

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAKURU

ELRC APPEAL NO. E022 OF 2023

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DAMASH NYAMBATI NYAMAIRURA

ALIAS THOMAS NYAMBATI.....

APPELLANT

VERSUS

PAUL MUREITHI T/A PANA PROPERTIES

RESPONDENT

***(Being an Appeal from the Judgment and Decree of
the Honourable Emmanuel S. Soita, Senior
Resident Magistrate, delivered on 8th August 2023
in Nakuru CM ELRC No. 55 of 2020)***

JUDGMENT

1. The Appellant, being dissatisfied with the judgment and decree of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, filed this appeal vide a Memorandum of Appeal dated 9th August 2023, on the following grounds that:-

1. The learned trial magistrate erred in law and in fact by failing to award 12 months' compensation as provided for under section 49 (1)(c) of the Employment Act, despite finding

that the Claimant's termination was unlawful and without notice.

2. The learned trial magistrate erred in law and in fact in completely failing to grant the Claimant's relief for service pay (2 years) even when it was clear that the Respondent did not remit contribution to NSSF.

3. The learned trial magistrate erred in law and in fact to grant the relief for underpayment and failing to consider that the Claimant's salary was way below the gazetted minimum legal wage for estate management.

4. Further to the above, the learned trial magistrate erred in law and in fact by failing to grant relief for underpayment despite admission by the Respondent during the hearing that the Claimant's salary was below the minimum wage as gazetted.

5. The trial magistrate erred in law and in fact by failing to consider that the burden of proof on the grant for underpayment was on the employer pursuant to section 10(7) and 74 of the Employment Act.

2. The Appellant prays that:

a. This court allows part of the appeal by awarding the Claimant the reliefs for underpayment, service pay (2 years) and 12 months' compensation as per section 49(1)(c) of the Employment Act, as computed in the Memorandum of Claim, plus costs of the appeal.

3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The Appellant submitted that it is challenging the trial court's award of Kshs.11,000/= as compensation for unlawful termination, arguing it was manifestly low and failed to consider key factors under **section 49(4) of the Employment Act**, including length of service, expected duration of employment, alternative job prospects, and severance entitlement. The Appellant relied on the Supreme Court's case in ***Kenfreight (EA) Limited V Nguti [2019] KESC 79 (KLR)***, the Appellant contends he was entitled to up to 12 months' gross salary and further submitted that the trial court erred by

denying service pay under Section 35(5) and (6) of the Employment Act, despite the Respondent's failure to prove statutory remittances, and by overlooking relief for underpayment, as his wages were below the gazetted minimum for an Estate Manager.

5. The Appellant urges the court to allow the appeal and grant the reliefs sought.

Respondent's submissions

6. The Respondent submitted that the trial court rightly exercised its discretion in awarding the Appellant Kshs. 11,000/=, equivalent to one month's salary, as compensation for unlawful termination. While **section 49(1)(c) of the Employment Act** allows for compensation of up to 12 months' salary, the actual award depends on factors under section 49(4) of the Employment Act, which must be supported by evidence. The Respondent noted that the Appellant failed to present such evidence and had only worked for less than two years in a role with minimal qualifications and fluctuating job security. The Respondent relied on the Court of Appeal case in

CMC Aviation Limited v Mohammed Noor

[2015] KECA 775, where a similar award was upheld for a two-year tenure, the Respondent maintained that the one-month compensation was fair and should not be disturbed.

7. The Respondent contended that the Appellant failed to produce his NSSF statement to prove non-remittance, arguing that under **section 35(6) of the *Employment Act***, service pay is not payable to NSSF members. Since the Appellant did not demonstrate what the Respondent ought to have remitted monthly, the trial court rightly declined to award service pay. Regarding underpayment, the Respondent maintained that the Appellant neither pleaded the expected salary nor cited any legal provision establishing a minimum wage for estate managers. The letter from the labour officer lacked authoritative basis, and without documentary evidence to substantiate the claim, the allegation of underpayment was unproven.
8. The Respondent urged this Honourable Court to dismiss the appeal with costs.

Analysis and determination

9. Being the appellate court, it is the court's responsibility to re-evaluate and analyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court as set out in ***Selle Associates V Associated Motor Boat Company Ltd (1968) E.A. 123.***
10. Having considered the records of appeal, the memorandum of appeal, and the submission by both parties, the issue for determination is whether the appeal is merited.
11. Looking at the record of appeal, there is no dispute that the Appellant was employed as an estate management agent earning Kshs.11,000/= per month. The Appellant was seeking compensation for salary in lieu of notice, 12 months' compensation for unfair termination in accordance with ***Section 49(1) (c) of the Employment Act***, service pay for two years and underpayment. The trial learned magistrate in his judgment stated that the Respondent did not state in his statement the reasons as to why the Appellant was terminated and found that the Appellant's termination was unlawful.

12. In ***Ombengi V Lavington Security Limited [2023] KECA 1147 (KLR)***, the Court of Appeal held that compensation under ***Section 49(1)(c) of the Employment Act*** is merely one of several remedies available to a trial court, and its application depends on the specific circumstances of each case. For an appellant to successfully challenge a trial court's discretionary decision, they must demonstrate that the discretion was exercised improperly, whether injudiciously, prejudicially, or in a capricious or whimsical manner. This principle was affirmed by the Supreme Court in ***Apungu Arthur Kibira V Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR***, which emphasized that judicial discretion must be exercised judiciously and without prejudice.

13. In ***Premier Bag & Cordage Limited V Peter Wakaba Wachie [2017] KECA 196 (KLR)***, the Court of Appeal held as follows:

“However, there is evidence from the respondent’s witnesses, Ibrahim Abdalla and John Busisa, pointing to the fact that Wakaba contributed to the termination

by failing or refusing to report back on duty in July, 2012. This evidence was significant, and the lower court ought to have taken it into account when determining whether or not to award compensation for unfair termination, and if so, how much to award. In view of the fact that the employment may have continued save for the refusal to return to work, and also appreciating the length of the employment, we would award six months' compensation."

14. In this instant appeal, the Appellant had worked for the Respondent for two years, and the learned trial magistrate did award compensation for unfair termination. The court is of the view that since the learned trial magistrate compensated for the unfair termination for only one month, it ought to have considered the length of period that the Appellant had worked for the Respondent. Since the Appellant had worked for the Respondent for about two years, the most appropriate compensation would be five months.

15. For the underpayment and leave days, **sections 107, 108, and 109 of the Evidence Act** provide that whoever alleges must prove. In ***Manyinsa V Lavington Security Limited [2023] KECA 1376 (KLR)***, the Court of Appeal stated as follows:

“.....it is evident that save for making general allegations, no evidence whatsoever was led to prove any of the claims/reliefs sought for under various heads for notice, under-payments, overtime, off days, public holidays, leave and compensation. The appellant for example did not state the number of days he had worked overtime, the accrued leave days and the number of days that he had worked on public holidays. Additionally, no documentary evidence in support of any of the claims or claim that he had applied for leave and was denied. The prayer for leave is revoked.”

16. In this instant case, the Appellant did not produce any documentary evidence to support the accrued

leave days and underpayment of salary; therefore, this appellate court will decline to award the same as he who alleges MUST prove **(Section 107-108 of the Evidence Act)** mere allegation cannot support a claim.

17. Flowing from the foregoing, the appeal partially succeeds on the part of compensation for unfair termination to five months taking all things into consideration, which is calculated: **Kshs.11,000 X 5 = Kshs.55,000/=** plus one month salary in *lieu* of notice Kshs.11,000/=.
18. Service pay is awarded at Kshs.11,000/= as Respondent did not present NSSF documents which should have been in his custody. **TOTAL AWARD Kshs.77,000/=.**
19. The Appellant will have the costs of the lower court proceedings and costs of this appeal.
20. Interest will accrue at 14% per annum from today's date till final payment.

Order accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 31st Day of October, 2025.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE

ORIGINAL