00 p.m., up to 9:00 p.m., and that the Company maintained a WhatsApp group through which staff were monitored and expected to provide hourly updates. However, while the Claimant confirmed that she was a member of the alleged WhatsApp group, she admitted that she had not produced any screenshots, transcripts, or extracts from the said WhatsApp group to support her assertions. Equally, the Claimant confirmed that she had not furnished this Honourable Court with any documentation to demonstrate that she lodged any complaints with the Company concerning the alleged long working hours during the subsistence of her employment. The Claimant further confirmed that she had not furnished this Honourable Court with any documentation evidencing that she worked on public holidays, nor had she presented any follow-ups or complaints made to her employer regarding the same. Additionally, she testified that she had not provided any evidence of overtime worked or any related claims made during the course of her employment. The Respondent further clarified that the Company's attendance tracking system only captured employees' clock-in times and not their clock-out times. The Respondent has indeed submitted to this Honourable Court copies of the Claimant's attendance reports extracted from the said system, which reflect her daily reporting times.. Further, as confirmed during the hearing, the Company has no records for overtime worked by the Claimant, given that the Claimant was not required to work beyond 5:00 p.m and never worked overtime. 88. Similarly, the Company has no records for work performed on public holidays since the Claimant was not required to work on such days. We respectfully submit that claims for overtime and work performed on public holidays must be strictly proved through cogent and credible evidence. In the absence of such proof, and given that the Claimant has not discharged the burden placed upon her by law, these claims cannot be sustained. We humbly refer this Honourable Court to the case of Asakhulu v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 1 of 2023) [2024] KEELRC 705 (KLR), where it was held that: "50.The Court holds that the appeal on claims for underpayment and all other reliefs dismissed by trial court have no foundation as per the foregoing re-evaluation of evidence before the trial court. The court finds no evidence was placed before the trial court on claims of underpayment , rest days, public holidays, leave and overtime. These are claims in nature of special damages and must be specifically proved as held in Twiga Construction

Limited v Julius Nyamai Mulatia [2018] eKLR where Justice Ndolo held as follows:- ''9. Apart from the claims for notice and leave pay which are admitted by the Respondent in its Defence, the Claimant claims underpayment and compensation for working on public holidays and weekly rest days. He also claims tools allowance at Kshs. 125 per month. All these claims are in the nature of special damages which must be specifically proved. Apart from his word, the Claimant did not provide any evidence to support any of these claims which therefore fail and are dismissed. "The Court holds that the reliefs sought were not merited. The decision of the trial Court is uphold on this issue." [Emphasis Ours] Additionally, in the case of Ngunda v Ready Consultancy Limited (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR), the Court held as follows: "20. On the issue of payment for 33 public holidays, 152 Sundays, and 5184 hours of overtime, the learned judge was not satisfied that a firm basis was established, and dismissed the claim. An analysis of the record does not disclose that these claims were properly established. No evidentiary proof was provided that the appellant worked on those days. There were no details or particulars given of the public holidays or Sundays worked. Did he work on all public holidays and Sundays, or just some of them? Which days in particular? As regards the alleged overtime, there was no breakdown of the 5184 hours into the days to which they related. As it were, it would seem that the appellant was engaged in overtime work continuously for the entire 5184 hours, which is neither feasible nor humanly possible. As correctly submitted by the respondent, he who alleges must prove. Since the appellant did not provide any proof that he worked on public holidays or the Sundays, or indeed overtime, contrary to his assertions, the burden could not shift to the respondent to provide further evidence in this regard. As rightly observed by the learned judge, the appellant did not clock overtime, and there was no record to show that he attended the workplace on public holidays or on Sundays. [Emphasis Ours] 92. In view of the foregoing, it is our respectful submission that the Claimant's claims for overtime and work performed on public holidays lack merit and should be dismissed.

35. Non-Payment of Housing Allowance. The Claimant avers that she was not paid housing allowance during her employment with the Company. It is our humble submission that the above averment is false and misleading since the Claimant was earning a consolidated monthly pay of Kshs. 20,500 which included all allowances payable to the Claimant, including the house allowance. Consequently, the Claimant was not entitled to a separate house allowance noting that the same had been catered for under the consolidated wage. We refer to the case of Muthomi v Brinks Security Services Limited (Supra) where the Court held that: "47.On the claim for house allowance, I note that the Claimant's employment contract dated 13th July 2009 produced by the Respondent, and which is duly executed by the Claimant Provided that the Claimant's salary was Kshs. 10,000/- (All Inclusive). I gather a clear impression that the figure included house allowance, therefore. It is not the business of this Court to rewrite contracts for parties. Mine is to enforce them. See also Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR." [Emphasis Ours] Accordingly, it is our respectful submission that the Claimant's allegation regarding nonpayment of housing allowance is without merit. Her consolidated monthly pay was inclusive of all applicable allowances. As such, no separate housing allowance was due, and this limb of the claim ought to fail. e. Leave Days. The Claimant seeks payment for a balance of 19 leave days. This claim is without merit. As at the time of issuing her resignation notice on 3rd February 2022, the Claimant had a leave balance of 40 days. She proceeded on leave for 17 days thereafter, leaving a balance of 19 leave days. The Respondent settled this balance by paying the Claimant in lieu of the accrued leave days. The Claimant's final payslip, marked as the Respondent's Exhibit 8, reflects a payment of Kshs. 15,502.36 as payment in lieu of leave, which, at the rate of Kshs. 683.33 per day, translates to 23 leave days. This payment exceeded the balance of 19 leave days claimed, demonstrating that the Claimant has already been adequately compensated for the leave days balance. The Claimant's claim for payment of leave days balance is therefore without merit and should be dismissed. from asserting constructive dismissal. Her resignation, when it eventually

occurred, was expressly attributed to domestic problems and not to any repudiatory conduct by the Respondent. Consequently, the claim for compensation equivalent to twelve (12) months' salary is without merit and should be dismissed in its entirety.

36. Payment of Terminal Dues- The Claimant alleges that she was not paid her terminal dues by the Company. It is our humble submission that this allegation is entirely unfounded. Upon the Claimant's resignation, the Company computed and paid her final dues, as evidenced by the Respondent's Exhibit 8. The computation included the following: a) The Claimant's salary for March 2022, inclusive of basic pay and allowances; b) Kshs. 15,502.36 being payment in lieu of leave; c) A deduction under "lost days amount" for the days not worked in March beyond the Claimant's effective last working day, that is after 4th March 2022. The Company pro-rated the Claimant's consolidated monthly salary of Kshs. 20,500 to deduct the equivalent amount for the unworked days in March, which was captured in the payslip as the "lost days amount"; and d) The applicable statutory deductions, including Pay As You Earn (PAYE), National Social Security Fund (NSSF), and National Hospital Insurance Fund (NHIF) contributions. The Claimant's salary for the month of February 2022 had been duly paid during that same month. The March 2022 payslip reflected the Claimant's final dues computation, which included the salary for the days worked in March, payment in lieu of leave, and applicable deductions. In light of the foregoing, it is evident that the Claimant's terminal dues were duly computed and paid in accordance with her entitlements under the Employment Contract and applicable law. Accordingly, the Claimant's allegation that she was not paid her terminal dues is baseless, and the claim in this regard lacks merit and ought to be dismissed in its entirety.

**Decision**

37. On the claim for Underpayment of salary - the claimant in submissions dropped the claim. No need to belabor on the same.

38. Overtime – The claimant pleaded that she used to report to duty at 8.45 pm and close at 9pm and was not paid overtime. That she used her time at night in her house to work online to serve clients and worked on public holidays. She relied on her oral evidence. Conversely, the respondent through RW1 stated that the claimant was expected at work from 8am to 5pm on weekdays and was not required to work over the public holidays. The burden of prove of work hours beyond the official time is on the employee. During cross-examination, the claimant told the court that while the reporting hours were 8am to 5pm, she was tracked on an hourly basis up to late hours. When asked whether she had produced evidence of work beyond 5pm, she answered in the negative. She said there was a WhatsApp group chat on work but had not produced the same. She also had no evidence of having been asked to work over the holidays. She had no evidence of complaints of overtime. The court finds that the claimant did not discharge her initial burden to prove she worked overtime. Nothing would have been easier than to produce email correspondence on the alleged work online, which information was within her control. The burden to produce records of her working time did not pass to the employer. The court finds that the claim of overtime was not proved on a balance of probabilities.

39. Claim for House Allowance-Section 31 of the *Employment Act* provides for housing as follows: '31. Housing (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation. (2) This section shall not apply to an employee whose contract of service— (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; '

40. The claimant's contract (C-exhibit 4) clause 4 guaranteed pay was Basic Salary of Kshs. 12000 per month, transport and communication allowance of Kshs. 8500. The claimant was further paid variable pay based on targets. The itemized payslip was produced as C-exhibt 5. There was no item of housing. In response, the respondent stated the salary was consolidated which the court found was not true as it was itemized as basic pay, transport and communication. This position is distinguished from the case cited by the respondent in Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR. 'Accordingly, it is our respectful submission that the Claimant's allegation regarding nonpayment of housing allowance is without merit. Her consolidated monthly pay was inclusive of all applicable allowances. '(emphasis given on the use of the word all allowances) The court finds on a prima facie basis that the claimant was not housed or paid a housing allowance, and the same is awarded as 15% of the basic salary under the Regulations of Wages(General) Order. The claimant submitted the basic salary paid of Kshs. 12000 was below minimum wages but did not prove that the position she held was regulated. The court finds that the position of a Territory Retention Executive staff is not a regulated position of employment under the Minimum Wages Orders. The claimant was engaged on 13th February 2020 and exited on 3rd February 2022 with notice for the month thus 2 years oF service. Thus, the tabulation of the housing allowance is to be based on the basic salary, thus 15/100x12000x 14 x 24 months, thus Kshs. 43200/- is awarded.

41. Leave – The claimant submitted that Annual leave is provided for under Section 28 of the *Employment Act*. The Claimant submits that she is entitled annual leave balance of 19 days. The Claimant firmly testified that at the time of tendering a termination notice on 3rd February 2022 she had 40 days of annual leave. However, the Respondent decided to send her on forced leave for 21 days leaving a balance of 19 days which she was not paid. The amount due and owing on account of leave balance is Kshs.14,980 calculated as below: Leave balance : 20,500/- /26 X 19 days = 14,980/-. RW1 equally admitted that the Claimant had 40 days leave balance and that they sent her on compulsory leave when she resigned due to underperformance. No show cause letter was produced to evidence claims of underperformance or that the Claimant was given a chance to give reasons for the alleged underperformance. Equally, there was no performance evaluation forms to back these allegations. The upshot is that the compulsory leave was unfair from the onset and it led to the Claimant losing a huge chunk of her accrued leave. (See Respondent's Exhibit 4 'Acceptance of Claimant's Resignation' showing leave days as 40). The respondent in the witness statement of Angela Nyoike stated that by virtue of the termination letter dated 2nd February 2022, it marked the last day of employment with the respondent on the same date. In the acceptance letter, the respondent indicated the last day of work for the claimant was 4th March 2022(page 16 of the respondent's bundle). The respondent issued a further addendum resignation letter (page 17 of the respondent's document) and directed the claimant to proceed on leave for the remaining 17 notice days and indicated leave balance of 23 days. The claimant submits they were 19 days. The court finds that the respondent as a custodian of records having indicated the balance days was 23 days and tallied with the record of the claimant having been informed to serve the 17 days of remaining notice on leave. The court finds the outstanding untaken leave days were 23 days . The respondent submits that the claim for leave is without merit. The Respondent settled this balance leave days by paying the Claimant in lieu of the accrued leave days. The Claimant's final payslip, marked as the Respondent's Exhibit 8, reflects a payment of Kshs. 15,502.36 as payment in lieu of leave, which, at the rate of Kshs. 683.33 per day, translates to 23 leave days. This payment exceeded the balance of 19 leave days claimed, demonstrating that the Claimant has already been adequately compensated for the leave days balance. The court finds that the outstanding leave days were 23 days. The claimant produced an old payslip from December 2021. The respondent produced the last payslip of March 2022 ( at page 49, Respondent's Exhibit 8), which reflects a payment of Kshs.

15,502.36 as payment in lieu of leave, which, at the rate of Kshs. 683.33 per day, translates to 23 leave days. The court finds on a balance of probabilities the claimant was paid the outstanding 23 leave days.

42. On the claim of service pay the claimant's exhibit 5 was a payslip which indicated she was under NSSF. The court holds that she was thus not entitled to service pay on termination of employment according to section 35(6) of the *Employment Act* to wit – '35 (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. (6) This section shall not apply where an employee is a member of—

    (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*

    (b) a gratuity or service pay scheme established under a collective agreement;

    (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

    (d) d) the National Social Security Fund.(emphasis given )

**In conclusion.**

43. The claim is allowed with respect to housing. Judgment is entered for the claimant against the respondent as follows-

    Payment of housing allowance for the sum of Kshs. Kshs. 43,200/- with interest from the date of filing the suit.

**Costs of the suit.**

44. Stay of 30 days is granted.

45. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF OCTOBER, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Claimant: Ochieng'

Respondent: Kitala