REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E226 OF 2024

COLLINS MUSONYE MUGAISI…….…….....APPELLANT

-VERSUS

PROSPEC SECURITY LIMITED…….....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. P.K. Rotich (SPM) delivered on 23rd March 2024 in Nairobi MCELRC E800 of 2021)

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. P.K. Rotich (SPM) delivered on 23rd March 2024 in Nairobi MCELRC E800 of 2021 between the parties filed a Memorandum of Appeal dated the 5th August 2024 seeking the following orders: -

a) A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.

b) Punitive damages for discriminatory practices in the work place against the claimant.

c) Maximum compensation for wrongful dismissal.

d) Special damages

i. One Month's pay in lieu of Notice		**Ksh.17,413.25**
ii. Damages for wrongful dismissal		**Ksh.208,959.00**
iii. Amounts for leave not taken		**Ksh.18,890.00**
iv. Underpayment		**Ksh.99,308.00**
v. House Allowance		**Ksh.49,962.00**
vi. Overtime		**Ksh.360,492.00**
vii. Rest Days		**Ksh.222,849.60**
viii. Public Holidays	**2018- 12 days**	**Ksh.37,454.40**
	2019- 12 days	**Ksh.37,454.40**
	2020- 4 days	**Ksh.13,108.80**
ix. Service Gratuity		**Ksh.24,110.00**

e) Interest on the total.

f) Certificate of Service.

g) Costs of the Cause.

h) Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

In line with the prayers contained in the memorandum as is contained in the record of appeal.

a) **Costs of the appeal to be awarded to the appellant**

GROUNDS OF THE APPEAL

2. The Honourable Magistrate erred in law by failing to consider the circumstances leading to the dismissal under the express provisions of section 41 of the Employment Act as is demanded by law.

3. The Honourable Magistrate failed to appreciate that the termination was unfair given the facts and pleadings before the court.

4. The Honourable Magistrate failed to consider section 31 of the Employment Act as read together with regulation 5 of the Regulation of wages protective security services with regard to the issue of house allowance.

5. The Honourable Magistrate failed to consider section 27 of the Employment Act as read together with regulation 6 and 7 of the Regulation of wages protective security services with regard to the issue of overtime.

6. The Honourable Magistrate failed to consider section 27 of the Employment Act as read together with regulation 9 of the Regulation of wages protective security services with regard to working on public holidays.

7. The Honourable Magistrate failed to consider section 28 of the Employment Act as read together with regulation 10 of the Regulation of wages protective security services with regard to the issue of annual leave.

8. The Honourable Magistrate failed to consider section 48(1)(a) and (b) of the Labour Institutions Act thereby leading to an error whose effect was dismissal of the claimant's special damages.

9. The Honourable Magistrate failed to consider the provisions of section 10 (7) and Section 74 of the Employment Act and placed an unjustified burden of proof on the Claimant.

10. The Honourable Magistrate failed to consider the minimum wage order with regard to basic minimum wage thereby wrongfully dismissing the claimant's prayer for underpayments.

11. The Honourable Magistrate generally failed to consider the provisions of the regulation of wages protective security services as submitted by the claimants.

12. The Honourable Magistrate failed to consider the claimants submissions resulting in a reversible error.

13. The Honourable Magistrate erred in law by failing to properly apply the law to the facts thereby resulting in the dismissal of the suit.

14. The court noted an error on the face of the memorandum of appeal as it was titled as a draft. The court noted it was paid for. The court held the error of labelling the appeal as a draft was a technical error in drafting and held the appeal as valid. Section 20 of the Employment and Labour Relations Court Act reads-'*20. General powers of the Court (1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.''*

15. In response to the Appeal, the Respondent herein filed a Notice of Preliminary Objection dated 28th July 2025 arguing that the appeal is a nullity and ought to be struck out on the premise that the same was filed out of time without the leave of the court, contrary to the mandatory provision of Rule 12 of the Employment and Labour Relations Court (Procedure) Rules 2024, and Section 79G of the Civil Procedure Act 2010.

BACKGROUND TO THE APPEAL

16. The Claimant/Appellant filed claim against the Respondent vide a memorandum of claim dated the 6th of May 2021 seeking the following orders: -

    a) A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.

    b) Punitive damages for discriminatory practices in the work place against the claimant.

    c) Maximum compensation for wrongful dismissal.

    d) Special damages

    i. One Month's pay in lieu of Notice Ksh.17,413.25

ii. Damages for wrongful dismissal	Ksh.208,959.00
iii. Amounts for leave not taken	Ksh.18,890.00
iv. Underpayment	Ksh.99,308.00
v. House Allowance	Ksh.49,962.00
vi. Overtime	Ksh.360,492.00
vii. Rest Days	Ksh.222,849.60
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2019- 12 days	Ksh.37,454.40
2020- 4 days	Ksh.13,108.80
ix. Service Gratuity	Ksh.24,110.00

e) Interest on the total.

f) Certificate of Service.

g) Costs of the Cause.

h) Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

(pages 19-30 of Appellant's ROA dated 3rd July 2025).

14. The Claimant filed his list of witnesses, witness statement, and list of documents with the bundle of documents attached, all dated 6th May 2021 (see pages 31-43 of ROA).

15. The claim was opposed by the Respondent who entered appearance and filed a response to statement of claim dated 31st May 2021 (pages 44-50 of ROA). They also filed a witness statement dated 31st May 2021, list of witnesses of even date and list of documents of even date with the bundle of attached (pages 51-61 of ROA).

16. The Claimant/Appellant's case was heard on the 11th of October 2023 where the claimant testified in the case, relied on his witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Respondent Ms. Njeri (pages 92-94 of ROA).

17. The Respondent's case was heard on the same day with the Respondent calling one (1) witness, Joseph Muma Mutula, to testify on its behalf. He relied on his filed witness statement, and produced the Respondent's documents. He was cross-examined by counsel for the claimant Mr. Wetaba (pages 94-95 of ROA).

18. The parties took directions on filing of written submissions after the hearing. The parties complied.

19. The Trial Magistrate Court delivered its judgment on the 23rd March 2024, dismissing the Claimant's claim with no order as to costs (judgment at pages 98-101 of Appellant's ROA).

DETERMINATION

20. The appeal was canvassed by way of written submissions. Both parties complied, and filed two sets of submissions each.

21. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. Ltd [1968] EA 123 that:- *"The appellate court is not bound necessarily to accept the findings of*

fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

22. The court on first appeal is further guided by the principles on appeal decisions in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation at page 94: "*I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.''*

Issues for determination

23. In his submissions dated 2nd July 2025, the Appellant submitted generally on the grounds of appeal. He later filed submissions dated 25th September 2025 towards the Respondent's preliminary objection.

24. On their part, the Respondent identified two issues for determination in their submissions dated 22nd September 2025, namely:

    i. Whether this Honourable Court has jurisdiction to hear and determine this appeal which is filed out of time without leave of the court.

    ii. Without prejudice to (i) above, whether the trial court erred in law and in fact in dismissing the memorandum of claim dated 6th May 2021.

25. In their supplementary submissions dated 3rd October 2025, the Appellant submitted generally on the issue of the Appellant seeking leave to appeal out of time.

26. The court concluded the issues placed before the court for determination in the appeal were-

    i. Whether this Honourable Court has jurisdiction to hear and determine this appeal which is filed out of time without leave of the court.

    ii. Whether the trial court erred in law and in fact in dismissing the memorandum of claim dated 6th May 2021.

Whether this Honourable Court has jurisdiction to hear and determine this appeal which is filed out of time without leave of the court.

The Appellant's submissions

27. The record in this matter will show that an application seeking leave to file an appeal out of time was filed dated 3rd August 2024 was filed and allowed on the 26th February 2025. The respondent's submissions on the filing out of time are therefore erroneous. The appeal is equally regrettably titled draft memorandum of appeal but which has been paid for and is properly on record. Substantive justice demands that the error be excused and the appeal be dealt with on merit. The respondent did not serve its submissions on time and we pray that this rejoinder to their submissions be considered.

Respondent's submissions

28. Where a party is keen to appeal out of time, leave should be obtained first before filing the appeal to seek leave to file it out of time. The court must first be satisfied that an applicant had good and sufficient cause for not filing the appeal in time. 19.In this case, the applicant filed the appeal. There is no leave to file the appeal. This invalidates the entire process of appeal." Ramji Devji Vekaria v Joseph Oyula [2011] KECA 327 (KLR), the Court of Appeal held as follows while declining to apply Section 3A and 3B to save an incompetent appeal that had been filed out of time without leave of the court: - "This is an omission that goes to the root of the Rules i.e. whether a party can file an appeal out of time and without leave of the court. To invoke the provision of Sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. Sections 3A and 3B were not meant for that."

29. Further the respondent on the issue filed supplementary submissions as follows- Upon receiving the Appellant's submissions dated 25th September, 2025 on our Preliminary

Objection dated 28thy June, 2025, it has come to our attention that the Appellant filed an application seeking leave to file appeal out of time without serving the Respondent with the said application. These submissions are crucial to respond to the Appellant's submissions dated 25th September, 2025 to respond to the new developments regarding leave sought in the absence of the Respondent. We therefore urge this Honourable court to deem these submissions as properly on record and consider the same. We thus humbly submit as follows: - That the Respondent is prejudiced by the leave granted to file this appeal out of time as it was not granted the right to be heard and yet an application for leave to file an appeal out of time is a very crucial application that ought to be served to all parties involved to avoid prejudice to the Respondent. Page 1 of 4 The Respondent who had been successful in the subordinate court was ambushed with a Record of Appeal served physical through its Advocates on record Kiugu & Company Advocates on the 16th July, 2025 at 11:52 a.m. That prior to that, the Respondent had not been served with any application for leave and or a mention or hearing notice for that application seeking leave to appeal out of time. Rule 45 (2) of the Employment and Labour Relations Court (Procedure) Rules, 2024; provides as follows: - "45. Interlocutory applications and temporary injunctions (1) An interlocutory application shall be made by notice of motion and may be heard in open court or as the Court may direct. (2) A party shall, after filing a notice of motion, notify all the parties of the motion." Your Ladyship, we submit that the action of the Appellant failing to serve the Respondent with the application for leave to file appeal out of time is extremely and grossly prejudicial to the Respondent and we urge this Honourable court not to condone such actions since in the adversarial system like Kenya's legal system, the principles of natural justice are crucial and they are upheld through the right to be heard and the right to fair hearing before an adverse decision is made. We have perused the efiling system and noted as follows: - 1)

That the Appellant filed a Notice of Motion dated 3rd August, 2024 on the 6th August, 2024. Page 2 of 4 2) That the Appellant failed to serve the Respondent with the said application and this is evident in the efiling system as there is no Affidavit of Service filed to demonstrate service. 3) That the matter came up in court for a mention on diverse dates being 23rd October, 2024, 10th December, 2024, 4th February, 2025, 5th May, 2025, 9th June, 2025 and 10th July, 2025 and in all these dates, the Respondent had not been served with any mention notice and was completely unaware of the matter as the Respondent was ambushed with a record of appeal on the 16th July, 2025 upon its Advocates being served with the same Physically. 4) The Respondent attended to this matter for the first time on the 29th July, 2025 upon being served with a Mention Notice dated 11th July, 2025 physically through its Advocates on record. 5) 6) 7) That the foregoing, explains why the Respondent was of the genuine view that the appeal had been filed without leave of the court as it was not served with the application seeking leave and neither was it involved in the proceedings for that application. To date, the Respondent has never been served with the aforementioned application for leave to file appeal out of time and has only perused it through the efiling portal upon the Appellant's indicating in their submissions dated 25th September, 2025 that leave to file appeal out of time was granted. In view of the foregoing, we submit that the procedure followed by the Appellant in seeking leave to file appeal out of time is flawed and misconceived and the orders granted on the 4th February, 2025 allowing the application dated 3rd August, 2024 ought to be set aside as the Page 3 of 4 8) 9) Respondent's right to fair hearing and right to be heard has be grossly infringed. That the Appellant's action of failing to serve the Respondent with the application for leave to file appeal out of time should not be condoned by this Honourable court as condoning such actions will cause great injustice and prejudice upon the Respondent.

Decision

30. The issue arose from the Notice of Preliminary Objection dated 28th July 2025 in response to the appeal on the following grounds-

    i. THAT the impugned Judgment was delivered on the 23rd March, 2024 and the Appellant filed the Memorandum of Appeal on or about 12th August, 2024 after the lapse of the 30 days' time for filing appeals without leave of this Honourable Court.

    ii. THAT this appeal is a nullity and ought to be struck out as it offends the Mandatory provision of Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024 which require an appeal from a Magistrate's Court to be filed within a period of thirty (30) days from the date the decision appealed against was delivered.

    iii. THAT this appeal is a nullity and ought to be struck out as it offends the mandatory provisions of Section 79G of the Civil Procedure Act, 2010 which requires every appeal from a subordinate court to the High Court to be filed within a period of 30 days from the date of the decision appealed against.

    iv. THAT this appeal was filed without leave of court to enlarge time and this Honourable Court thus lacks jurisdiction to entertain the appeal.

v. THAT this appeal is incompetent, fatally defective, a nullity, bad in law and it's an abuse of the court process and the same ought to be struck out with costs to the Respondent.

31. The law is that appeals from the Magistrates' court to this Court ought to be filed within 30 days. Section 79G of the Civil Procedure Act reads- ***'***_79G. Time for filing appeals from subordinate courts -Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.''_

32. The Employment and Labour Relations Court (Procedure) Rules 2024 affirms the above provisions in Rule 12 as follows-

'*12. Time for filing appeals*

(1) Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law.

(2) Where an appeal is from a magistrate's court or where no period of appeal is specified in the written law referred to in subrule (1), the appeal shall be filed within thirty days from the date the decision is delivered.'' Was the memorandum filed within 30 days of the Court Decree appeal against ?- The answer is no as the

judgment was delivered on the 23rd March 2024 and the Memorandum of Appeal filed on the 12th August 2024. The court has judicial power to enlarge time under section 79G of the Civil Procedure Act (above). This is a court of record. The court noted that the appellant filed an application dated 3rd August 2024. On the whether the respondent was aware of the application, on perusal of the court record the court established that the parties were before Hon Nyamora, the Court Deputy Registrar on 4th February 2025 when Wetaba Advocate appeared for the appellant and Mr. Omari h/b Namada Advocate for the respondent. The Wetaba advocate asked the Hon Nyamora, the Court Deputy Registrar, for the hearing date of the application dated 3rd August 2025 . Mr. Omari for the respondent is recorded to have said he was not aware pf the application. Hon Nyamora fixed the application dated 3rd August 2024 for hearing before me on the 26th February 2025. The respondent was thus aware of existence of the application and hearing date. On the 26th February 2025 the respondent was absent despite the date having been given in presence of their counsel, Omari. The application was coming for hearing and the court on finding the application unopposed and being satisfied on the reason for the delay allowed the application and extended time for filing of appeal against the impugned judgment.

33. Consequently, Notice of preliminary objection is held to lack merit and is dismissed. The court on basis that the ruling/order of the court was delivered in absence of the appellant declined to award costs. The court gave benefit of doubt to the respondent's possibility of not having been aware of the ruling and made no award on costs.

Whether the trial court erred in law and in fact in dismissing the memorandum of claim dated 6th May 2021.

34. The grounds of appeal of appeal are on whether there was error on not finding unfair termination and in relief sought. The court bifurcated the issue into two sub issues-

    a. Whether the trial court erred in fact and law failing to find unfair termination
    b. Whether the trial court erred in failing to award relief sought.

Whether the trial court erred in fact and law failing to find unfair termination

35. The grounds under the sub-issue are as follows-

    a. The Honourable Magistrate erred in law by failing to consider the circumstances leading to the dismissal under the express provisions of section 41 of the Employment Act as is demanded by law.

    b. The Honourable Magistrate failed to appreciate that the termination was unfair given the facts and pleadings before the court.

The Appellant's Submissions

36. GROUND 1 & 2; THE QUESTION OF UNFAIR TERMINATION - The issues leading to separation of employment is not contested and the fact that the claimant lost his sister and sought leave which he was not given owing to what the employer stated was inappropriate dressing. At page 94 of the record of appeal the respondents witness states; I was informed

the respondents sister was ill. Statement is true except for the leave. At page 40 of the record of appeal is a letter from the respondent and they insist that the claimant and now appellant was expected to be in full uniform as per company policy in order to sign his leave form. The appellant had lost the sister and was expected to report to the company in full uniform. Where is this policy that was referenced by the respondent? Does it exist? The absence of any notice to show cause and equally the absence of a termination letter is one we queried in our submissions at pages 70-72 of the record of appeal. The court in Mary Achieng Ouma & another v Salihihiya Company Ltd [2016] Eklr considered whether employment relationship can be terminated on assumption and they held; However a contract of employment cannot be terminated through assumption. A party especially the employer must take a positive step and terminate a contract of employment. It may well be true that the accusations the claimants are facing are serious enough to warrant their summary dismissal but such dismissal cannot be assumed. The respondents must act and terminate the relationship.

37. Where is the termination letter that the employer is mandated by law to issue to the claimant. The argument that the claimant and now appellant absconded duty must be looked at from the question of what steps did the respondent take after the alleged absconding? The court in Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016[eKLR considered the requirement placed on an employer to prove desertion. The court held; An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserting employee. At the very least, the employer must issue reasonable notice to the employee that termination of employment is being considered. The Respondent's Human Resource Manager, Beatrice Waiganjoh testified that the Respondent had the Claimant's forwarding address. There was therefore no

reason why the Respondent failed to issue such a notice to the Claimant. The letter to the Labour Office cannot serve as notice as it was merely reporting the Claimant's separation from the Respondent's employment. The respondent chose the defense of desertion but that is not available to them at least not on the facts on record. What is before this court is redundancy horribly handled. We equally relied on the court in Felistas Acheha Ikatwa v Charles Peter Otieno where the Court expressed itself as follows: "The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered." The appellant at page 35 of the record of appeal states; THAT when I returned to the head office at the lapse of the 26 days of leave I had taken, I went to the head office on the 26th day of March 2020 and I tried to talk to them and they told me to get clearance from my advocate. m. The witness proceeds; THAT the respondent took me in circles up until it reached a point, I realized that my services had been terminated. n. The record of appeal is before this court and the court will note that there is no single shred of evidence showing that the claimant had absconded and the appellants absence after the 26th was with the respondent's directive having refused to allocate him duties and in essence terminated him.

38. What are the requirements under section 41 of the Employment Act? In Walter Ogal Anuro v Teachers Service Commission [2013] eKLR Ndolo J. held that- "However, for a termination of employment to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.": In Naima Khamis v Oxford University Press (EA) Limited [2017] eKLR, the Court of Appeal was

authoritative that - "On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required." In JAMES ONDIMA KABESA -V- TROJAN INTERNATIONAL LIMITED [2017] eKLR Onyango, J. observed as follows; "Under Section 41 of the Employment Act an employer is required to inform the employee in the presence of a fellow employee or a shop floor union representative of his choice, the reasons for which the employer contemplates to terminate the services of the employee. The employer is then supposed to hear the employee s representations and the representations of the person who has accompanied the employee to the disciplinary hearing. The employer is also expected to observe the rules of natural justice of giving the employee notice of the impending hearing and the grounds for the disciplinary hearing to enable the employee prepare to defend him." The aspect of preparation is integral in all legal proceedings and the element of ambush is discouraged but the respondent failed to afford the claimant more time and even when he appealed the plea for more time was again ignored. s. The holding in Menginja Salimi Murgani =vs= Kenya Revenue Authority [2006] eKLR thus; 'It is clear too that the suspicions which led to the suspensions and termination of employment, were not set out in a document availed to the Plaintiff, so he

could respond. For the most part, the Plaintiff did not share a forum with his accusers, so that differing views could be resolved through an informed process. I have considered the foregoing facts and come to the conclusion that they were not consistent with the requirements of a fair hearing," t. What justification does the respondent have? They have offered no justification and given the issues raised the claimant deserves 12 months compensation and notice. v. This prayer is ripe for granting as prayed in the memorandum of claim. The termination was definitely unfair.

The Respondent's submissions

39. Without prejudice to our submissions on the Notice of Preliminary Objection, we submit as follows on the issues raise in the draft memorandum of appeal. Ground I & 2 of the draft memorandum of appeal on the question of unfair termination. In his adopted statement dated 6th May, 2021, the Claimant/Appellant herein pleaded that on 17th February, 2020 his sister fell ill and he was given leave by the Operations Manager to take her to hospital. The Claimant further pleaded that he rushed his sister to hospital but unfortunately, she passed on while receiving treatment at the hospital. The Claimant alleged that upon the death of his sister, he went back to the Operation Manager to seek compassionate leave to enable him organize and attend the burial when he was informed by his supervisor to remove his turban before he can be helped. He alleged that when he declined to remove the turban, he was denied leave and he approached his Advocates who wrote to the Respondent informing them that the Claimant would be proceeding for his leave from 19th February, 2020. The Claimant/appellant pleaded that when he returned back from his compassionate leave on the 26th March, 2020, his services had been terminated. However, during the hearing while being cross-examined, the Claimant/Appellant contradicted his adopted witness statement and averred that he was terminated orally on the 18th February, 2020 when he sought to go

to compassionate leave. He also contradicted his adopted statement that he had been told to remove his turban before he could be heard about the leave and stated during cross-examination that he was not told to remove his turban but was requested to wear the company uniform. Parties are bound by their pleadings and the appellant having given contradictory evidence did not prove his case that he was terminated. In his statement he states that he learnt that his services were terminated after his leave which ended on the 26th March, 2020 after the Respondent allegedly took him in circles. During the hearing, his testimony was that he was orally terminated on the 18th February, 2020 after he sought leave. The Claimant/Appellant retained an Advocate on 18th February, 2020 and if his allegations that he was terminated from employment after 26 days leave, he would have been able to prove the allegations that after his compassionate leave he went back to work as alleged in his pleadings when he learnt that his services had been terminated. The Respondent on the other hand gave unequivocal evidence that it never terminated the Claimant/Appellant from employment but rather it was the Claimant/Appellant that terminated his own employment as he failed to return back to work after the lapse of his 26 days compassionate leave. No evidence was tabled before court to prove that after 26 days' leave, the Claimant went back to work as was expected. Section 47 (5) of the Employment Act, 2007 provides that: "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." The Claimant/Appellant therefore had the burden to prove that he was indeed terminated from employment as alleged while the Respondent had the burden to prove the reasons for termination. The Claimant must thus first discharge his burden first. We submit

and reiterate that the Appellant never proved that he was terminated. His allegations that he was terminated were controverted by letter dated 29th February, 2020 at page 61 of the Record of Appeal in which the Respondent made it clear that the Claimant was on 18th February, 2020 politely was requested to report to the head office with full uniform for his leave to be processed but instead he left the head office without a word and he never returned back to fill his leave form. RW-1, the Operations Manager, Joseph Mutula, testified on oath that he never terminated the Claimant as alleged, and he never told the Claimant to remove his turban as alleged. We submit that this is a case of no termination as the Claimant upon proceeding for his leave from 19th February, 2020 did not return to work after the expiry of the said leave which was ending on 26th March, 2020. The Claimant deserted work on his own volition. We rely on the following cases where courts found a case of no termination and dismissed the Claimant's claim of unfair termination: - a) Rudolf Shitandi Daraja v Zablon Juma Atulo t/a & Company Advocates {2016] eKLR, the Judge while making a determination on whether the Claimant absconded duty or was dismissed stated that the Claimant had the Claimant had the burden of proving that the Respondent unfairly terminated his employment and further stated that where there are two sets of probable evidence on the same issue the court must find against the person who bears the burden of proof and that is the Claimant. The court thus held as follows: "It is trite law that he who pleads must prove Section 107 of the Evidence Act specifically provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It is also a rule of evidence that in civil matters the standard of proof is on a balance of probability. Section 47(5) of the Employment Act provides that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination or wrongful

dismissal has occurred shall rest in the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. From the evidence on record the claimant has not discharged the burden of proving that the respondent unfairly terminated his employment or wrongfully dismissed him. It is his word against the evidence of RW2. Where there are two sets of probable evidence on the same issue the court must find against the person who bears the burden of proof, in this case the Claimant" (mine emphasized for emphasis) b) K.B Sanghani & Sons v Peter Idewa PPapa (2021) eKLR, the Honourable court in this case while finding that there was no verbal termination upheld the Appellant's submission that the Respondent's pleading and evidence was credible and coherent that the claimant had by himself absconded duty without reason and notice - essentially constructively resigned from employment. c) In Andrew Isaack Karani v Spinners & Spinners Ltd {2020] eKLR, the d) Claimant had alleged that he reported on duty and while on duty he was summoned by the Respondent's manager who told him to leave the Respondent's premises because his services were no longer needed. The Respondent on the other hand contended that the Claimant absconded duty and that there was no unlawful or unfair termination because the Claimant terminated his own employment by absconding from duty. The Honourable court found that the Claimant had absconded duty in December 2014 and proceeded to find that the claims for unfair or unlawful termination were unfounded. Nancy C Maritim v Sot Tea Growers Sacco Ltd [2018] eKLR, the Honourable Judge in this case found a case of no termination of the claimant by the respondent and proceeded to dismiss the claimants claim for unfair dismissal. In view of the forgoing, we submit that the Learned Trial Court did not err in law and in fact in holding that the Claimant/Appellant absconded employment sand was not terminated by the Respondent. The Claimant did not prove his case of termination and this

Appeal which has also been filed out of time and without leave of this Honorable court ought to be dismissed with costs to the Respondent.

40. IF CLAIMANT/APPELLANT WAS TERMINATED, WHETHER THERE WERE VALID REASONS- Section 43 of the Employment Act requires the employer to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. As indicated, and submitted earlier on the question of unfair termination, the Respondent did not terminate the Claimant. It was the Claimant/Appellant who deserted his work. He failed to report to work even after the lapse of compassionate leave of 26 days. In view of the above, we submit that Section 43 of the Employment Act does not apply in this case because the Respondent did not terminate the Appellant and therefore, the Respondent is not required to prove reasons for termination because there was no termination in the first instance. The Claimant has not provided any evidence at all to prove that after the lapse of 26 days leave, he went back to work and was terminated as alleged. We therefore submit that since the Respondent did not terminate the Claimant, section 41 of the Employment Act requiring employer to conduct a disciplinary hearing before terminating an employee is not applicable in this case. We rely on the case of Dan Ebukoro Juma v Brinks Security Services Limited [2018] eKLR, where the Honourable court stated as follows: - "Hearing under Section 41 of the Employment Act is required only when the Employer is considering termination. It was not necessary in the circumstances, as the Respondent did not contemplate termination,....." The Claimant terminated his own employment with the Respondent by failing to report to work and there was no need for the Respondent to conduct a disciplinary hearing because the Respondent had not contemplated terminating him. We further rely on the case of Daniel Mueke v Bhogals Auto World [2014]

eKLR Supra, where court held that if the Claimant has failed to prove unfair termination as required under section 47(5) of the Employment Act, it is not necessary for court to embark on issues where Respondent complied with sections 41, 43, 45, and 47(5) of the Employment Act, 2007. The court thus held as follows: - "*16. By leaving the work station and not returning, the claimant repudiated his employment contract. He was in breach of contract. The claimant abandoned work. 17. The claimant has not discharged the very low threshold placed upon an employee in a complaint of unfair termination by section 47(5) of the Employment Act, 2007. 18. It is not necessary therefore to embark on an inquiry as to whether the respondent complied with sections 41, 43, 45 and 47(5) of the Employment Act 2007. The question as to whether there was unfair termination of services is therefore not necessary."*

Decision

41. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '*45(2) A termination of employment by an employer is unfair if the employer fails to prove—*

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.'' To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013] eKLR).The appellant in memorandum

of claim in paragraph 4 stated what he called events leading to the dispute as follows-

'a*) On or around the 17th day of April 2020, the claimant approached the operations manager one Mr. Wycliffe Mutula and he informed him that his sister whom he was staying with was very ill and he was needed to take her to the hospital.*

While the respondent's sister was being treated she passed away at a local hospital and the claimant took it upon himself to inform the respondent of his sister's demise.

When the claimant went to the respondent's offices on the 18th day of February 2020 to make an application for compassionate leave so that he can begin the process of starting the burial preparations of his late sister.

The claimant then met with the operations manager and he was informed that the only way that his leave will be processed will be if he removes his turban. The claimant refused as it was against his religious beliefs.

All his attempts to plead with the respondent fell on deaf ears and he was left with no option but to seek legal counsel. A demand letter was sent by claimant's advocate to the respondent.

In their response the respondent's acknowledged that they were aware of the death of the claimant's sister and that indeed they had commented on his 'full uniform'.''(pages 13 and 14 of the ROA).

42. In the witness statement the appellant said it was his lawyer who wrote and informed the respondent he was proceeding on leave from 19th February 2020. That he returned back to the head office after the lapse of 26 days leave he had taken on 26th March 2020 and when he tried to talk to them he was told to get clearance from his advocate who advised to file the

impugned claim (see pages 34-35 of the ROA).The respondent in statement of defence agreed with the fact of the appellant's sister having been reported as unwell and later deceased. The divergence on facts was that on 18th February 2020 the respondent asked the appellant to be in uniform when he applied for leave but never returned but served a demand letter of his advocate to extent that he was entitled to 26 days of leave and did not return to sign for the leave and has never gone back. During cross-examination the appellant admitted he was told to wear uniform. He said he went back to the officer on 26th February 2020 but they differed. The appellant admitted he had no evidence of having gone back to work. On re-examination the appellant said there was no requirement to wear unform while going on leave.

43. The respondent called as its RW1 Mutula, its operation manager. RW1 admitted he was called about the appellant's sister's illness. He said they did not terminate the services of the appellant. He terminated himself. They did not look for the claimant or write to him on the disciplinary hearing. The trial court held that the appellant absconded his employment and there was no termination.

Decision

44. The court on first appeal is guided by decision Mbogo v Shah [1968] EA, De Lestang V.P (as he then was) observation at page 94: "*I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong*

conclusion.'' In the instant case the Court agreed with the trial court that the appellant never proved he went back on the 26th as alleged. Indeed his version of events in the claim did not state exact date the employment was terminated. It was the appellant's burden of proof to prove the termination occurred before the court could decide on its fairness. The burden to prove the fairness of the termination could not occur before prove of the termination as per section 47 (5) of the Employment Act. I find no basis to interfere with the finding of the trial court as it was based on facts before the court (Mbogo v Shah)

Whether the trial court erred in fact and law in failing to award relief sought.

45. The grounds of the appeal on the issue were as follows-

A. The Honourable Magistrate failed to consider section 31 of the Employment Act as read together with regulation 5 of the Regulation of wages protective security services with regard to the issue of house allowance.

B. The Honourable Magistrate failed to consider section 27 of the Employment Act as read together with regulation 6 and 7 of the Regulation of wages protective security services with regard to the issue of overtime.

C. The Honourable Magistrate failed to consider section 27 of the Employment Act as read together with regulation 9 of the Regulation of wages protective security services with regard to working on public holidays.

D. The Honourable Magistrate failed to consider section 28 of the Employment Act as read together with regulation 10 of the Regulation of wages protective security services with regard to the issue of annual leave.

E. The Honourable Magistrate failed to consider section 48(1)(a) and (b) of the Labour Institutions Act thereby leading to an error whose effect was dismissal of the claimant's special damages.

F. The Honourable Magistrate failed to consider the provisions of section 10 (7) and Section 74 of the Employment Act and placed an unjustified burden of proof on the Claimant.

G. The Honourable Magistrate failed to consider the minimum wage order with regard to basic minimum wage thereby wrongfully dismissing the claimant's prayer for underpayments.

H. The Honourable Magistrate generally failed to consider the provisions of the regulation of wages protective security services as submitted by the claimants.

I. The Honourable Magistrate failed to consider the claimants submissions resulting in a reversible error.

J. The Honourable Magistrate erred in law by failing to properly apply the law to the facts thereby resulting in the dismissal of the suit.

46. The court on perusal of the trial court's judgment found the reliefs were not considered on merit. I will proceed to re-evaluate the evidence before the trial court to reach my own conclusion. (Mbogo v Shah).

47. On prayer for Housing - housing is provided as a minimum condition of employment under section 31 of the Employment Act to wit- '***31. Housing***

(1)An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.(2)This section shall not apply to an employee whose contract of service—(a)contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or(b)is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).(3)The Cabinet Secretary may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employee shall be dealt with as shall be specified in the notice.'' The appellant in the witness statement said he was paid a monthly salary of 10600, which he said was below minimum wage, and he was not provided with housing. In the claim, he sought a housing from period of May 2018

to February 2020 at 15% of Kshs 15141.95, which he said was the lawful minimum wage. In response the respondent said the contract provided for gross pay inclusive of all allowance. Mutula, in a witness statement, said the parties had agreed and signed a contract. That the first contract was of 7th May 2018-7th November 2019 for Kshs. 12000 (pages 56-57 of ROA)and 1st November 2019 to 1st November 2020 for Kshs, 12670 (PAGE 58 of ROA). During the hearing before the trial court the appellant denied the salary was all inclusive. Conversely, Mutula, for the respondent, told the trial court the appellant was a night guard, and they were aware he was supposed to be paid Kshs. 15000 and was inclusive. The court holds that the Employment Act provides for minimum terms of employment, which include minimum wages, and the court is obliged under section 26 to uphold gazetted wages. The alleged agreement to pay less than gazette wages was thus null and void. Section 26 states- '***26. Basic minimum conditions of employment***

*(1)The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.(2)Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Employment and Labour Relations Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.''*The minimum monthly wages are exclusive of housing component which is given at 15% under general wages order. Mutula(RW1) knew the lawful wage was Kshs. 15000. I find the trial court erred in failing to consider and award the housing as sought, which is allowed as sought for the entire period of employment, being within the statutory period of 3

years post termination of employment, thus Kshs. 15%x 15141.95 x 22 months, total sum on housing awarded at Kshs. 49, 962.00

48. Prayer for underpayment- consistent with my finding on the law as above, the applicant was underpaid. The court finds that the contract provided for a salary of Kshs. 12000 increased to 12670. The claimant was underpaid under first contract which he served from May 2018 to October 2019 thus (15141.95-12000)x 18 months total Kshs. 56555.10. The 2nd contract from November 2019 to February 2020(4 months)15141.95-12670 x 4months thus 9887.80. Total underpayment **is** awarded for **Kshs. 66442.90**

49. **Prayer for Leave in liue for 2019 -** the appellant sought for leave for year 2019. It is a statutory right under section 28 of the Employment Act. The claim for leave was not contested, and even Mutula told the court the 2018 one was not paid. The court allows the claim for leave as prayed **Kshs. 18890/-**

50. **Prayer for Service gratuity**- There was no evidence that the appellant was on any type of pension scheme including the basis of NSSF. Section 35(5) and 36 of the Employment Act provides for service pay where an employee is not under pension as follows-

'An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.(6)This section shall not apply where an employee is a member of—(a)a registered pension or provident fund scheme under the Retirement Benefits Act;(b)a gratuity or service pay scheme established under a collective agreement;(c)any other scheme established and

operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and(d)the National Social Security Fund.'' The court finds that the appellant completed only 1 year of service. I upheld the decision relied on by the appellant in Wanyera v Central Isiolo Investment Limited (Appeal E002 of 2023) [2024] KEELRC 596 (KLR) (8 March 2024) (Judgment) *''I also find the claim for service pay merited because the employer had the legal mandate to register the claimant, deduct and remit NSSF contributions for him. The allegation that the appellant refused to register with the NSSF has not been substantiated by evidence. The respondent did not adduce any letter or other documentary evidence to prove that it requested the appellant to register with the NSSF but he declined. Consequently, I find that the appellant is entitled to service pay for the five years served at the rate of 15 days' basic salary for each completed year of service equaling to Kshs. 75,000. '* I award the appellant thus 15 days of total of his legal salary of Kshs, 17413.25 thus **Kshs. 8706.60/= as service pay.**

51. **Claim for rest days.** – during cross-examination of Mutula for the respondent he said the appellant worked for 6 days a week. The appellant did not submit on this issue. I agreed with the respondent that the claim of rest days had no basis as the appellant rested 1 day per week as per the law.

Claim for overtime

52. The claim for overtime was for the entire period worked. Mutula told the court the appellant worked 72 hours and he was aware the legal work hours were 52 hour per week. He this admitted the appellant worked 20 extra hours per week. He had no proof of overtime having

been paid. It was thus due for award. The claim was for 20 hours for 88 weeks worked at rate of 136.55x1.5. Section 27 of the Employment Act on working hours states-

'*27. Hours of work (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law*.'' REGULATION 6 of Regulations of Wages Order,1982- 'Hours of work -The normal working week of all employees including day and night guards shall be fifty two hours of work spread over six days of the week.'' Regulation 7: '*OVERTIME i. 7. Overtime (1) An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rates- (a) one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and (b) twice the normal rate of wages per hour in respect of any time worked on a rest day. "*What would be the rate of wages per hour? I found the computation was wrong. The legal salary was Kshs. 17413.25. For each day it was Kshs. 17414.25 /30 (Kshs. 580.47 per day) times x(52hours divide by 6 days per week thus 8.7 hours per day) thus Kshs 67 per hour. The court then finds the computation of 136.55 was on higher side and erroneous. The award at appeal is thus 20 hours x Kshs 67x1.5x 88 weeks thus **Kshs. 176.880/- awarded as overtime.**

53. On claim of public holidays- the appellant sought for payment for all public holidays in the entire period of worked. During the hearing RW1 told the court they required their security to work during public holidays. He had no evidence to prove the appellant was paid separately. I find the appellant proved his case of public holidays overtime. The respondent did not provide evidence to controvert the claim, and the witness admitted the

appellant worked during public holidays. Again, the court rejects the rate per hour of 130.05 as above and replaces it with KShs. 67 per hour. Regulation 9 on public holidays –

'9. *Public holidays (1) The days specified in the Second Schedule including any other day that may subsequently be gazetted as a public holiday shall be holidays with full pay. (2) Where an employee is required to work on a day which by virtue of subparagraph (1) is a holiday with full pay, the employees shall be paid, in respect of any time so worked, at double the normal rate of wages per hour in addition to the payment the employee would have received had he not been required to work on that particular day.* "The computation for pay during public holidays is thus -2018- 12 days x 12 hour x 2 x Kshs. 67 per hour thus Kshs. 19,296; in 2019 -12 days x 12 hour x 2 x Kshs. 67 per hour thus Kshs. 19,296 and in 2020- 4 days x 12 hours x 2 x Kshs 67 per hour thus Kshs. 6,432. Total public holidays award is the sum of Kshs. 45,024.

CONCLUSION

54. In conclusion the appeal is allowed on terminal dues only. The court upheld trial court finding that there was no prove of unfair termination. The Judgment and Decree of the Hon. P.K. Rotich (SPM) delivered on 23rd March 2024 in Nairobi MCELRC E800 of 2021 is set aside and substituted as follows-

i. Judgment is entered for the claimant against the respondent as follows-

   a. House allowance – Kshs. **49,962.00**

   b. Underpayment – Kshs. **66,442.90**

   c. Leave in lieu for 2019-**Kshs. 18,890/-**

d. Overtime **-176,880/-**

e. Service pay- **Kshs.8,706.60/=**

f. Public holidays pay **-Kshs. 45,024/-**

ii. Total sum awarded is **Kshs.365,905.50** with interest at court rate from date of judgment

iii. Costs of the suit.

55. The appellant is awarded costs of the appeal.

56. Stay of 30 days granted.

57. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – absent

Respondent- Ms. Njeri h/b for Kiungu