

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E171 OF 2024 (Lead file)

AS CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E176 OF 2024

BONIFACE MUTISYA JOSIAH

.....APPELLANT

VERSUS

TEXAS ALARMS (K)LTD

RESPONDENT

(Being Appeals from the judgment of Hon. G. Sogomo, PM, delivered on 16th August, 2024, in Mombasa CMEELRC Cause No. E661 of 2022)

JUDGMENT

Introduction

1. Via the Statement Claim dated 21st November, 2022, filed in the above-stated suit, the Appellant sued the Respondent, and sought the following reliefs;
 - a. Kshs. 255,667 on account of underpayment;
 - b. Kshs. 191,694.41 on account of unpaid house allowance;
 - c. Kshs. 405,790.00 on account of minimum public transport allowance;
 - d. Kshs. 23,870.00 on account of unpaid clocking allowance;
 - e. Kshs. 42,966.00 on account of unpaid tallying guard allowance;

- f. Kshs. 975,193.03 on account of unpaid overtime during normal working days;
- g. Kshs. 676,643.21 on account of unpaid overtime during weekly Rest Days;
- h. Kshs. 176,534.35 on account of unpaid wages for work done during public holidays;
- i. Kshs. 135,268.40 on account of unpaid wages for work done during annual leave days;
- j. Kshs. Kshs. 7,700.00 on account of unpaid leave traveling allowance;
- k. Kshs. 13,650.00 on account of unpaid monies for purchase of good quality bar soap;
- l. Kshs. 89,148.15 on account of gratuity;
- m. Kshs. 19,502.85 being gross minimum wage at time of termination on account of payment in lieu of notice of termination;

n. Maximum compensation for unfair termination of employment;

o. Costs of this suit;

p. Interest on all the money awards at 12% per annum from date of filing the suit until payment in full; and

q. An order compelling the Respondent to issue the Claimant with a certificate of service.

2. The Respondent contested the Appellant's claim through a Statement of Defence dated 23rd March, 2023. It refuted the Appellant's cause of action and entitlement to the relief sought.

3. After hearing the Parties on their respective cases, the trial Court found in favour of the Appellant, substantially granting him the remedies sought, but refused others. Dissatisfied with that part of the Judgment that denied

some of the reliefs, the Appellant filed the appeal in this lead file.

4. The Respondent, dissatisfied with the success achieved by the Appellant in the suit, has challenged the judgment of the trial Court through Appeal No. E 176 of 2024. For the purposes of this Judgement, I shall consider the Respondent's appeal as a cross-appeal.

Appellant's case before the trial court

5. The Appellant was employed by the Respondent as a night watchman on 17th April 2015 under a written contract, a copy of which was never supplied to him.
6. In the course of his employment and due to the nature of his duties, the Appellant was assigned to different locations within Mombasa County. His working schedule consisted of Sundays through Fridays, from 1800 hours to 0600 hours, and on Saturdays, starting at 1630 hours for parade duties at Changamwe Social Hall Grounds, which

coincided with his regular Sunday shift, which ended at 0600 hours.

7. The Appellant had no rest days for six consecutive working days. He was required to fill in the clock-in register when reporting for duty and fill out the clock-out register when leaving duty.

8. The Appellant's salary was paid in two monthly instalments, one at the start of the calendar month and the other towards the end of the month.

9. The Appellant worked diligently until 31st October 2022, when the Respondent constructively dismissed him.

10. He asserted that during his employment, the Respondent violated statutory provisions, thereby breaching the protections and rights granted to him [the

Appellant]. They paid him below the minimum wage, in violation of the Regulations of Wages (Protective Security Services) Order, 1998, failed to provide him with a copy of the employment contract, and created a working environment marked by arbitrariness—including paying below the statutory minimum, extending working hours, making unlawful deductions, and denying statutory allowances, annual leave, and overtime.

11. Furthermore, the Respondent demanded that the Appellant submit original academic documents and unjustifiably withheld them. This amounted to servitude.

12. The Appellant asserted that the Respondent consistently paid him below the statutory minimum wage under **Regulation of Wages [General] [Amendment] Order, 2015**, for night and day watchmen during the period May 2015-April 2017. The cumulative underpayments amounted to KShs. 136,278.80.

13. He further asserted that between May 2017 and April 2018, a period during which the Regulation of Wages [General] [Amendment Order, 2017] applied, the Respondent underpaid him by a total of KShs. 58,795.
14. He stated that from May 2018 to April 2022, the **Regulation of Wages [General][Amendment]Order, 2018**, applied to him, and during this period, the Respondent also consistently paid him below the minimum wage stipulated by the Order. Cumulatively, he was underpaid by the sum of KShs. 136, 278.0
15. He further asserted that during the period May 2022 and October 2022, the Respondent underpaid him by the total sum of KShs. 30,145.00, as they always paid him below the stipulations of the **Regulation of Wages [General][Amendment]Order,2022**, which applied to him.

16. He asserted that throughout his period of employment, the Respondent did not provide him with reasonable housing accommodation or pay him in lieu at a rate of 15% of his basic salary, contrary to Regulation of Wages [Protective Security Services] Order, 1998. For the period from May 15, 2015, to April 2017, KShs. 43,995.60, May 2017-April 2018, KShs. 25,957.62, May 2018-April 2022, KShs. 109, 022.04, and May 2022, October 2022, KShs. 12, 719.25. Totalling KShs. 156,720.91.

17. The Appellant further contended that the Respondent neither assigned him a duty near to his residence, nor provided him with transport to and from employment premises, nor paid him a minimum public transport allowance pursuant to order 18 of Regulation of Wages [Protective **Security Services**] **Order, 1998**. He could thus spend KShs. 170 daily from his own pocket as fare. During the entire period, he expended KShs. 405,790.00.

18. . He was also denied a daily clocking allowance totaling KShs. 23,870.00 and tallying guard allowance KShs. 42,966.00, respectively.

19. Additionally, the Respondent made him work 72 hours over six days each week, exceeding the statutory 52-hour limit set out in Order 6 of the Regulation of Wages [Protective Security Services] Order, 1998. Despite this, the Respondent failed and/or neglected to pay him for the overtime hours worked, in accordance with Order 7[1][a] & [2]. For the periods mentioned earlier, he was not paid a total of KShs. 975,193.03.

20. He alleged that the Respondent did not allow a day off in any week. Thus, he worked 7 days a week without any rest day as required by Order 8 of the Regulation of Wages [Protective Security Services] Order, 1998. The Respondent did not pay him for the rest days worked. In his computation, under the various Regulations of Wage

Orders, relevant to periods mentioned earlier, the Respondent ought to have paid him, KShs. 153,984.60, KShs. 89,986.42, KShs. 397,790.11, and KShs. 52,912.08.

21. He asserted that he worked on public holidays without compensation. We worked as such for a total of 80 days. The Respondent was supposed to pay him compensation per Order 9. Cumulatively, he was not paid KShs—176,534.35.

22. The Appellant claimed that he was denied opportunities to take his annual leave; as a result, at the time of his separation, he had accrued but not used 203 days. The Respondent did not compensate him for these accrued but unused leave days. Between May 2015 and October 2022, the payment in lieu of leave totalled KShs. 135,268.40.

23. He asserted that under Order 21 of the Regulation of Wages [Protective Security Services] Order, 1998, the Respondent failed to provide him with money for half a kilogram of good-quality soap per month. Using an average price of KShs. 150.000 per Kilogram, he claimed, KShs. 13,650.00).

24. Lastly, he alleged that he was entitled to gratuity under paragraph 17 of the Regulation of Wages [Protective Security Services] Order,1998, KShs. 89, 148.15.

25. The Appellant asserted that the Respondent demonstrated unwillingness to be bound by the terms of the employment contract between it and the Appellant by; failing to improve the Appellant's conditions despite numerous prompting by the Appellant; depriving the Appellant of a grievance procedure to pursue after his incessant complaints to his supervisor regarding the working conditions fell on deaf ears; declaring the

Appellant *persona non grata* at their Director's office; and unnecessarily withholding the Appellant's academic certificates without justifiable cause.

26. The foregoing frustrated him, created a hostile working environment for him entitling to consider himself as having been dismissed from employment, and demonstrated that the Respondent had fundamentally breached the contract.

27. As a result of the Respondent's repudiatory breach of contract of employment, the Claimant considered himself terminated and proceeded to draw a letter of resignation dated 26th September 2022.

Respondent's case

28. The Respondent, Texas Alarms (K) Limited, presented one witness, Bernard Aduda, their Group HR Manager, who testified on their behalf. The witness testified that the

Appellant was employed as a security guard on a renewable three-month contract from 17th April 2015 until his voluntary resignation on 26th September 2022.

29. He stated that the terms of employment were outlined in a letter of employment dated 17th April 2015. Among the terms was that he was required to work 12-hour shifts, either day or night, due to the nature of the security business the Respondent is involved in.

30. The Appellant earned a gross daily wage of KShs. 340 when he began employment on 14th April 2015. This wage was later increased to KShs. 420 for the years 2017 to 2021 and further raised to KShs. 460 from 2021 until his exit. Throughout this period, the daily wage included overtime pay and house allowances paid to him. The payment was at all material times in accordance with the minimum wage guidelines.

31. The Respondent contended that the Claimant was a problematic employee who repeatedly engaged in workplace infractions that included reporting late to work, replacing a client's padlock with an unknown intention, working in civilian clothes, forging a colleague's signature, and sleeping on duty. These actions resulted in multiple verbal and written warnings, culminating in a final warning issued in May 2020.

32. The Respondent denies all allegations of underpayment, failure to provide leave, wrongful deductions, or constructive dismissal.

33. The Appellant gave his resignation notice dated 26th September 2022. The Respondent acknowledged his resignation via a letter dated 26th September 2022. However, the Appellant refused to take the letter. He only opted to take a photo of it.

34. He asserted that the Appellant resigned voluntarily, and therefore was not entitled to gratuity or other reliefs claimed.

35. He also stated that the Appellant did not collect his certificates or complete necessary formalities despite reminders, and no official grievances were ever lodged with the Labour Office or the Court during his employment.

Judgment

36. The court trial examined the evidence and determined that the Respondents' actions, including withholding academic certificates and neglecting to address complaints, constituted constructive dismissal. The court adjudged the termination as unjust and unlawful, and consequently awarded the Claimant compensation for underpayment, unpaid housing allowance, unpaid leave, one month's salary in lieu of notice, and maximum damages for unlawful termination. Claims related to

gratuity, various allowances, and additional overtime were dismissed due to the absence of contractual stipulations or insufficient evidence. The Respondents are mandated to issue a certificate of service.

37. The Appellant succeeded in his claim against the Respondent. The Court granted declaratory and pecuniary reliefs, thus:

1) A declaration that he was constructively dismissed.

2) Pecuniary awards:

a) Compensation for salary underpayments Kshs
255,667.00

b) Compensation for unpaid house allowance Kshs
191,694.41

c) Public transport allowance Nil

d) Unpaid clocking allowance Nil

e) Unpaid tallying allowance Nil

f) Unpaid overtime Nil

g) Unpaid rest days Nil

h) Public holidays Nil

i) Compensation for earned but untaken leave days KShs 135,268.40

j) Unpaid leave travelling allowance Nil

k) Toiletries Nil

l) Gratuity Nil

m) One-month salary in lieu of Notice Kshs 15,201.65

n) Compensation for unfair dismissal KShs 182,419.80

Total KShs 780,251.26

o) Costs

p) Interest

q) Certificate of service

3) Interest

The Appeal

38. Dissatisfied with part of the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds:

1. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for the unpaid Minimum Public Transport Allowance.

2. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for unpaid Clocking Allowance.

3. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for unpaid Tallying Guard Allowance.

4. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for unpaid overtime during regular working days.

5. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for unpaid overtime during weekly rest days.

6. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for compensation for work done during public holidays.

7. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for unpaid Leave Travelling Allowance.

8. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for unpaid monies for the purchase of good-quality bar soap.

9. The learned magistrate erred in law and in fact by dismissing the Appellant's prayer for gratuity.

10. The learned magistrate erred in law and in fact by basing the award of one month's pay in lieu of notice of termination of employment on the Appellant's basic wage of Kshs.15,201.65 instead of the statutory gross monthly wage of Kshs. 19,502.85; and

11. The learned magistrate erred in law and in fact by basing the award of maximum compensation for unfair termination of employment on the Appellant's basic wage of KShs. 15,201.65, thus arriving at a sum of KShs. 182,419.80 instead of basing it on the Appellant's

statutory gross pay of KShs. 19,502.85 to arrive at the sum of KShs. 234,034.20.

39. Aggrieved by the Judgment, the Respondent challenged it under Appeal E 176 of 2024 [the cross-appeal]. They set forth the following grounds of Appeal:

- I. The learned trial magistrate erred in law and fact in arriving at contradictory findings on the Respondent's unlawful termination, where, on the one hand, the court satisfied itself that the Respondent willfully resigned from employment.

- II. The learned trial Magistrate erred in law and in fact in making an award for one month's salary in lieu of notice of KShs. 15,201.65 and a maximum compensation for unfair termination of KShs. 182,419.80, whereas there was no legal basis to make these awards when there was factual and credible evidence on record that authoritatively rebutted the notion that the Respondent was terminated as the

Respondent willfully resigned from employment by issuing one month's notice to the Appellant.

III. The learned trial Magistrate erred in law and fact in awarding the Respondent unpaid leave days of KShs. 135, 268.40, without laying a basis for how the amount was arrived at, when there was factual and credible evidence on record that authoritatively rebutted the notion that the Respondent was unfairly terminated from employment, as he willfully resigned from employment.

IV. The learned trial Magistrate erred in law and fact in making an award for salary underpayments in the sum of KShs. 255,667. 00, whereas there was no legal basis to make these awards in view of its earlier findings that the Respondent had willfully resigned from employment.

V. The learned trial Magistrate erred in law and in fact by ignoring and neglecting the weighty evidence and exhibits.

VI. The trial Magistrate was biased against the Appellant.

The Appellant's Submissions

40. The Appellant's Counsel submits that the two appeals revolve around two principal issues, namely, whether the Appellant is entitled to the payment of terminal dues and how much, and whether *the Appellant is entitled to compensation for unfair termination*.

41. Counsel for the Appellant then made his submissions on the issues in a trinity of thematic areas, thus: Superiority of Wages Order over Contracts of Employment; justiciability of continuing injury; and Burden of the employer to [dis] approve terms of employment.

42. It was submitted that by dint of the provisions of Section 48[1] of the Labour Institutions Act, Wages Orders assume superiority over written contracts of employment. To support this point, the Counsel for the Appellant relies on the case of **Kathra Hussein Noor & another v Kaderdina Hajee Essack Limited [2016] eKLR**. Where a contract of employment provides for terms and conditions which are less favourable to the employee compared to what the Wage Orders provide, those contractual terms and conditions are deemed substituted with the superior term by operation of the law.

43. Submitting on the justiciability of continuing injury, Counsel stated that accrued benefits, including salary arrears and underpayments, remain enforceable even if they span more than three years. Such defaults have been categorised as continuing in nature. A continuing injury has been ringfenced against becoming stale, even when it persists for more than three years during the pendency of the employment relationship. As long as the employee

remains in service, a new cause of action arises every month when they are paid contrary to the Wage Orders. To buttress this submission, the case of **The German School Society & another v Ohany & another [2023] KECA 894 [KLR]**.

44. Therefore, all accrued benefits dating back to the start of employment are recoverable if claimed within 12 months of termination. To support this point, Counsel has relied on the case of **G4S Security Services [K] Limited V Joseph Kamau & 468 others [2018] eKLR**.

45. On the burden of proof, Counsel submitted that to disentitle a claim, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. The justification for this is statutory; the employer is the custodian of employment documents. He relied on the case of **Omengo v Ultimate Engineering Ltd [2023] eKLR**.

46. The Appellant's suit was filed within 21 days after the constructive dismissal; he relies on the doctrine of continued injury. For this reason, none of his claims that were anchored mainly on the Regulation of Wages [Protective Services] Order, 1998, would be severed and treated as having gone stale.

47. The Appellant elaborately pleaded and particularised his dues in his statement of claim, stretching back to the commencement of employment. The Respondent didn't place forth evidence before the trial Court to rebut the claims.

48. Counsel urged this Court not to lose sight of the Respondent's witness's evidence under cross-examination before the trial Court, when he asserted that the Appellant's terminal dues were computed, but were not paid out to the Appellant because he filed the lower court

suit. Surprisingly, he didn't disclose the computed terminal dues for the trial Court's consideration.

49. In light of the provisions of the Labour Institutions Act, 2007, the Respondent's defence of contractual freedom cannot be a basis for this Court to disturb any of the awards that the learned trial Magistrate granted.

50. The Appellant also relied on the cases of **Joseph Siva Musaki v Vickers Security & Anor [2023] eKLR, Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR, Bamburi Cement Ltd v William Kilonzi [2016] eKLR and Cola v Maria [2015] eKLR**, to support his submissions on the justification of the awards that the learned trial Magistrate made, and also urged this Court to grant those reliefs that the trial Court didn't make.

Respondent's submissions

51. The Respondent identified the following issues for determination:

- I. Whether a competent record of Appeal has been lodged before this court by the Appellant in the lead file of Appeal Number E171 of 2024.
- II. Whether the Appellant herein was unfairly terminated /constructively dismissed/ resigned from employment.
- III. Was the Appellant constructively dismissed from employment?
- IV. What reliefs are available to the Respondent?
- V. Who bears the costs of this Appeal?

52. Counsel for the Respondent argued that Order 42 Rule 13[4] of the Civil Procedure Rules provides for what a record of appeal shall contain. A decree is among those documents that must be incorporated in a record of appeal. Despite the Appellant filing a record of appeal and a supplementary record of appeal, neither contains a decree as one of the documents. Where a certified copy of

a decree is not included in a record of appeal, the appeal is incomplete and incompetent. The appeal becomes a good candidate for dismissal. To buttress this point, Counsel relied on the case of **Trans Mara Sugar Co Ltd v James Omondi Obudho (2020) eKLR.**

53. On whether the Appellant was unfairly terminated/constructively terminated or he resigned from employment, Counsel submitted that the Appellant voluntarily resigned from employment. The termination of his employment was not, therefore, at the initiative of the Respondent and was not unlawful. The learned trial Magistrate erred in law when he found that the termination was unfair, while at the same time finding that the Appellant willfully resigned from employment.

54. Having satisfactorily found that the Appellant willfully resigned from employment, the learned trial Magistrate erred in law and fact when she granted the Appellant

relief, such as notice pay and compensation for unfair termination. To support this submission, Counsel placed reliance on the case of Aristide **Marege Nyang'au v Lavington Security Limited (2021) eKLR.**

55. On constructive dismissal, the Respondent submitted that constructive dismissal occurs when an employer creates intolerable conditions forcing an employee to resign. The Appellant did not provide evidence to demonstrate that he exited from his employment by resignation, due to the conduct of the Respondent that culminated in a hostile and intolerable work. His Claim for constructive dismissal should fail. To support this point, Counsel has cited the case of Henry **Ochido v NGO Coordination Board (2015) eKLR.** The burden of proof rested on the Appellant to prove constructive dismissal. The decision on **Bernard Muriuki Gikandi vs Kenya Wildlife Service [2022] eKLR.**

56. On the reliefs, Counsel submitted that, having willfully resigned from employment and not been dismissed from employment, the Appellant was not entitled to any of those reliefs that the learned Magistrate awarded him. As such, the learned Magistrate erred in making the award.

Analysis and determination

57. It is essential to point out that in the two appeals before this Court, the Court is invited to render itself on them as a first Appellate Court. No doubt, the role of a First Appellate Court is to reassess and reevaluate the material presented to the trial Court and draw its own independent conclusions. However, it should bear in mind that it neither saw nor heard the witness testify, and give due allowance for that. See **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**

58. I have thoroughly reviewed the grounds of appeal in the two appeals, the parties' pleadings, the oral and

documentary evidence presented before the trial court, and the written submissions by Counsel. In my assessment, the two appeals turn on three key issues: (a) whether the Appellant's appeal herein is incomplete and incompetent for want of inclusion of a certified copy in the record of appeal, (b) whether the Appellant was constructively dismissed from employment, and (c) whether the Appellant was entitled to the reliefs sought.

(a) Whether the Appellant's Appeal is incomplete and incompetent.

59. The Respondent argued that the Appellant's appeal is incompetent and fit for striking out, as the record of appeal he has filed herein did not incorporate a copy of a certified decree of the lower Court. To buttress this submission, they relied on the persuasive decision in **Trans Mara Sugar Co Ltd v James Omondi Obudho [2020] eKLR**, where Mrima J held;

“I will also add my voice on the subject. First, from the reading of Section 65[1] of the Act, it is the decree or part thereof that is appealed from the subordinate court to the High Court. Second, under Order 42 Rule 13[4] of the Rules, a Court may dispense with and document to be part of the Record of Appeal, except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from, and in appropriate cases, the order giving leave to appeal. Third, the saving grace under Article 159 [2] [d] of the Constitution is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. Fourth, despite clear provisions on extension of time, the Appellant never sought any extension of time to file the decree, nor did it explain the difficulty in obtaining the decree. The appeal was filed around 60 days post the delivery of the Judgment appealed against. That was clearly out of time.

The Record of Appeal is therefore incomplete. In the words of the Supreme Court in Civil Application No. 20 of

2014- Bwana Mohammed [supra], “such an appeal would be incomplete and hence incompetent. Having said so, there is no competent appeal for consideration. The appeal is therefore struck out with costs.”

60. With great respect, I am not persuaded by the holding for three reasons. First, considering the entire structure of Order 42 of the Civil Procedure Rules, in my view, the non-inclusion of a decree in a record of appeal is not a matter of substance but rather a procedural issue. In my understanding of the law, substantive issues are those that relate to the actual rights, duties, and liabilities of parties in a case. Procedural issues, on the other hand, concern the methods and processes involved. Including a decree in a record of appeal, along with other documents, is primarily a procedural matter.

61. The saving grace of Article 159 of the Constitution can set in depending on the circumstances of each case and

save an appeal in which the record of appeal does not embody the decree. The reason is that the issue is procedural, and the tone in *Green Power Generation Company Limited v Kenya Power and Lighting Company Limited & another* [2025] KECA 760[KLR] explicitly suggests this. The Court stated:

“This Court has variously stated that the rules for procedure are handmaidens of justice, but, in appropriate cases, they ought not to obstruct the dispensation of substantial justice. Article 159[2] [d] of the Constitution prescribes that “.....justice shall be administered without undue regard to procedural technicalities” Under Rule 86 of this Court’s rules, the court has discretion to strike out a Notice of Appeal or Appeal where an essential step has been omitted during filing, or has not been taken within the prescribed time. The discretion should nevertheless be exercised judiciously in each case.

62. In **Kirira v Deputy Registrar High Court Nyeri &4 others [Civil Appeal [Application 128 of 2020] [2025] KECA 953[KLR]**, the Court of Appeal stated;

“The courts have numerously held that rules of procedure are the handmaidens of justice. We share this view and do not believe that a party that flouts all rules of procedure can seek refuge in Article 159 of the Constitution. The intention of the framers of the Constitution could not have been to assist litigants who do not comply with rules and who have no plausible reasons for their sloppiness or omission. To do so would be to throw the court into disarray and interfere with the administration of justice, and would be totally unfair to the party on the other side. This is not to say that in deserving cases, the court will not use its discretion in favour of such a litigant. [Emphasis added]

63. I am of the view that this is an appropriate case in which I should exercise discretion to refrain from striking out the appeal on the basis fronted by the Respondent. The circumstances of this matter necessitate such an approach. The objection is raised at a very late stage, when the opposing party cannot respond or provide an

explanation for the oversight. Furthermore, when this matter was brought before the court for directions regarding the hearing of the appeal, Counsel for the Respondent did not raise any concerns regarding the incompleteness of the appeal record.

64. Furthermore, this Court has not overlooked the fact that the objection is raised by a party who was equally responsible for filing a record of appeal, as they are the appellants in Appeal E 176 of 2024. The Court observes that on 25th September 2024, Justice Nzei ordered the Respondent to file a record of appeal within 14 days of that date in their appeal [E176 of 2024]. They failed to do so.

65. This Court is not incapacitated from rendering a just decision in this appeal as a consequence of the parties' failure to have the certified copy of the decree included in the record of appeal.

66. Under order 42 Rule [1] provides;

“1. Every appeal to the High Court shall be in the form of a memorandum of Appeal signed in the same manner as a pleading.

2. The memorandum of Appeal shall set forth concisely and under heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

67. Undeniably, therefore, unlike in the procedure provided for the filing of an appeal in the Court of Appeal provided for under Rule 84 of the Court of Appeal Rules, which provides;

“Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry within sixty days after the date when the notice of appeal was lodged;

a) A memorandum of appeal, in four copies,

b) The record of Appeal, in four copies,

c) The prescribed fees and security for the costs of the appeal,

A complete and competent appeal contemplated under Order 42 Rule 1 of the Civil Procedure Rules is initiated when the memorandum of appeal is lodged within the prescribed period.

68. Order 42 of the Civil Procedure Rules explicitly states that the initiation of an appeal must be undertaken through a single document, namely the memorandum of appeal. This process is distinct from that of filing a record of appeal as outlined in Order 42 Rule 13. Therefore, if the rule framers intended that a failure to produce a complete record would automatically render a properly filed appeal incompetent and incomplete, such an intent would have been explicitly articulated. Indeed, the rules do not contain any provision—nor can any inference be reasonably drawn—implying such a consequence. In cases

where the necessary documents are not included, the record of appeal should be deemed incomplete and therefore incompetent. Consequently, it is the record of appeal that should be struck out, if necessary.

69. A critical examination of Order 42[13] [4] reveals that the duty lies with the Court to satisfy itself that all necessary documents have been included in the record of appeal before it, prior to allowing the appeal to proceed to hearing. In my view, if the Court, for some reason, fails to fulfil this duty, it cannot be open to the other party to approach the Court after the directions for hearing the appeal have been issued merely to seek striking out of the appeal. The party can only make an application for the Court to rectify the error.

70. It is for the reasons outlined above that I am not persuaded by the Respondent's plea to strike out the Appellant's appeal and the authorities cited by the Respondent.

71. No doubt, the Appellant's claim before the trial Court was that of constructive dismissal. However, considering the Respondent's pleadings and evidence before the learned Magistrate, this Court gets the impression that the Respondent did not seriously view it as such and did not present an appropriate defence. They consistently argued that the Appellant voluntarily resigned, without considering the legal position that resignations can be a vital factor in a claim for constructive dismissal.

72. The Memorandum of appeal filed in the cross-appeal by the Respondent also reflects the Respondent's approach. None of the grounds of appeal contained therein can be regarded as an objection to the learned Magistrate's determination that the Appellant was constructively dismissed.

73. Contrary to the consistent assertion by the Respondent that the Appellant willfully resigned from employment, the tone of the resignation letter does not, to a reasonable

person, suggest a willful resignation. Instead, it indicates that the resignation was influenced by the conduct of the Respondent, which the Appellant could not endure.

74. Numerous, this Court has held that once constructive dismissal is proved, it equates to an unfair termination, which opens an avenue for the employee to claim reliefs associated with unfair termination. Consequently, the learned trial Magistrate cannot, therefore, be faulted for employing the term unfair termination in his judgment in the context of the matter that was before him and his findings.

75. Contrary to the Respondent's argument before this Court, this Court does not see anywhere in the trial Court's Judgment where the learned Magistrate found that the Appellant willfully resigned. "The learned trial Magistrate's Judgment was explicit. The resignation was a result of the oppressive conduct of the Respondent.

76. The learned trial Magistrate appreciated that in a claim for constructive dismissal, it is the conduct of the employer that is in issue. That duty lay on the employee to prove constructive dismissal. The Respondent has not challenged his apprehension of the principles or that he misapplied the same.

77. The Court of Appeal case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, the Court held that,

“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 the 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 the 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.

78. JW Keli, J in the case of **Wanyonyi v Principal Kamusinde Secondary School & another (Employment and Labour Relations Appeal E010 of 2023) [2024] KEELRC 648 (KLR) (14 March 2024) (Judgment)** relied on **Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR** where it was held that: -
“On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions, forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that, indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.”

79. In **Kenya Union of Sugarcane Plantation and Allied Workers v Othira (Appeal E005 of 2023)**

[2024] KEELRC 843 (KLR) (18 April 2024)

(Judgment), it was held that,

“For a constructive dismissal to be construed, there must be resignation. Resignation is viewed as a communication of the intolerability of the employer’s conduct. In the absence of resignation, it is safe to draw an inference that the employee has acquiesced to the employer’s intolerable conduct.”

80. By reason of the foregoing, this Court finds no basis to hold that the resignation by the Appellant was willful, and that the learned trial Magistrate’s finding that he was constructively dismissed was erroneous.

Whether the Appellant was entitled to the reliefs sought

81. The reliefs sought by the Appellant were categorised into two groups. The first comprised those dependent on the claim of constructive dismissal, such as notice pay and compensation for unfair dismissal, while the second encompassed reliefs independent of this claim.

Importantly, the latter category would be granted irrespective of the success or failure of the claim for unfair dismissal. It appears that the Respondent did not fully recognise this categorisation, opposing the award of the reliefs pursued before the learned trial magistrate on the grounds that the Appellant's resignation was voluntary and therefore disqualified him from obtaining the reliefs.

82. Section 48 of the Labour Institutions Act, 2007, prohibits the underpayment of remuneration to employees subject to the Regulation of Wage Orders outlined therein. The terms and conditions of employment for such employees may only be more favourable than those specified in the Wage Orders from time to time, and not less so. By operation of law, the terms and conditions of the Wage Orders, which are more favourable than those originally provided to the employee, automatically become part of the contractual agreement. They supersede any inferior terms and conditions.

83. Having thoroughly examined the Wage Orders explicitly detailed in the pleadings, the witness statement of the Appellant, and the well-crafted and valuable submissions of the Appellant's Counsel, I conclude that these Orders delineated the minimum wages and their applicable recipients at various times. It is apparent that they applied to the Appellant. Throughout all material times, the Respondent failed to pay the Appellant the minimum wages stipulated or any higher amounts; instead, remuneration was below the mandated levels. The Respondent did not submit any substantial evidence before the trial Court to refute this assertion. Furthermore, the submissions of the Respondent's Counsel have not effectively challenged this conclusion.

84. The Appellant meticulously, thoroughly, and impressively pleaded and presented his evidence in a tabular form. If there was any non-compliance with the provisions of the Wage Orders, nothing was easier than

for the respondent to present evidence that the Wage Orders did not apply to the Appellant, or that what he was paid was according to the Orders.

85. The learned trial Magistrate did not err in finding that the Appellant was entitled to compensation for underpayments of salary and unpaid house allowances, in the sums he awarded.

86. I observe that, although the Appellant carefully detailed in his pleadings and, by extension, in his witness statement, the specific public holidays on which he worked without remuneration, the Respondent failed to present evidence before the trial Court explaining why the Appellant would not be entitled to compensation, the law mandated that he be compensated or that he did not work on those days as alleged. In sum, the claim under this head was not sufficiently challenged. The learned trial Magistrate erred in not so finding.

87. Undeniably, there was no dispute that the Appellant, throughout his employment, worked for 12 hours, whether he was on the day or night shift. As correctly pointed out by the Appellant, the law stipulates a maximum working hour of 8 hours per day. Therefore, where an employee works beyond the hours stipulated, they are entitled to compensation. The Respondent's defence to the Appellant's claim for unpaid overtime was that he was paid. This was a bald assertion that wasn't supported by any evidence. The learned Magistrate erred when he failed to award the relief.

88. The claim for toiletries and transport allowance correctly failed. They were special damages, considering how they were pleaded. They needed specific proof. The Appellant failed to discharge this duty.

89. The claim for clocking in and tallying allowance was not sufficiently challenged, considering the Appellant's

assertion that it flowed from the Regulation of Wages Order peculiar to the security space.

90. Lastly, having found that the Appellant was underpaid at all material times, the notice pay that the Appellant was entitled to would only be based on the minimum wage of the time of separation. The learned trial magistrate erred when he did not approach the award he made under this head in this manner.

91. Gratuity is a contractual benefit, not a statutory one. As such, gratuity can only be availed of by an employee in a litigation where it is proven that their contract or Collective Bargaining Agreement provides for it. See **Bamburi Cement Limited v William Kilonzi [2016] eKLR**. The learned trial Magistrate did not fall into any error when he did not grant the same.

92. Section 49[1][c] of the Employment Act, 2007, grants the courts the authority to award compensation to an employee who has successfully challenged their termination. However, it is important to emphasise that the exercise of this authority is discretionary and depends on the circumstances of each case. I have carefully considered the circumstances that led to the Appellant's resignation, the length of the period for which the Respondent sustained them, and the Appellant endured them, the length of the Appellant's service, and the fact that he did not in any proven manner influence the separation, and I hold that the learned trial Magistrate's exercise of discretion cannot be faulted.

93. In the upshot, the Appellant's appeal partially succeeds in the following manner;

- a) The learned trial Magistrate's Nil award for Clocking and Tallying allowance is hereby set aside and in

place thereof, KShs. 23,870.00 and 43,966 awarded, respectively.

b) The learned trial Magistrate's nil award for overtime compensation is hereby set aside, and in its place, an award of KShs. 975,103.03 is made.

c) Wages for work done during public holidays, KShs. 176,534.00 is hereby made, substituting the nil award by the learned trial Magistrate.

d) KShs. 4, 301.15, the difference between the gross wage, KShs. 15,201.65 and KShs. 19,502.8, which the trial Magistrate could have applied when awarding notice pay, is hereby granted.

e) As the Appeal partially succeeded, the Appellant shall be entitled to 60% of the costs of the appeal.

f) The Cross-Appeal [Appeal E176 of 2024] is hereby dismissed. Each party is to bear its own costs of the appeal.

Read Signed and Delivered this 31st Day of October 2025.

OCHARO KEBIRA

JUDGE