

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NUMBER E244 OF 2024**

**WATCHDOG ALERT LIMITED.....APPELLANT**

**VERSUS**

**PETER SIPENJI MAYUNGU.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. A. N. Ogonda (SRM)  
delivered on 26<sup>th</sup> July 2024 in Nairobi CMELRC No. E474 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. A.N. Ogonda (SRM) delivered on 26th July 2024 in Nairobi CMELRC No. E474 OF 2021 between the parties filed a Memorandum of Appeal dated the 21<sup>st</sup> of August 2024 seeking the following orders: -

- a) The appeal be allowed**
- b) The award of Kshs. 470,340/- be set aside.**
- c) Any other relief this Honourable Court may deem fit to grant.**
- d) The costs of this appeal and the trial court be awarded to the Appellants.**

2. The Respondent herein filed a cross appeal vide a Notice of Cross-Appeal dated 27<sup>th</sup> August 2024 seeking the following orders:-
  - a) **The appeal by the Appellant be dismissed with costs.**
  - b) **The cross appeal be allowed.**
  - c) **This Honourable Court do vary or reverse the determination on compensation under Section 49 (1) (c) of the Employment Act of the judgment and decree delivered on 26<sup>th</sup> July 2024 in Nairobi Chief Magistrates MCELRC No. E474 of 2021 and this Honourable Court be pleased to assess and award damages for wrongful dismissal to the Respondent for failure by the Appellant to follow due process.**
  - d) **Costs of this appeal and the cross appeal to be borne by the Appellant.**

### **GROUND OF THE APPEAL**

3. The Honourable Magistrate erred in law and fact in failing to determine what the Respondent herein determined as "Overtime worked and not paid."
4. The Honourable Magistrate erred in fact in failing to consider that the Respondent herein had been paid his Overtime.
5. The Honourable Magistrate erred in calculating the amount of Overtime worked and not paid to be Kshs. 470,340/=.
6. The Honourable Magistrate erred in law in failing to recognize that the Claimant failed to specifically prove that he was due Kshs. 470,340/= being the "Overtime worked and not paid."

### **GROUNDINGS OF THE CROSS-APPEAL**

7. The Honourable Magistrate erred in law and in fact in failing to assess and award damages for wrongful dismissal despite having made a finding that the Appellant had failed to follow the due procedure provided under Section 41 of the Employment Act.
8. The Honourable Magistrate erred in law and in fact in failing to consider the submissions by the Respondent and failed to consider the precedent as set by the superior courts that the Court's have proceeded to assess and award compensation for wrongful dismissal despite having found that there was a fair and valid reason for dismissal.

### **BACKGROUND TO THE APPEAL AND CROSS-APPEAL**

9. The Respondent filed a suit against the Appellant vide a statement of claim dated 23<sup>rd</sup> March 2021 seeking the following orders: -
  - a. A declaration that the Claimant suffered unfair, wrongful and unlawful dismissal from employment
  - b. The Respondent be ordered to pay the Claimant the following sums:
    - i. One month in lieu of notice Kshs.21,00/=
    - ii. Compensation for leave days not taken Kshs.21,000/=
    - iii. Damages for wrongful dismissal Kshs.252,000/=
    - iv. Overtime Kshs.627,200/-
    - v. Service Pay Kshs.73,500/=

vi. Cost of the suit

vii. Interest on (i) to (vi) above from the date of filing the suit until payment in full at court rates

c. An order that the Respondent do issue the Claimant with a Certificate of service and references befitting his status.

(pages 3-7 of Appellant's ROA dated 22<sup>nd</sup> September 2025).

14. The Respondent filed his list of witnesses dated 23<sup>rd</sup> March 2021; his witness statement of the same date, and list of documents also of the same date (pages 8-12 of ROA).

15. The claim was opposed by the Appellant, who entered appearance and filed a reply to the claim dated 31st May 2021 (pages 13-20 of ROA). They also submitted a witness statement from KULA KILUNGU dated 28th July 2021; a witness statement from Muli Kiio of the same date; and a list of documents dated 5th October 2021, with the bundle of documents attached (pages 21-37 of ROA).

16. The Respondent's case was heard on July 14, 2022, with the Respondent testifying in the case. He relied on his filed witness statement as his primary evidence and presented the documents attached to his list of documents. He was cross-examined by counsel for the Appellant, Ms. Wekesa (pages 112-114 of ROA).

17. The Appellant's case was heard on September 25, 2023, with the Appellant calling two witnesses: Kula Kilungu as RW1 and Kiio Muli as RW2. Both relied on their filed witness

statements as their direct evidence, and RW1 produced the Appellant's documents. They were both cross-examined by counsel for the Respondent, Ms. Kyeva, but RW2 was stood down due to technical difficulties. On the new dates for the defense hearing, counsel for the Appellant was absent, so the court scheduled the judgment without the defense case being closed (pages 117-123 of ROA).

18. The parties took directions on filing of written submissions after the hearing. The Claimant complied.
19. The Trial Magistrate Court delivered its judgment on July 26, 2024, partially granting the Claimant/Respondent's claim of Kshs. 502,855.84, which includes one month's salary in lieu of notice, unpaid leave days, and overtime worked, plus costs of the suit (judgment at pages 100-103 of ROA).

#### **DETERMINATION**

20. The appeal was canvassed by way of written submissions. Both parties complied.
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 their submissions dated 3<sup>rd</sup> October 2025, the Appellant submitted generally on the appeal and cross-appeal.
24. The Respondent identified the following two issues for determination in his submissions dated 6<sup>th</sup> October 2025:
- i. Whether the learned trial magistrate erred in law and in fact in awarding Kshs. 470,340/- for overtime worked and not paid.

- ii. Whether the learned trial magistrate was proper in failing to assess and award damages for wrongful dismissal.
25. The court, having considered the grounds the appeal found the issue for determination in the appeal to be –
- i. Whether the learned trial magistrate erred in law and in fact in awarding Kshs. 470,340/- for claim of unpaid overtime.
26. The court having considered the grounds the cross-appeal found the issues for determination in the cross- appeal to be –
- i. Whether the learned trial magistrate was proper in failing to assess and award damages for wrongful dismissal.

**The Appeal- Whether the learned trial magistrate erred in law and in fact in awarding Kshs. 470,340/- for claim of unpaid overtime.**

27. The grounds of appeal were-
- a) The Honourable Magistrate erred in law and fact in failing to determine what the Respondent herein determined as "Overtime worked and not paid."
  - b) The Honourable Magistrate erred in fact in failing to consider that the Respondent herein had been paid his Overtime.

- c) The Honourable Magistrate erred in calculating the amount of Overtime worked and not paid to be Kshs. 470,340/=.
- d) The Honourable Magistrate erred in law in failing to recognize that the Claimant failed to specifically prove that he was due Kshs. 470,340/=being the "Overtime worked and not paid."

**The appellant's submissions**

28. The instant Appeal was instituted through a Memorandum of Appeal dated 21st August 2024. The Memorandum of Appeal enumerated 4 grounds of Appeal as they appear on the face of it. The Respondent filed a Cross Appeal via Notice of Cross Appeal dated 27th August 2024. The gist of the Appellant's Appeal is that the learned Trial Magistrate Court erred in allowing the Claim for Overtime of Ksh. 470, 340 to the Respondent. The Respondent at the Trial court sought Compensation for Overtime worked at Ksh. 627,200. The trial learned Magistrate in her judgement delivered on 26th July 2024 awarded the Respondent Ksh. 470,340 being compensation for overtime for a period of 3 years. The Respondent in the Memorandum of Claim at the Trial Court had calculated the overtime claim at Ksh. 21,000 as his monthly salary. The Respondent did not show in the Trial Court when he put in excess hours. The evidence on record does not even demonstrate how the normal overtime was arrived at. The rates of compensation are different for the period the Respondent sought compensation and the period awarded by the Trial court. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulation of Wages [Protective Security Services] Order 1998. He gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of Kshs. 627,200 claimed as the

overall overtime. The Trial Magistrate erred in law and in fact in awarding the Claim for overtime for three years in the absence of a formula used to arrive at the daily overtime and consequently the global figure awarded. The Appellant invites the Honorable Court to borrow from the decision in Julius Arisi & 90 others v Research International East Africa Limited [2019] KEELRC 2367 (KLR) in which the Learned Judge Maureen Onyango declined the relief for overtime as it was advanced with without demonstrating the formula of how the lump sum figure was arrived at. The Appellant further relies and invites the Honorable Court to be persuaded and find guidance in the decision in Boniface Muhatia v Uba Kenya Bank Limited [2021] KEELRC 2096 (KLR) in which the Honorable Court also declined the Claim for overtime and stated as follows The Claimant sought a blanket sum on overtime asserting he worked for 18½ hours every day without a break year on year. This was not proved in evidence and as such the claim as framed would fail with the Court only awarding him overtime for one month at the rate of 15 hours overtime in the entire month 8. In the case of Naomi Osiemo v Geoffrey Nyang'au t/a Mavuno Mini Supermarket [2020] KEELRC 1407 (KLR), the Learned Judge also declined the relief for overtime and stated as follows Likewise, the claim for overtime is declined for the same reason. It is not enough for an employee to verbally allege that he/she worked overtime. More effort should be put including adducing documentary evidence and calling eye witnesses. The Appellant in conclusion invites the Honorable Court to agree with it and find that indeed the Honorable Trial Court erred both in law and in fact in awarding the Respondent Ksh. 470, 340 as overtime worked in the absence of evidence and formula of how the global figure was arrived at.

### **Respondent's submissions**

29. From the onset, we submit that the learned trial Magistrate was well founded and supported by the evidence presented and laws applicable in awarding Kshs. 470,340/= for overtime worked and not paid. Regulation 5 of the Regulation of Wages (General) Order provide that normal working week shall consist of 52 hours a week spread over six days of the week. Regulation 6 of the same Regulations is to the effect that overtime shall be payable at the rate of one and one half times the normal hourly rate. It was the Claimant's/Respondent's testimony that he would work from 6:00 a.m. to 6:00 p.m. (Page 113 of the Record of Appeal). CW1's testimony was corroborated by the Respondent's/Appellant's own witness, who confirmed the said position. DW1 who was the Claimant's colleague and who worked in the same station as the Claimant/Respondent (at Aero club) testified before the Court that they would work from 6:00 p.m. to 6:00 a.m. (Page 118 of the Record of Appeal) DW2, who was the Claimant's/Respondent's supervisor, equally confirmed the PW1's and DW1's testimony by testifying during cross-examination that the Claimant would work 12-hour shifts- either 6:00 a.m. to 6:00 p.m. -6:00 a.m. to 6:00 p.m. (Page 120 of the Record of the Record of Appeal). 35. Upon being referred to the copies of the pay slips and the leave salary vouchers (Page 29-37 of the Record of the Record of Appeal), DW2 confirmed to the Court that the pay slips clearly indicated that the Claimant's/Respondent's gross salary was composed of a basic salary of Kshs. 14,408/-; housing allowance of Kshs. 2,125/- and travelling allowance of Kshs. 850/- (Page 120 of the Record of the Record of Appeal). DW2 confirmed to the Court that based on the pay slips and the leave salary vouchers no amount was paid towards overtime worked.

30. Further, it is pertinent to note that while the Appellant's own witnesses confirmed that the Claimant worked overtime, no material evidence was placed before the Court in the form of receipts to confirm that the Respondent herein was paid for overtime worked. That the information on payment of allowances such as overtime is ordinarily expected to be in the custody of the employer who maintains the employment records. By dint of Section 112 of the Evidence Act, in civil proceedings, if any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon the said party. In the absence of any material to prove that overtime was duly paid as alleged by the Appellant herein, we submit that the Appellant's Appeal lacks merit and the same ought to be dismissed with costs.

### **Decision on the Appeal**

31. The burden of proof of extra hours of work amounting to overtime lies with the employee. In the instant case, the claimant pleaded that –*‘3. I discharged my duties continuously and to the Respondent's satisfaction, to work an extent even my salary was increased over the years. I was required for 12 hours a day, 6 days in a week.’* His prayer for overtime was framed as follows-*‘ d) Overtime. .Kshs. 627,200/- Normal working hours per week is 52hrs 1/225x21,000x (72-52) 20hrsx4weeksx84 months.’*(pages 9-10 of ROA). The Appellant in defence stated that- *‘The Respondent states that it offered the Claimant a yearly Contract of Employment for 52 weeks from the 1st September 2013 as a Security Guard’* (page 17 of ROA). During the trial, the respondent adopted their witness statement as evidence in chief. It is dated 23/3/2021. The documents attached to his list dated 23/3/2021 was marked PEXH 1 to 4. He asked that the statement of claim dated 23/3/2021 be adopted as his evidence in

chief, together with his response to the Respondent's reply to the claim dated 8/06/2021. In his examination-in-chief, the respondent stated that the appellant hired him as a security guard. He worked from 6:00 am to 6:00 pm. He was not cross-examined on the issue of overtime by counsel for the appellant (pages 112-113 of ROA).

32. RW1 was a fellow employee of the respondent and told the court as follows during cross-examination - *'We were working at Aero club as security guards. We would work from 6:00pm to 6:00am.'* RW2 was the supervisor of the respondent and at cross-examination told the court as follows- *'I know Peter very well. He was employed to work as a security guard. I cannot recall the exact date. I have many people who work under me. The shift were either day or night. They worked 12-hour shifts- either 6: 00am to 6:00pm or 6:00pm to 6:00am. I am referring to REXH8-payslip.'* (page 120 of ROA). The trial court held- *'8. There is a claim for overtime worked for 84 months. The Respondent did not provide evidence to refute this claim. I have allowed this claim for 3 years only which is 36 months. I am guided by the authority of Charles Kariuki Mwangi v Intersecurity Services Limited [2018] eKLR where Nzioki wa Makau J., held thus; "The Claimant claimed certain sums for leave, underpayment, severance pay for 6 years as well as house allowance and off days for 6 years. Under the Employment Act, the claims one can make are limited to 3 years. Half of his claim would by operation of law be statute barred and unrecoverable." I allow the claim as follows - 1.5 rate x Kshs. 83.75 hourly pay x 4 extra hours per day x 26 days x 36 months = Kshs. 470,340/=.'* (PAGE 102 OF THE ROA) The court finds that the claim of overtime was corroborated by the defence, whose witnesses confirmed the claimant worked for 12 hours, making it more than the 52 hours allowed under the regulations of the Wages Order. The

appellant had a ground of appeal on the tabulation. I upheld the limit of the overtime to 36 months. The prayer was as follows- Overtime. .Kshs. 627,200/- Normal working hours per week is 52hrs.  $1/225 \times 21,000 \times (72-52) \times 20 \text{hrs} \times 4 \text{weeks} \times 84 \text{ months}$ . The respondent was awarded 1 month salary notice pay of Kshs. 17,419.20/= . (page 102 of ROA) The court finds the formula applied by the Trial Court was erroneous and that the correct formula was as pleaded thus  $1/225 \times 17419.20 \times (72-52) \times 20 \text{hrs} \times 4 \text{weeks} \times 36 \text{ months} \times 1.5$  thus Kshs. 334,448.64. The award of 470,340/- is set aside and substituted with Kshs. 334,448.64

### **CROSS-APPEAL**

**Whether the learned trial magistrate was proper in failing to assess and award damages for wrongful dismissal.**

33. The grounds of cross-appeal were -

- a) The Honourable Magistrate erred in law and in fact in failing to assess and award damages for wrongful dismissal despite having made a finding that the Appellant had failed to follow the due procedure provided under Section 41 of the Employment Act.
- b) The Honourable Magistrate erred in law and in fact in failing to consider the submissions by the Respondent and failed to consider the precedent as set by the superior courts that the Court's have proceeded to assess and award compensation for wrongful dismissal despite having found that there was a fair and valid reason for dismissal.

### **The appellant's submissions**

34. It is worth noting that the learned magistrate duly acknowledged and found that the termination Claimant/Respondent's employment was unfair and unlawful for failure by the

employer to follow procedure provided under section 41 of the Employment Act. (Page 101 of the Record of Appeal) While we agree with the Court's finding, we submit that the Honourable Magistrate erred by holding that the Claimant/Respondent was not entitled to compensation under section 49(1)(c). 40. Your Ladyship, we submit that the Claimant is entitled to compensation for unfair termination as Section 49(4) of the Employment Act provides for several factors to be considered when deciding what remedy to give under subsection (1)(c) of the Employment Act which provides for an award of up to 12 months gross salary. The Respondent herein had worked for the Appellant for a continuous period of 7 years prior to being summarily dismissed unprocedurally. We pray that this Honourable Court be guided by the determination of Makau J in *Del Monte Kenya Limited v Kiptoo* (Employment and Labour Relations Appeal E007 of 2024) [2025] KEELRC 45 (KLR) (23 January 2025) (Judgment) in which the Court allowed an award of 4 months gross salary compensation for procedural unfairness despite having found that the employer was justified to terminate the employment on account of the employees theft of pineapples.

**Appellant's submissions on the cross-appeal**

35. The Respondent filed a Cross Appeal through a Notice of Cross Appeal dated 27th August 2024 claiming that the Learned Trial Magistrate erred in Law and in fact in failing to award the Respondent herein for unlawful termination even after finding that the termination was unfair. The Appellant opposes the Cross Appeal and submits that of the Learned Trial Magistrate rightly found that the Respondent was not entitled to the Relief for compensation under Section 49 (1) (c) based on the conduct of the Respondent that lead to the termination of employment. The Appellant reiterates the findings on the Honorable Trail Magistrate in

dismissing the relief for compensation and invites the Honorable Court to agree with the Trail Magistrate and decision in Jacob Juma Makokha v Radar Security (K) Limited [2018] KEELRC 2577 (KLR).

### **Decision on cross-appeal**

36. The court finds that the grievance is about failure by the Trial Court to award more than notice pay on finding lack of procedural fairness. The trial court held:

*'5. On compensation under section 49(1)(c) of the Employment Act, the Claimant would have been entitled to the same but I have considered the circumstances surrounding the termination of his employment and the fact that the Claimant admitted to having taken the cap. He only returned it after he was asked to do so. He insists that he did not steal it, but there is no reason given as to why he did not immediately hand it over to the management upon finding it and only did so after being informed that he had been captured on the CCTV camera and asked to return it. Based only on the evidence of the Claimant, I find that the Respondent had ground for dismissal. The Claimant's explanation was not satisfactory and although the Respondent did not take him through a disciplinary hearing, I find that the Claimant is not entitled to compensation under section 49(1)(c) of the Employment Act. This was the reasoning in Jacob Juma Makokha Vs. Radar Security (K) Limited [2018] eKLR, in which the Court held as follows: - "The above was addressed in the case of Naqvi Syed Qmar versus Paramount Bank Limited &*

another [2015] eKLR the court held that; "... Where an Employer suspects the Employee of stealing; or where the Employee carelessly and improperly performs his role; the Employer has the right to summarily dismiss the Employee under Section 44 [4] of the Employment Act 2007. The 1st Respondent is a Bank, and the industry correctly demands Employees of the Banks, are imbued with a high degree of trust and confidence." Employee employed in a bank, such required a high degree of trust and confidence. Just like in the role of a Security Guard, where one is given the responsibility and duty to guard property, to enter therein and engage in acts contrary to what is expected of a security guard would be to lose the trust and confidence of the client and the employer. To award the claimant under section 49 of the Employment Act, 2007 with compensation would be to reward gross misconduct. Such would not be in the interests of justice and good order. As the remedy of unfair termination must put into account the provisions of section 45(5) (b) of the Act in that the conduct and capability of the employee up to the date of termination becomes material. No compensation is awarded in this case." I therefore make no award under section 49(1)(c) of the Employment Act in the present case. 6. In the above-noted case (Jacob Juma Makokha (supra)) the court stated as follows: "Despite the findings above, where termination of employment is not procedural, notice pay is due. based on the wage orders and wage due to the claimant, notice pay is herein awarded at Kshs.16, 227.00." In the present case, the Claimant was earning a basic salary of Kshs. 14,408/=. House allowance is 15% of the basic pay (see rule 5 of the Regulation of Wages (Protective Security Services) Order 1998), and ought to have been Kshs. 2,161.20/=. plus his allowances. I will therefore allow the sum of Kshs. 17,419.20/= as one month's salary in lieu of notice. " The court on first appeal is

guided by the decision 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.” The court 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.”

37. The trial court correctly held the appellant had a valid reason to dismiss the cross-appellant on account of having kept a found cap of a client, and this was contrary to the operational requirements of the employer. The court found there was no procedural fairness and, guided by a decision of the court, awarded 1 month's notice in lieu. The cross-appellant relied on a

decision of the court where Makau J in Del Monte Kenya Limited v Kiptoo (Employment and Labour Relations Appeal E007 of 2024) [2025] KEELRC 45 (KLR) (23 January 2025) (Judgment) allowed an award of 4 months' gross salary compensation for procedural unfairness despite having found that the employer was justified to terminate the employment on account of the employees theft of pineapples. The decision is not binding on this court or the court that delivered the decision relied on by the trial court. The Supreme Court guided on the compensation for unfair termination under section 49 of the Employment Act in Ken Freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR as follows-

*“.....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the Employment Act, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies...”* Section 49(1) provides for 3 remedies as follows- *‘Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—*

*(a)the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;*

*(b)where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or*

*(c)the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”*

The law says the court may award any or all of the above remedies. The trial court gave the cross-appellant remedy of payment of 1 month's salary Kshs. 17,419.20/= for the unfair termination on account of lack of compliance with procedural fairness. It had not been demonstrated to me that the trial court misdirected itself on facts and the law. I find no basis to interfere with the discretion of the trial court, which was lawful.

(Mbogo v Shah). The cross-appeal is held to lack merit.

## **CONCLUSION**

38. The appeal is allowed on the basis of the erroneous computation of the overtime. The Judgment and Decree of the Hon. A.N. Ogonda (SRM) delivered on 26<sup>th</sup> July 2024 in Nairobi CMEELRC No. E474 OF 2021 is set aside and substituted as follows-

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

- a. Notice pay for procedural unfairness- Kshs. 17,419.20
- b. Overtime pay  $-1/225 \times 17419.20 \times (72-52) \times 20\text{hrs} \times 4\text{weeks} \times 36 \text{ months} \times 1.5$  thus Kshs. 334,448.64
- c. Leave days not taken - Kshs. 15,096.64/=

Total sum awarded Kshs. **366,964.48**

- d. The Claimant shall have the costs of the suit.
  - e. Interest to apply at court rates on judgment sum from the date of filing the suit until payment in full.
39. The court declines to award costs on the appeal as the error was attributed to the computation by the trial court, not on the facts and the law.
40. The cross-appeal had no merit and is dismissed with costs to the appellant/respondent.
41. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup>  
DAY OF NOVEMBER, 2025.**

**J.W. KELI,  
JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – Ms Mwangi h/b for Kwamboka

Respondent – Ms. Kyeva h/b for Thiongo