

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KAKAMEGA
APPEAL NO. E019 OF 2024

ROBINSON INVESTMENT LIMITED APPELLANT

VERSUS

PETER MWANJE CHILUYI RESPONDENT

(Being an appeal from the judgment and decree issued in Kakamega Chief Magistrate's Court in ELRC No. E15 of 2022 by Hon. O. Amboko (SRM) delivered on 30th September 2024)

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a judgment dated and delivered on 30th September 2024 the lower trial court awarded the respondent (the claimant in the lower court) the following –

a) A declaration that the termination of the claimant's employment was unfair and unprocedural.

b) 1-month salary in lieu of notice = Ksh.9,800/=

*c) House allowance 15% x 9,800 x 72 months (6 years) =
Ksh.105,840/=*

d) 6 months' salary as compensation for the unfair and unjust

termination = 6 x 9,800 = Ksh.58,800/=

e) Overtime dues calculated as:

6am to 6pm – 12 hours = 4 hours overtime (normal working day 8 hrs)

4 x 7 = 28 hrs per week.

52 weeks a year – 3 weeks (leave) = 49 weeks a year

28 x 49 x 6 (years) = 8,232 hours

8232 hours (divide by 24 hours in a day) = 343 days

343 x 9800 = Ksh.112,046/=

30

f) Service pay $15/30 \times 9800 \times 6 = \text{Ksh.29,400/=}$

g) Certificate of service.

h) The claimant is entitled to a total award of Ksh. 315,886/=.

i) Costs of the suit and interest at court rates.

2. Thereafter, the appellant (the respondent in the lower trial court) through P. D. Onyango & Company Advocates commenced this appeal vide a memorandum of appeal dated 11th October 2024 raising the following grounds of appeal –

1. *That the learned magistrate erred in law and fact in failing to make a finding that overtime and house allowance were continuing wrongs.*

2. *That the learned magistrate erred in law and fact in failing to make a finding that continuing wrongs should be claimed within*

- 1 year from the date of termination of employment.*
- 3. That the learned magistrate erred in law and fact by awarding overtime and house allowance yet the same were statute barred.*
 - 4. The learned trial magistrate erred in her analysis and appreciation of the law and fact thereby arriving at a wrong decision.*
 - 5. The learned trial magistrate erred in law and fact by failing to read and analyze the evidence and submissions by the appellants thereby arriving at a wrong decision.*
 - 6. The learned trial magistrate erred in law and fact by failing to properly analyze and appreciate all the issues that were before the court as per the pleadings thereby arriving at a wrong decision.*
 - 7. That the learned magistrate erred in law and fact by failing to make a finding that the respondent herein had contributed to the termination.*
 - 8. That the learned magistrate erred in law and fact by awarding excessive compensation on unlawful termination yet the respondent herein had contributed to the same.*
 - 9. The learned magistrate erred in law and fact by failing to consider documents produced by the appellant herein in respect to working hours.*

3. The appellant is seeking for orders that –

a) The claims on overtime and house allowance be dismissed for being statute barred.

b) The judgment of the lower court be set aside and the memorandum of claim be dismissed with costs to the appellant herein.

c) Costs of the appeal.

4. By consent, the appeal was canvassed by way of written submissions. Mr. Bagada for the appellant filed written submissions dated 22nd July 2025 while Miss Chumo instructed by Mwakio, Kirwa & Co. Advocates for the respondent filed submissions dated 25th July 2025.

II. BACKGROUND

5. In a statement of claim dated 12th September 2022 the respondent pleaded that he was a permanent employee of the appellant as a supervisor and security guard with effect from 9th January 2015. It was pleaded that the respondent was unfairly and unlawfully terminated on 27th April 2021 without payment of terminal benefits. His last salary was stated as Kshs9,800/= excluding of house allowance.
6. It was further pleaded that on 27th April 2021 the respondent was issued with a letter of transfer from Butali to Kisumu but when he requested to be facilitated in the movement to his new station he was allegedly orally dismissed by the manager, Mr. James Nyarandi.

7. It was further pleaded that the termination was unfair and unlawful as it did not comply with **Sections 35, 36, 41, 43, 45, 49, & 51 of the Employment Act**. He pleaded that he was denied both substantive and procedural fairness.
8. The respondent prayed for the following reliefs in the lower trial court –
- a) A declaration that the termination of the claimant's services from employment was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the claimant.*
 - b) The sum of Kshs. 700,737.69/= as set out herein above.*
 - c) Compensation as per Section 49 (c) of the Employment Act, 2007.*
 - d) A certificate of service as per Section 51 of the Employment Act.*
 - e) Costs and interest of this suit.*
 - f) Any other award as the honorable court deems fit to grant in the circumstance of this case.*
9. In a response to the claim dated 13th December 2022 the appellant denied the claim in toto pleading that the termination of the respondent was fair and lawful both in substance and procedure. It was pleaded that the respondent was terminated after he deserted duty upon being served with the letter of transfer alluded to above.

10. The appellant pleaded that the salary paid to the respondent was consolidated inclusive of house allowance. It was further pleaded that the claim was statutorily barred under ***Section 90 of the Employment Act.***

11. It is upon hearing the parties that the lower trial court entered judgment in favour of the respondent as stated above. It is that judgment that is now challenged by the appellant in this appeal.

III. SUBMISSIONS BY COUNSEL

12. Counsel for the appellant condensed the grounds of appeal into four thematic areas –

- a) The learned magistrate erred in failing to make a finding that overtime and house allowance were continuing wrongs*
- b) The learned magistrate failed to analyze and or appreciate all issues before her as per the court pleadings*
- c) The learned magistrate failed to take into consideration that the respondent contributed to his termination and awarded excessive damages in the circumstance*
- d) The learned magistrate erred in awarding service pay yet the same was not proved.*

13. On the first issue, counsel submitted that the respondent was allegedly terminated on 27th April 2021 and the claim in the lower trial court was filed on 14th September 2022, more than one year after termination. It is submitted that the lower trial court failed to

find and hold that the claims on house allowance and overtime constituted continuing injury and as such had been filed outside the one-year limitation under **Section 90 (now Section 89) of the Employment Act.**

14. Citing **Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye & Another (2016) KECA 213 (KLR)** it is submitted that while all claims in employment and labour relations shall be filed within three years, those based on a continuing injury shall be filed within one year of termination or within one year of cessation of the injury. It is submitted that the appellant disputed the claim of overtime and the trial court in failed to analyze that claim and instead unlawfully and against the weight of the evidence held that the claim was not disputed.
15. On the second issue, it is submitted that the lower trial court failed to list and analyze the issues in dispute. It is submitted that the evidence on record confirmed that indeed the respondent failed to report to duty upon transfer from Butali to Kisumu and instead deserted duty. It is submitted that no evidence was produced by the respondent to confirm that he requested for and was allegedly denied facilitation to move on transfer.
16. On the third issue, it is submitted that it is submitted that it is the respondent who terminated the employment relationship and or substantially contributed to the collapse of the same upon failing,

refusing, and or neglecting to report to duty on transfer and or deserting duty. It is submitted that the respondent filed the claim in the lower court two years after desertion and that is not the conduct of an employee who had been rudely, unfairly, and unlawfully terminated. Counsel cited ***Pius Machafu Isindu V Lavington Security Guards Limited (2017) KECA 225 (KLR)*** in support of the argument that the conduct of the respondent and the evidence adduced during the trial was not commensurate with that of an employee who had been terminated as alleged and claimed.

17. Further citing ***Moses Ojani Khasaya V Wasso Security Company Limited (2017) eKLR*** it is submitted that the lower trial court ought to have considered the extent to which the respondent contributed and or was to blame for the termination. It is submitted that the appellant exercised its lawful administrative and management authority in transferring the respondent from Butali to Kisumu but instead of obeying those lawful directions the respondent deserted duty only to reappear in court with the claim.
18. On the last issue, it is submitted that the respondent did not prove that he was entitled to service pay and hence the court was wrong in awarding the same. It is submitted that it was upon the respondent to prove that the appellant had failed to pay dues to the National Social Security Fund (NSSF). It is submitted that it is the respondent who had the burden of proving this issue as he could readily access his

NSSF statement using his national identity card.

19. On the other hand, counsel for the respondent submitted on three issues –

1. *Whether the award of overtime and house allowance constitute a continuing injury;*
2. *Whether the respondent herein contributed to his termination from employment;*
3. *Who should pay for costs of this appeal?*

20. On the first issue, it is submitted that house allowance and overtime did not constitute continuing injury as to be limited to the one-year limitation period prescribed in **Section 90 (now Section 89) of the Employment Act**. It is submitted that the two items constituted contractual obligations that the appellant ought to have met throughout the employment relationship. Counsel cited **G4S Security Services (K) Limited V Joseph Kamau & 468 Others** (proper citation not provided) in support of the argument that the two items did not constitute continuing injury as envisaged in the above law. Counsel further relied on several other decisions including **Ol Pajeta Ranching Limited V David Wanjau Muhoro (2017) eKLR** in support of this argument.

21. On the second issue, it is submitted that it is the appellant who solely contributed to his termination by failing to facilitate the respondent to move on transfer. It is submitted that the appellant

failed to demonstrate that any efforts were made to trace the respondent upon the alleged desertion. It is submitted that in any event no evidence was availed that the respondent was heard before the termination. It is submitted that the respondent was clearly and evidently denied a hearing as envisaged under **Sections 41, 43, & 45 of the Employment Act**. In that regard counsel cited ***Kimani V Ngigi (2024) KEELRC 864 (KLR)***.

22. It is further submitted that **Sections 10(7) & 74 of the Employment Act** obligated the appellant as the employer to keep employment records and as such it was upon the appellant to prove that indeed deductions made had been remitted to the NSSF as to disentitle the respondent to service pay. It is submitted that in absence of such records the lower trial court was right in awarding the respondent as it did.
23. In the circumstances, the court is urged to uphold the decision of the lower trial court and dismiss the appeal with costs.

IV. ISSUES FOR DETERMINATION

24. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, there are two main issues raised in the grounds of appeal and counsel for both parties submitted on the same –
- whether the respondent was unfairly and unlawfully terminated or***

whether he deserted duty upon transfer from Butali to Kisumu; and, whether the remedies granted to the respondent were fair and just.

25. Overall, the issues that commend themselves to the court for determination in this appeal are -
- a) *Whether the respondent was unfairly and unlawfully terminated or whether he deserted duty upon transfer from Butali to Kisumu.*
 - b) *Whether the lower trial court arrived at the wrong and improper verdict and made the wrong and unlawful orders in the impugned judgment.*
 - c) *Is there a reason(s) for this court to interfere with the decision of the lower trial court as prayed by the appellant?*
 - d) *What appropriate orders should the court make in regard to the above issues and on costs?*

V. THE TERMINATION

26. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle & Another V Associated Motor Boat Company Ltd (1968) EA*.
27. The facts of the employment relationship between the appellant and the respondent are to a large extent uncontested and are as laid out in

the summary of the pleadings and submissions in the foregoing part of this judgment. It is not contested that the respondent was an employee of the respondent as a security guard for the period from 9th January 2015 to 27th April 2021.

28. On 26th April 2021 the respondent was served with a letter of transfer from Butali to Kisumu. While the respondent alleged that he requested for facilitation to enable him move on transfer, which the appellant allegedly failed to avail and hence he could not and did not report to Kisumu, the appellant's case is that the respondent failed, refused, and or neglected to move on transfer and instead deserted duty only to resurface by way of filing this cause in court. The respondent's evidence during the trial was that when he requested for the facilitation the appellant's manager was unhappy and dismissed him orally.
29. In cross-examination during the trial in the lower court – page 100 of the record of appeal – the respondent admitted that he had no evidence that he requested for facilitation to move on transfer from Butali to Kisumu. He admitted that he did not write a letter requesting for such facilitation. He admitted that he received the letter of transfer on 26th April 2021. He also admitted that he never complained about the claimed unpaid house allowance and leave pay during the period of employment.
30. In his evidence for the appellant, Stephen Mogusu Nyakang'o

(PW1) – page 102 of the record of appeal – stated that the transfer of the respondent and other employees was necessitated by the termination of the contract between the appellant and the Butali based West Kenya Sugar Limited. It was decided that the respondent and others be transferred to Kisumu and the appellant provided three mini-vans to move the affected employees from Butali to Kisumu. He stated that no letter or request was received from the respondent asking or seeking for further facilitation beyond what was provided to the respondent and all the other affected employees.

31. PW1 stated that efforts to contact the respondent by the appellant’s manager in Kisumu were fruitless as the respondent did not pick the calls.
32. In regard to the above issue the lower trial court concluded that *“DW1 testified that transport was provided using 3 Nissans. I have read the transfer letter dated 26/4/2021. The letter did not communicate the availability of transport to Kisumu”*. The lower trial court went on *“DW1 also testified that the claimant deserted duty. It was his testimony that they called the claimant but did not produce any evidence as proof. He also stated on cross-examination that the claimant was not issued with a show cause letter. The claimant was also never invited to a disciplinary hearing. The respondent had a duty to act if the claimant had absconded/deserted duty. I find that the claimant was unfairly terminated from*

employment by the respondent” – page 125 of the record of appeal.

33. For ease of reference the letter of transfer by the appellant to the respondent dated 26th April 2021 stated as follows –

Robinson Investments Limited – The Hallmark Of Excellence

TO: PETER CHILUYI

RE: TRANSFER LETTER

This letter communicates the decision by Robinson Investments Ltd. Concerning the recommendation for a transfer action in our rules as a Company.

You are aware that Robinson Investments Ltd has branches throughout the county, therefore according to workload and requirements, an employee can be transferred to any branch, as required.

You are therefore transferred to Kisumu. Note that the company decision stands, you are hereby asked to report to Kisumu Working station with effect from Monday 3/5/21.

Yours Faithfully

JAMES NYARANDI

Manager

34. The evidence on record is that the above letter was served upon and acknowledged by the respondent on 26th April 2021. There is no

- evidence on record that the respondent responded to the above letter.
35. Neither of the parties availed the contract of employment between the parties.
 36. According to the above letter of transfer the appellant was exercising its administrative power over the respondent in moving him on transfer from Butali to Kisumu. The appellant did not promise or undertake to support or facilitate the respondent in moving or relocating on the transfer. The respondent did not produce in the trial court a policy or guideline or a term of contract that entitled him to any facilitation or compensation or reimbursement upon such transfer.
 37. The appellant's position is that it availed means of transport for the respondent and all the others affected by the transfer but the respondent was a no-show. It is the appellant's case that the respondent deserted duty as from 27th April 2021 and did not know of his whereabouts and that he only resurfaced by way of filing this claim in court.
 38. The undisputed fact is that the respondent did not report to work in Kisumu on 3rd May 2021 as instructed in the letter of transfer and thereby or thereafter or as a consequence thereof the employment relationship between the parties terminated.
 39. It is important to state that the fundamental principle in law of evidence, that (s)he who alleges has the burden of proof, holds true

in employment and labour relations disputes as it holds in all other matters. It was thus upon the respondent to demonstrate and prove during the trial in the lower court that he was indeed terminated as alleged and pleaded. It is only upon such proof that the appellant was duty-bound and obligated to justify the termination under ***Section 43(2) of the Employment Act.***

40. As the court has noted above, the respondent did not report to Kisumu as directed in the letter of transfer reproduced above. There is no evidence on record that he responded to the letter of transfer requesting for facilitation and or that he was entitled to such facilitation either by virtual of his contract or company policy or guidelines. In my considered view, no evidence was adduced by the respondent to prove that he was dismissed orally or otherwise by the manager as alleged and claimed in the statement of claim.
41. Furthermore, it cannot be that upon the alleged oral dismissal the respondent did not protest and or dispute the dismissal until a letter of demand by his lawyers was addressed to the appellant on 19th April 2022, about one full year after the alleged unfair and unlawful termination or dismissal. In that regard, it is evidently clear that the cause in the lower court, though filed within the statutory period, was an afterthought.
42. If indeed the respondent was unfairly and unlawfully terminated on 26th April 2021, what immediate steps did he take to protect and

enforce his rights? Did he report to the labour office or even to the police? Did he write a letter in protest to the management informing it of the unfair and unlawful termination by the local manager?

43. It is the finding and holding of the court that the respondent blatantly and adamantly refused, failed, and or neglected to report to Kisumu on transfer and deserted duty thereby terminating his own employment. In the converse, the respondent failed to prove that he was orally or otherwise terminated as claimed and pleaded. It is only upon proving the termination that the court should have called upon the appellant to justify the reason for the termination as alluded to above.
44. While the respondent did not avail any evidence of the efforts made to contact the claimant, and or a report made to the labour office about the desertion, the court holds that the respondent failed in establishing and proving that he was indeed terminated as alleged.
45. This court does not align itself with the argument that an employer has a duty and or obligation to go looking for an employee who has adamantly and blatantly decided to desert duty. We must all be realistic about the economic times that we live in. Law does not operate in a vacuum; it operates in real economic realities and dictates. If an employee decides to desert duty in protest of a lawful administrative action such as a transfer, like the respondent did, the court has no obligation to enter into the workplace to manage such

an employee. If an employee deserts duty in protest of a lawful order or action, or direction, well, it means he is no longer ready and willing to sell his labour to the employer. The court cannot and should not enter the fray and reward such gross misconduct.

46. Even if the respondent felt that he was not facilitated to report to Kisumu on transfer, he ought to have used and applied all means possible to report as directed and then protest. He ought to have responded to the letter of transfer in writing.
47. Although the appellant did not avail evidence of efforts made in tracing the respondent, the court is not persuaded that the respondent was terminated as he claimed. The court finds and holds that the respondent deserted duty in protest of the transfer, never to show up until he addressed a demand letter through his lawyers, almost one full year later. Having authored his own misfortune and termination, the respondent should not and cannot benefit from the same.
48. This court therefore differs with the holding by the lower trial court and sets aside the finding that the respondent was unfairly and unlawfully terminated. In place therefor, the court finds and holds that the respondent terminated his own employment when he deserted duty as discussed and detailed in the foregoing paragraphs of this judgment.

VI. RELIFES

49. The lower trial court awarded to the respondent as stated in the

introductory part of this judgment. It is the appellant's case that all the awards made to the respondent by the lower trial court ought to be set aside. Of course, the respondent is imploring upon the court not to interfere with the judgment as handed down by the lower trial court and dismiss the appeal with costs.

50. This court has found and held above that the respondent deserted duty thereby terminating his employment with the appellant. In the circumstances, each of the reliefs awarded shall now be re-evaluated with the above finding and holding in mind.
51. The court finds and holds that house allowance and leave and overtime pay are not in the category of continuing injury and hence a claim in that regard is not limited in the one-year provided for under **Section 89 of the Employment Act**. This court aligns itself with the reasoning of the Court of Appeal in ***Ol Pajeta Ranching Limited V David Wanjau Muhoro (supra)*** and ***G4S Security Services (K) Limited V Joseph Kamau & 468 Others (2018) eKLR***.
52. The award for one month's salary in lieu of notice in the sum of Kshs9,800/= is hereby set aside for the reason that it is the respondent who deserted duty and was thus not entitled to any notice or compensation in that regard.
53. Likewise, the award of compensation in the sum of Kshs58,800/= is set aside for the same reason stated above.
54. The claim on house allowance is allowed at Kshs105,840/= as

awarded by the lower trial court. The appellant did not avail any evidence to confirm, as claimed, that the salary of Kshs9,800/= was all inclusive and as such the respondent was entitled to monthly house allowance at the rate of 15% of the basic salary above.

55. Likewise, the claim on overtime is allowed as the appellant did not avail records to disapprove that the respondent worked overtime as claimed. The award of Kshs112,046.30 is upheld.

56. The award of service-pay in the sum of Kshs29,400/= is upheld as the appellant did not avail any evidence that the respondent was a member of a pension scheme, NSSF, and that dues were deducted and remitted thereto.

57. The respondent is as a matter of law - ***Section 51 of the Employment Act*** - entitled to a certificate of service and the appellant shall issue and deliver the same.

58. The above awards are subject to statutory deductions.

59. The respondent shall have costs of the trial in the lower court but each party shall meet own costs for this appeal.

VII. ORDERS

60. Flowing from the foregoing, the court makes the following orders –

a) This appeal is hereby partially allowed in the terms set out in the judgment.

b) A declaratory order be and is hereby issued that the respondent was not terminated by the appellant but rather he

- deserted duty thereby terminating the employment relationship.*
- c) All the awards made to the respondent are upheld and affirmed except for the awards of Kshs9,800/= as one month's salary in lieu of notice and Kshs58,800/= as compensation which are both hereby set aside and dismissed.*
- d) The awards upheld are subject to statutory deductions –*
- i. House allowance Kshs105,840/=*
 - ii. Overtime Kshs112,046/=*
 - iii. Service pay Kshs29,400/=*
- Total Kshs247,286/=*
- *This award is subject to statutory deductions**
- e) The appellant shall issue and deliver a certificate of service to the respondent within 30 days of this judgment.*
- f) Each party shall meet own costs in this appeal.*
- g) The costs of the trial in the lower court shall be to the respondent.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 27TH DAY OF NOVEMBER, 2025.**

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DAVID NDERITU
JUDGE