

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E068 OF 2025

LILUMBI PATRICK APPELLANT

VERSUS

HATARI SECURITY GUARD LIMITED RESPONDENT

[Being an appeal from the judgment of Hon. Emily Mwamuye delivered on 20 March 2025 in Mombasa CMELRC No. E010 of 2024]

JUDGMENT

The appeal arises from the judgment delivered on 20 March 2025 in Mombasa CMELRC No. E010 of 2024. The appellant is seeking that the judgment be set aside on the grounds that the learned trial magistrate erred in law and fact in dismissing his claim and failing to award him the remedies sought. The underpayments and house allowances were not assessed. The due accrued leave days were not addressed, contrary to the evidence on record.

The appellant's case was that he was employed from April 2018. From February 2022, he became a security guard. He worked until April 2023, earning Ksh. 13,000 per month. He claimed that there was underpayment contrary to the Wage Orders. There was neither a house provided nor a house allowance. On 6 April 2023, the appellant sought permission to go for a medical check-up, which was granted, and he would be called back to work. There was no call. This resulted in unfair termination of employment without payment of terminal dues. He claimed the following;

- a) Notice pay Ksh.15,201.55;
- b) 3 months leave pay Ksh.6,107.81;
- c) Unpaid house allowance for 11 months Ksh. 25,081.65;
- d) 12 months compensation Ksh.182,419;
- e) Underpayment for 3 months from February to April 2023 Ksh.1,718.70;
- f) Underpayments May 2022 to April 2023 Ksh.24,218.70'
- g) Certificate of service;
- h) Costs.

In reply, the respondent asserts that the appellant was inconsistent in his work attendance. He was permitted to seek medical treatment but never returned to work. He deserted his duty from 10 April 2023 and failed to communicate, only to file suit, which should be dismissed with costs.

The experienced magistrate listened to the parties and determined that the appellant ended his employment by desertion, and his claim was dismissed.

The appellant submitted that the finding that he terminated his employment was in error, since under section 43 of the Employment Act (the Act), the respondent bore the burden of justifying the reasons for the termination of employment. This burden was not discharged, as held in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**. The respondent did not demonstrate the steps taken to address any disciplinary issues against the appellant.

The appellant submitted that there were no reasons given for the termination of his employment, and the claims made are justified and should be awarded.

The respondent submitted that the trial court assessed the evidence and made correct findings dismissing the claims. The appellant deserted duty and hence did not prove any unfair termination of employment as required under section 47(5) of the Act. The remedies ought not to be available as held in **Kenfreight Limited v Benson K. Nguti [2016] eKLR**. An employee who absconds from duty commits gross misconduct. The respondent allowed the appellant to be sick off on 6 April 2023; he did not submit a sick-off sheet or medical records. Desertion of duty was not justified as held in **Boniface Francis Mwangi v BOM Iyego Secondary School [2019] eKLR**.

Determination

This is a first appeal. Therefore, the court is called upon to re-evaluate all the material on record and arrive at its conclusions on the disputed facts. However, I am also aware that I did not have the opportunity to assess the demeanour of the witnesses as the trial magistrate did. Thus, I should be reluctant to upset the trial court's decision that turns on assessment of the credibility of witnesses unless there are compelling grounds to do so, as held in **Top Tank Company Limited v Amos Ondiek Wandaye [2018] eKLR**.

The appellant's case is that on 6 April 2023, he applied for permission to undergo a medical checkup and was granted permission. He was informed that he would be recalled to work.

The respondent asserts that the appellant was lazy and irregular in work attendance. He was allowed to seek medical treatment, but failed to report back to work. He did not share any treatment notes from a sick-off sheet. He thus deserted duty on 10 April 2023.

Indeed, under sections 30 and 34 of the Act, an employee who is sick or unwell is allowed to take time off work. However, the subject employee must submit a medical certificate from a recognised medical facility upon return to work. In the case of **Andrew Ogola Makomere v Agro Industrial Tools Limited [2017] KEELRC 1996 (KLR)**, the employee enjoys the right to seek medical attention under the Act. However, the employee is required to submit a medical certificate.

In **Dorothy Ndung'u v Machakos University College [2016] eKLR**, the court held that;

When an employee is sick, the duty is on the employer to ensure that there is sufficient medical attention and time off for the employee to recuperate. Where an employee has to attend for medical attention, such information has to be brought to the attention of the employer within a reasonable time, and even a third party is allowed to communicate such information to the employer.

In this case, the appellant was allowed time off to attend a medical check-up. He did not submit any sick leave sheet or the necessary medical certificate. None is filed to support his claim. Instead of filing the medical certificate, he filed suit.

The respondent issued notice to the labour office on 1 July 2023. This is allowed under section 18 of the Act.

Upon the appellant's demand alleging unfair termination of employment, the respondent replied on 23 August 2023, noting that the appellant had been lawfully granted time off for a medical check-up but failed to resume duty. The desertion was reported to the labour office.

The appellant was frustrated in his employment and cannot now claim notice pay or compensation. The learned magistrate well assessed these facts, and the findings cannot be faulted.

Regarding the claims for unpaid leave, the period in question is not addressed.

Upon desertion on 10 April 2023, the appellant failed to consider this in relation to his claims. The desertion from duty, which has been deemed unjustified, requires context when asserting the claim for untaken leave days.

On the claim for unpaid house allowance from February to April 2022, the claim is that the appellant was earning Ksh.13, 572.90 and hence for 3 months he was underpaid.

The respondent did not file the necessary payment statements. The assertion that the wage paid was KSh. 13,000 per month is not challenged. There is a contract dated 17 February 2022 indicating the wage paid was Ksh.13, 000 per month

Under the Wage Orders, a security guard working in Mombasa from February to April 2022 had a minimum wage of KSh. 13,752.90 according to the Wage Orders, 2018. On this basis, the due house allowance was KSh. 2,062.90, making the total wage Ksh. 815.80.

There was an underpayment of Ksh.2, 815.80.

For the 12 months applicable under section 90 of the Act, the continuous injury of underpayment amounts to Ksh. 33,970.

The underpayment and the due house allowance are thus addressed.

The appeal is allowed to this extent only. Judgment in Mombasa CMELRC No. E010 of 2024 shall be reviewed to this extent with an award of underpayments at ksh.33, 970. Each party bears its costs.

Delivered in open court at Mombasa, this 2nd day of October 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Japhet

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