

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

ELRC APPEAL NO. E005 OF 2025
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

**ARN SECURITY CONSULTANTS
& TRAINING SERVICES LIMITED.....**
.....APPELLANT

VERSUS

EBBY WASILWA.....
RESPONDENT

***(Being an Appeal from the Judgment and Decree of
the Honourable Ruth Kefa Chebesio, Principal
Magistrate, delivered on 11th January 2025 in
Nakuru CM ELRC No. E191 of 2023)***

JUDGMENT

1. The Appellant, being dissatisfied with the judgment and decree of the Honourable Ruth Kefa Chebesio, Principal Magistrate, filed this appeal vide a Memorandum of Appeal dated 24th January 2025 on the following grounds:

1. The learned trial magistrate erred by finding that the Claimant was not given an opportunity to be heard and defend herself.

2. *The learned trial magistrate erred by finding that the reasons cited for the Claimant's dismissal were not proved.*
3. *The learned trial magistrate erred in law and fact by shifting the burden of proof to the Respondent with regard to the Claimant's alleged entitlement to overtime, unpaid off days, gratuity, and public holiday.*
4. *The learned trial magistrate erred by finding that the Claimant was entitled to gratuity pay, unpaid off days, overtime pay, and holiday despite the absence of evidence to support these claims.*
5. *The learned trial magistrate erred by failing to find that the Claimant had abandoned her claims for gratuity and rest days by explicitly omitting them from the reliefs sought in her submissions.*
6. *The learned trial magistrate erred in law and fact by finding that the Claimant had worked for the Respondent for 10 years.*
7. *The learned trial magistrate erred by failing to find that the claims for unpaid off days, overtime, and public holidays constituted a continuing injury and were time-barred under section 90 of the Employment Act.*

8. *The learned trial magistrate erred in law and fact by failing to consider the Claimant's own contribution to her dismissal when computing the compensation payable to her.*
9. *The learned trial magistrate erred by awarding the Claimant 12 months' compensation for unfair termination.*
10. *The Honourable Court erred by disregarding the Respondent's submissions in reaching its final determination.*

2. The Appellant prays that:

1. *The appeal be allowed*
2. *The Judgment and decree of the Hon. Ruth Kefa Chebesio- PM dated 11th January 2025 be set aside in its entirety with costs to the Appellant.*
3. *The costs of this Appeal be borne by the Respondent.*
4. *Such other or further reliefs, orders and remedies as this Honourable court may deem just and expedient.*

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

Appellant's submissions

4. The Appellant submitted that the Respondent's dismissal was lawful and justified, having been preceded by a fair disciplinary hearing and supported by valid reasons. The minutes of the hearing recorded multiple instances of misconduct, including abusive language towards supervisors, refusal to obey lawful instructions, neglect of patrol duties, and disclosure of confidential information, all of which were unchallenged by the Respondent in her pleadings or testimony. Her own admission of serving at the relevant sites corroborated the Appellant's account. These actions fall squarely within the scope of gross misconduct under **section 44(4) of the Employment Act**. Furthermore, in ***Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & Another [2022] KEELRC 590 (KLR)***, the court affirmed that employers may summarily dismiss employees for conduct that undermines the employment relationship, even beyond the listed grounds. The Respondent's behaviour eroded the trust essential to continued employment, rendering the dismissal both procedurally and substantively sound.
5. The Appellant contends that the trial court erred in awarding gratuity, overtime, unpaid off days, and

public holiday pay by improperly shifting the burden of proof to the Appellant, contrary to established legal principles. The Respondent had expressly abandoned several claims, including service gratuity, uniform refund, 30 rest days, and days worked up to 17th March 2021, in her submissions, thereby conceding their lack of merit and leaving the court with no basis to entertain or award them.

6. Regarding gratuity, the Appellant submitted that the Respondent failed to produce any evidence to support her entitlement, and her employment contract contained no provision for such a benefit. Although she claimed reliance on a Collective Bargaining Agreement (CBA), she did not present the document or prove its applicability, while the Appellant clearly denied being party to any CBA. Nonetheless, the trial court awarded gratuity and other reliefs without requiring strict proof, effectively treating mere pleadings as sufficient, which is legally unsound. The court further awarded KShs.93,000 without explaining how the figure was derived or providing any legal or factual basis. Similarly, the claim for 30 days of unpaid off days—

also abandoned in submissions—was awarded without supporting evidence.

7. The Appellant submitted that the Respondent's assertion that she was required to work on off days and public holidays from 2020 lacked explanation or proof of any change in her employment terms, and she failed to demonstrate that such obligations existed prior to 2020. Her contract explicitly provided for one rest day after every six consecutive days worked, and the Appellant confirmed she received her rest days and was not required to work on public holidays. The Respondent did not discharge her burden of proof, and the trial court failed to hold her to strict proof, resulting in erroneous awards. Therefore, the Appellant urges that these claims be dismissed for lack of evidence and failure by the Respondent to meet the requisite burden of proof.
8. The Appellant submitted that the Respondent's claims for overtime, unpaid off days, and public holiday pay were time-barred under **section 90 of the Employment Act**, which mandates that claims based on continuing injury must be filed within twelve months of cessation of employment. Since the

Respondent's employment ended on 17th March 2021 and the suit was filed on 26th July 2023, the claims were clearly outside the statutory limitation period. Courts have consistently upheld this principle, as seen in ***David Ngala Ochieng V Hatari Security Guards Ltd [2022] KEELRC 1013 (KLR)***, where Justice Radido held that monthly employment claims constitute continuing injuries, and in ***John Kiiru Njiri V University of Nairobi [2021] KEELRC 41 (KLR)***, where Lady Justice Mbaru dismissed similar claims for being filed beyond the permissible period. Despite the Appellant's detailed submissions on this issue, the trial court failed to address the limitation period and erroneously awarded the time-barred claims.

9. The Appellant submitted that the trial court erred in determining the Respondent's length of service as ten years, which led to an inaccurate calculation of the gratuity award. Evidence was presented showing that the Respondent abandoned duty for nine consecutive months beginning in January 2017, effectively terminating her employment through her own conduct. This was further confirmed by her Application for re-employment submitted in October 2017, indicating she sought to be engaged afresh. Despite this, the

Respondent calculated gratuity based on eleven continuous years of service, and the trial court reduced it to ten years without accounting for the employment break. The Appellant maintains that the award was based on a flawed premise and reiterates, without prejudice to its earlier position, that the Respondent was not entitled to gratuity in the first place.

10. The Appellant submitted that the trial court erred in awarding the Respondent the maximum twelve months' salary as compensation under **section 49(1) (c) of the Employment Act** without providing reasons or considering the Respondent's own contribution to her dismissal. Evidence of prior misconduct, including negligence, sleeping on duty, abusive behavior, and breach of confidentiality, was adduced, demonstrating a pattern that undermined the employment relationship. The Appellant relied on the case of ***Oi Pejeta Ranching Limited v David Wanjau Muhoro [2017] KECA 329 (KLR)***, where the court emphasized the need for judicial justification when granting maximum awards, and ***Samsung Electronics East Africa Ltd V K M [2017] KECA 267 (KLR)***, which cautioned against

awarding full compensation without assessing its impact or providing a rationale. Additionally, in ***Jacob Juma Makokha V Radar Security (K) Limited [2018] KEELRC 2577 (KLR)***, the court held that awarding compensation to an employee guilty of gross misconduct would be unjust and contrary to good order.

11. The Appellant urged this Honourable Court to set aside the judgment of the trial magistrate and allow the appeal as prayed.

Respondent's submissions

12. The Respondent submitted that the instant appeal is incompetent due to the omission of a certified copy of the decree from the record of appeal, as required under ***Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2024***. The Respondent relied on the case of ***Watu Credit Co. Ltd V Matere [2025] KEHC 2608***, the court held that failure to include a decree deprives the court of jurisdiction, citing the Supreme Court's decision in ***Bwana V Bonaya & 2 others [2015] KESC 8 (KLR)***. Similarly, in ***Mburu & 6 others V Kirubi [2023] KEHC 3599***, the court struck out the appeal for lack of

a formal decree, citing the case of ***Chege V Suleiman (1988) eKLR***, which emphasized that appeals must be founded on formally extracted decrees or orders. Additional cases reinforcing this position include ***Nairobi Plastics Ltd V Munialo & Anor [2024] KEHC 13125, Mutubi V Mbiti [2022] KEELC 15727***, and ***Lucas Otieno Maseye V Lucia Olewe Kidi [2022] KEELC 489***, all of which found appeals fatally defective in the absence of a decree.

13. The Respondent submitted that the trial court's decision was sound, having thoroughly evaluated the evidence, pleadings, and submissions of both parties in line with the appellate duty outlined in ***Selle V Associated Motor Boat Company Ltd [1968] E.A 123***. The Respondent claimed unfair dismissal without being given a fair hearing, while the Appellant argued that she was terminated for gross misconduct following a disciplinary hearing. However, the trial court found that the minutes of the hearing lacked any indication that the Respondent was allowed to make representations, have a representative present, or even sign the attendance, thereby failing the procedural fairness test under Section 41(2) of the Employment Act. The court noted that mere

attendance at a disciplinary hearing does not suffice; the employee must be given a genuine opportunity to defend herself. No notice to show cause was issued, and the Respondent was summoned by phone with no time to prepare a defence. Testimony from the Appellant's director and HR revealed a lack of documented misconduct, absence of recent warnings, and reliance on unverifiable phone complaints. The disciplinary hearing minutes listed multiple charges, yet no witnesses were called to substantiate them. The trial court rightly held that the Appellant failed to meet the burden of proof under **sections 43 and 45 of the Employment Act** and concluded that the dismissal was procedurally and substantively unfair.

14. The Respondent submitted that the trial court did not improperly shift the burden of proof to the Appellant, as the Appellant was legally obligated under **sections 74 and 27 of the Employment Act** to maintain and produce employee records, including those related to weekly rest days and working hours. The Respondent had pleaded for overtime, unpaid public holidays, and rest days worked, and it was incumbent upon the Appellant to rebut these claims with proper documentation, which it failed to do. The trial court

rightly noted this at paragraph 35 of its judgment. Supporting this position, the Court of Appeal in ***Chengo Kitsao Chengo V Umoja Rubber Products Ltd [2017] KECA 648 (KLR)*** emphasized the employer's duty to produce employment records to counter verbal allegations. Similarly, in ***Mwangi V Superiofone Holdings Ltd [2023] KEELRC 1430***, the court held that employers must avail employment records to facilitate fair adjudication, especially since terminated employees are not expected to have access to such records.

15. The Respondent submitted that the trial magistrate made no error of fact or law in finding that she had served the Appellant for ten years. Her employment contract and statement, along with the dismissal letter dated 17th March 2021, confirm her employment began on 1st December 2009. Although the Appellant's director initially stated she was employed in 2012, he later testified that she had been their employee since 2009, thereby corroborating the Respondent's position. The trial court also acknowledged the Respondent's nine-month absence

in 2017 and factored it into its assessment, as reflected in paragraph 33 of the judgment.

16. The Respondent submitted that the Appellant misapplied the law by citing the wrong section on limitation, as the applicable provision is **section 90, not Section 89 of the Employment Act**. In ***Arisa V Kipkebe Limited [2024] KEELRC 1232***, the court, drawing from the Indian Supreme Court decision in ***M. Siddiq V Suresh Das (2020)***, clarified that a continuing injury arises from a breach of an ongoing legal duty, not merely from the enduring effects of a past wrong. The court held that where an employee continues to work under the same conditions giving rise to the claim, the breach is of a continuing nature and thus not time-barred under Section 90.
17. Similarly, in ***Vipingo Ridge Limited V Swalehe Ngonge Mpitta [2022] KEELRC 309***, the court, relying on the Court of Appeal's decision in the G4S case, affirmed that claims such as house allowance and leave dues may remain valid if filed within three years of the end of the employment relationship, even if they accrued earlier. In this case, the Respondent only sought reliefs for the three years immediately

preceding her termination, placing her claims within the statutory limitation period.

18. The Respondent submitted that **section 49(1)(c) of the Employment Act** provides remedies for wrongful dismissal and unfair termination, applicable only after such dismissal has been deemed unfair. It emphasizes that once liability is established, the focus should shift to remedies rather than revisiting fault, and any assessment of the employee's contribution must be cautiously applied to preserve protections under section 45 and **Article 41 of the Constitution**. The appellant's claim that the trial court erred by not considering the claimant's contribution and by awarding 12 months' compensation is deemed legally unfounded. The trial court correctly evaluated both substantive and procedural fairness, found the dismissal unfair, and awarded compensation in accordance with the law.

19. The Respondent urged this Honourable Court to dismiss the appeal with costs.

Analysis and determination

20. Being the first appellate court, this court's duty is to re-evaluate, reassess and reanalyze 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 (supra)***.

21. In ***Peter M. Kariuki V Attorney General [2014] KECA 713 (KLR)***, where it was held that:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported).”

22. 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.

23. The Respondent had raised the issue of the record of appeal being incomplete, and the court will take this issue before proceedings dealing with the main issues raised in the appeal.

24. **Rule 15 of the Employment and Labour Relations Court (Procedure) Rules 2024** provides as follows:

“A memorandum of appeal shall be accompanied by a record of appeal comprising a certified copy of pleadings, the proceedings, any documentary evidence relied on, and the judgment, ruling, decision, order, decree or award appealed against.

Where the record of appeal is not filed together with the memorandum of appeal, the appellant shall file the Record within sixty days from the date of delivery of the judgment, ruling, decision, order, decree, or award appealed against

Unless the nature of the document renders it impracticable, each document prepared for the record of appeal shall—

- (a) contain a table of contents of the record of appeal;**
- (b) be on foolscap paper of durable quality;**
- (c) printed on only on one side of the paper;**
- (d) have a margin of not less than one and a half inches left on the left side of the sheet; and**
- (e) be paginated consecutively.**

The Court may, in addition to or in lieu of a record of appeal, call and rely on the court file or material for the proceedings appealed against in disposal of the appeal.”

25. Rule 16 also provides as follows:

“The appellant may, with the leave of the Court, file and serve a supplementary memorandum of appeal or a supplementary record of appeal.”

26. From the above, the Employment and Labour Relations Procedure Rules are not clear cut on the production of a decree alongside the record of appeal. Furthermore, this Court (ELRC) proceedings are not closely bound by the Civil Procedure Rules as

otherwise provided. The Appellant in his record of Appeal had annexed the trial court's judgment.

27. The parties did appear in court for directions. The Respondent should have raised the issue of the absence of the decree so that the Appellant could have perchance produced it. The same was only raised during the submissions. The court will not lock out the Appellant from the corridors of justice due to procedural technicalities as provided in article 159(2) (d) of the Constitution. The Judgment was annexed and that should suffice.
28. Having said so, the court will proceed to determine the other issues raised in the Memorandum of Appeal. The court is satisfied the trial court analysed the issue of unfair termination fairly and having had the benefit of hearing first hand evidence of the witnesses.
29. The trial court ruled that the employer failed on the ingredients of procedural fairness as well as failed to inform the employee clearly of the charges levelled against him.
30. The minutes of the disciplinary hearing did not allude that the Respondent was informed of her right to be

represented by a fellow worker or a shop floor union representative of her choice. The court is not aware whether she was represented by such a person. The minutes availed to court do not show the Respondent signed the same and so is not clear she was availed the final minutes and the proceedings therein.

31. In the case cited by the trial court **Antony Mkala Chitavi -Vs- Malindi Water & Sewarage Company Limited (2013) eKLR** the court held:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union

representative if possible. Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

32. The court therefore finds that the trial Magistrate was right in ruling that substantive fairness and procedural fairness were not met and so Claimant/Respondent proved her case on the balance of probability.

33. Having upheld the trial court judgment in favour of the Respondent the court will however vary the awards as follows-

(a) One month salary in lieu of notice is upheld
- Kshs.15,500/=

(b) Gratuity is not provided in the contract and is not proved and so is disallowed.

(c) Unpaid off days are upheld as the Appellant did not prove otherwise that he paid the Respondent - Kshs.31,100/=

As for unpaid overtime and public holidays the court is persuaded by the case of James Kyama

-VS- Muthaiga Golf Club 2022 KEELRC 968

where the court held: -

“The burden of proof is upon him to demonstrate through pleadings and evidence the exact overtime worked and how he arrived at the sum claimed. However, he has not demonstrated how he arrived at the figure of Kshs.530,875.58 pleaded in his claim. He testified that the computation was to be provided during submissions but clarified that the claim is based on a flat rate of 4 hours per day from 2nd June 2009 to 2nd June 2015.”

These two prayers are disallowed as they are not proved.

(d) Compensation for unfair termination will suffice to ten months equivalent instead of 12 months - Kshs.155,000/=

34. The costs of the lower court proceedings and the costs of this Appeal are awarded to the Respondent.

35. Interest will also accrue at 14% per annum from date of this judgment till full payment.

Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 11th Day of November, 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