

**REPUBLIC OF KENYA**

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

**APPEAL NUMBER E164 OF 2023**

**GEORGE WAFULA JUMA.....APPELLANT**

**-VERSUS**

**PINKERTONS (K) LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. E. Kagoni (PM) delivered on 22<sup>nd</sup> August 2022 in Nairobi MCELRC E1926 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. E. Kagoni (PM) delivered on 22<sup>nd</sup> August 2022 in Nairobi MCELRC E1926 of 2021 between the parties filed a Memorandum of Appeal dated the 29<sup>th</sup> August 2023 seeking the following orders: -

- a) **This appeal be allowed.**
- b) **This Honourable Court sets aside the orders in the Judgement of Nairobi CMEL**

**CAUSE NO. MCELRC/E1926 OF 2021 and make an appropriate award thereto.**

- c) **Cost of the Appeal be borne by the Respondent.**
- d) **Any other reliefs as the Honourable Court may deem fit and just to grant in the circumstances of this Appeal.**

**GROUND OF THE APPEAL**

2. The Honourable Magistrate erred in law and in fact by arriving at a judgement that is erroneous regarding the claims pleaded in the Memorandum of Claim dated and filed on 5th November 2021.
3. The Honourable Magistrate erred in law and in fact by proceeding on wrong principles and failing to totally consider the relevant factors provided under the enabling statute when dismissing the claim in totality.
4. The Honourable Magistrate erred in law and in fact by stating that the dismissal of the claimant was lawful.
5. The Honourable Magistrate erred in law and in fact by failing to appreciate that the Claimant had expressly stated in the Memorandum of Claim and in other pleadings that he was employed by the Respondent on 1<sup>st</sup> October 2000 and terminated on 6<sup>th</sup> July 2021, a period of twenty one (21) years.

6. The Honourable Magistrate erred in law and in fact by disregarding the Appellant's claim for one month's salary in lieu of notice despite a finding that the termination was unfair in its procedure contrary to the law.
7. The Honourable Magistrate erred in law and in fact by failing to appreciate that the compensation for failure to issue a termination notice is equated to issuing a termination notice effected immediately, thus entitles the aggrieved party to receive a sum equivalent to the salary for one month under the statute.
8. The Honourable Magistrate erred in law and in fact by arriving at an erroneous finding that the Claimant had not tendered a bank statement to prove that his April 2021 salary was not paid and thus the claim failed.
9. The Honourable Magistrate erred in law and in fact by failing to appreciate that the Claimant had produced his Personal Current Account Bank Statement dated 5<sup>th</sup> October 2021.
10. The Honourable Magistrate erred in law and in fact by arriving at an erroneous finding that the Claimant had not proved the award of Kshs. 648,454.35/= as pleaded and thus the claim failed.
11. The Honourable Magistrate erred in law and in fact by failing to appreciate that the Claimant had produced his NSSF Provisional member statement of account for period from 1<sup>st</sup> January 1977 until 31<sup>st</sup> August 2020 the period contributions were made.

12. The Honourable Magistrate erred in law and in fact by drawing an erroneous inference of satisfaction or contentment with the salary amount the Claimant was being paid and thus the claim failed.
13. The Honourable Magistrate erred in law and in fact by failing to appreciate that under statute law an agreement cannot vary or limit the application of minimum rates of remuneration established in a wages order as a term of employment of any employee to whom the wages order applies.
14. The Honourable Magistrate erred in law and in fact by failing to appreciate that under statute law the remuneration established by the wages order are inserted in the contract in substitution of the contractual provisions for the payment of less remuneration than the statutory minimum remuneration.
15. The Honourable Magistrate erred in law and in fact by failing to find that the claims for salary arrears for April, May and June 2021, Service Pay and Under payment had been proved in accordance with the Rules of Evidence in Kenya.
16. The Honourable Magistrate erred in law and in fact by failing to find that the claims for salary arrears for April, May and June 2021, Service Pay and Under payment pleaded were highly meritorious and met the threshold required for claims under employment law.

### **BACKGROUND TO THE APPEAL**

17. The Claimant/Appellant filed a claim against the Respondent vide a memorandum of claim dated the 5<sup>th</sup> of October 2021 seeking the following orders: -

- a) A Declaration that the Claimant's Contract of Employment was unfairly and unlawfully terminated.
- b) A Declaration that the Claimant's terminal dues were wrongfully and/or unfairly withheld by the Respondent.
- c) Payment of the Claimant's full terminal dues of Kshs. 648,454.35/= as per Paragraph 15 above.
- d) Certificate of Service.
- e) Costs of this suit.
- f) Interests at commercial rates from the date of termination of the employment contract until payment in full.
- g) Any other relief that this Honourable court may deem fit to award.

(The record of appeal was not paginated).

1. The Claimant filed his list of witnesses dated 5<sup>th</sup> November 2021; witness statement dated 19<sup>th</sup> October 2021; and list of documents dated 5<sup>th</sup> November 2021 with the bundle of documents attached.
2. The claim proceeded undefended.

3. The Claimant/Appellant's case was heard on the 21<sup>st</sup> of June 2022 where the claimant testified in the case, relied on his filed witness statement as his evidence in chief, and produced his documents as exhibits.
4. The court gave directions on filing of written submissions after the hearing, and the Claimant/Appellant complied.
5. The Trial Magistrate Court delivered its judgment on the 5<sup>th</sup> of August 2022, dismissing the Appellant's claim in its entirety, with no order as to costs.

#### **DETERMINATION**

6. The appeal was canvassed by way of written submissions. Both parties complied.

#### **Issues for determination**

7. In his submissions dated 17<sup>th</sup> December 2024, the Appellant submitted generally on the Appeal.
8. The Respondent identified the following issues for determination in their submissions dated 1<sup>st</sup> October 2025:-
  - i. Whether the learned Magistrate erred in law and in fact in holding that the Appellant/Claimant had failed to prove, on a balance of probabilities, that his employment was unlawfully and unfairly terminated.

- ii. Whether the learned Magistrate erred in law and in fact in finding that the Appellant/Claimant had constructively resigned from his employment by voluntarily refusing to resume work after the lapse of 60 days.
- iii. Whether the learned Magistrate erred in law and in fact in concluding that the evidence adduced by the Appellant/Claimant was not corroborated.

9. The court on perusal of the grounds of appeal was of the considered opinion that the issues for determination in the appeal were –

- i. Whether the learned Magistrate erred in law and in fact in holding that the Appellant/Claimant had failed to prove, on a balance of probabilities, that his employment was unlawfully and unfairly terminated.
- ii. whether the trial court erred in law and fact in its decision on reliefs sought in the claim.

**Whether the learned Magistrate erred in law and in fact in holding that the Appellant/Claimant had failed to prove, on a balance of probabilities, that his employment was unlawfully and unfairly terminated.**

**Appellant's submissions**

10. The Appellant was forced by the Respondent to go on unpaid leave on or about May and June 2021. The Respondent unlawfully coerced or forced the Appellant to resign from employment via writing the resignation letter on 6th July 2021. This was done by withholding salary through compulsory unpaid leave and failing to deploy the Appellant to any work station. section 35 (1)(c) of the Employment Act stipulates a termination notice as: “(1) A contract of

service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.” The Appellant asserts that he was constructively dismissed and effectively terminated since the unreasonable actions of the Respondent drove him to leave employment on 6th July 2021. The Respondent under the employment contract had the obligation of assigning or deploying the Appellant to a particular workstation and to pay the agreed-upon wages as and when they fall due. The failure to pay wages and deploy the Appellant to a particular work station is a fundamental breach going to the root of the contract of employment. The Appellant left employment within a reasonable time and never accepted, waived, acquiesced or conducted himself in a manner to be estopped from asserting the repudiatory breach. We rely on *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* (Civil Appeal 20 of 2012) [2015] KECA 394 (KLR) paragraph 30 has explained the legal principles relevant to determining constructive dismissal including the following: (a) What are the fundamental or essential terms of the contract of employment? (b) Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer? (c) The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. (d) An objective test is to be applied in evaluating the employer’s conduct. (e) There must be a causal link between the employer's conduct and the reason for the employee terminating the contract i.e. causation must be proved. (f) An employee may leave with or without notice so long as the employer’s

conduct is the effective reason for termination. (g) The employee must not have accepted, waived, acquiesced, or conducted himself to be estopped from asserting the repudiatory breach; the employee must, within a reasonable time, terminate the employment relationship pursuant to the breach. (h) The burden to prove repudiatory breach or constructive dismissal is on the employee.” (i) Facts giving rise to repudiatory breach or constructive dismissal are varied. The Constructive dismissal of the Appellant amounted to actual dismissal by the Respondent that contravene the procedural and substantive fairness requirement under the Employment Act, 2007. Thus Appellant is entitled to claim compensation for unlawful and unfair termination.

11. Whether the Learned Magistrate erred in law and in fact by failing to award Damages for unlawful termination. The Appellant reiterates the submissions on the unlawfulness and unfairness of the termination under paragraph 15(ii) of the memorandum of claim and consequently be awarded damages for unlawful termination of Kshs. 156,000= (13,000 x 12months) this is informed by section 49(1)(c) of the Employment Act which provides for Remedies for wrongful dismissal and unfair termination 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— (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 Supreme Court agreed on applicability of section 49 in awarding damages in Kenfreight (EA) Limited v Nguti (Petition 37 of 2018) [2019] KESC 79 (KLR) para 38 held as follows: “[38] 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 or magistrate to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder.”

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### **Respondent's submissions**

12. We have framed the above issue at variance with the Appellant's approach in the headline preceding paragraph 3 of his submissions dated 29.09.25 deliberately. We say so because the trial court did not hold or find that the Appellant's termination was lawful. The judgement of Hon. Edgar Kagoni (a complete version is to be found in the terminal pages of the proceedings filed before this court) shows that the learned magistrate held that the evidence of unlawful termination was insufficient. Refer to pages 2,3 and 6 of the judgment of the trial court. 9. Put differently, the trial court held that the Appellant herein failed to discharge the burden of proof of unfair termination. The detailed reasoning of the trial court is to be found in pages 2 and 3 of the judgment. More seriously, the court found that there was a contradiction between the pleadings and the evidence produced in court. In his witness statement adopted in court, the Claimant alleged that he was forced to resign on the 09.08.21. This evidence directly contradicted what had been pleaded in paragraphs 10 and 11 of the Memorandum of Claim, where the Claimant alleged that he was forcefully sent on unpaid leave in May and June 2021, and upon return, was forced to resign by a letter dated 06.07.21. 11. Page 13 of the record of Appeal attests to the trial court's observations as to what was pleaded, while page 19 of the record of appeal which contains the Appellant's witness statement confirms his evidence. The contradictions are in plain sight and as such, there is no

error of fact on the part of the trial court. Critically, the trial court found that there was insufficient evidence of unlawful termination due to lack of credibility in the Claimant's testimony. The Claimant was neither clear on when he was terminated/resigned, nor the reasons for termination/resignation, if any. His witness statement cited failure to deploy him to workstations. His Memorandum of Claim pleaded a forced resignation. The foregoing is proof of dishonesty. We affirm the reasoning of the trial court for three reasons:- a) The cause of action that was before the court was unfair termination. There was no plea of constructive dismissal before the court. If there is any doubt on this point, the submissions of the Claimant before the trial court as produced in page 40 of the record of appeal put the same to rest. The submissions tally with page 13 and 14 of the record of Appeal which contain the Memorandum of Claim filed in the trial court. Paragraphs 3- 11 of the Appellants submissions dated 29th September 2025 are therefore misplaced, focusing as they do on constructive dismissal. There was no such plea before the trial court and the cause of action cannot be introduced at the appeal stage. b) Allegations of resignation, forced or otherwise, can only relate to a claim of constructive dismissal. This was however not what was pleaded in the Memorandum of Claim before the trial court, or urged in the submissions later filed. The cause of action was therefore wholly incompatible with the evidence, regardless of the latter's quality. This fundamental misalignment means that even if the Claimant had proved resignation in any of the various dates he alleged, this evidence would be worthless as constructive dismissal had not been pleaded as the cause of action. c) As Claimant had pleaded unfair termination, he had the burden to prove the same on a balance of probabilities. This is the test set by section 47 (5) of the Employment Act, 2007. Where the burden is not discharged, the Respondent has no corresponding duty to justify any alleged reasons of

termination. In a recent case of *Ayuma v Omunga* [2025], the court held as follows in paragraph 28: “The court appreciates that section 47(5) of the Employment Act places the burden of illustrating that unfair termination has occurred on the employee. The employer is called upon by the same section to justify the grounds of termination. This court agrees with the trial court findings that the Appellant did not discharge this burden since she requested for her dues which were paid but she reversed meaning she repudiated her own contract...” [Emphasis Added] Thus, the Appellant had the burden of proving unfair termination before the trial court, which he failed to discharge. Given the contradictions between his witness statement and what had been pleaded in the Memorandum of Claim, the trial court cannot be faulted for reaching the conclusion it did. We agree with the trial court because it is trite law that parties are bound by their pleadings. The Appellant had pleaded in paragraphs 10 and 11 of the Memorandum of Claim that he was forced to go for unpaid leave on May and June 2021. He returned and was forced to write a resignation letter dated 6th July 2021. The Appellant was expected to lead evidence showing that he was forced to go for unpaid leave and write a resignation letter dated 06.07.21. Any other evidence, such as that in his witness statement where he indicated a resignation in 9th of August 2021 due to failure to deploy him in workstations was untenable. The Appellant could not lead evidence to prove un-pleaded facts. The Appellant’s evidence before the trial court on how he was terminated was therefore wholly irrelevant and only for rejection. We rely on *Mrima J’s* holding in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] at paragraph 11 as follows: “..It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in

consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded...” [Emphasis Added] It follows, therefore, that no evidence whatsoever was tendered to support the Appellant’s plea of unfair termination. In the circumstances, we submit that the Appellant herein left the trial court with no option than to dismiss the plea. We therefore conclude that the trial court was justified in dismissing the plea of unfair termination and urge that the same be upheld.

**Decision on issue 1.**

13. The grounds of appeal were as follows-
  - a. The Honourable Magistrate erred in law and in fact by arriving at a judgement that is erroneous regarding the claims pleaded in the Memorandum of Claim dated and filed on 5th November 2021.
  - b. The Honourable Magistrate erred in law and in fact by proceeding on wrong principles and failing to totally consider the relevant factors provided under the enabling statute when dismissing the claim in totality.
  - c. The Honourable Magistrate erred in law and in fact by stating that the dismissal of the claimant was lawful.
14. As the first appellate Court, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. In Selle & Another -VAssociated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus: "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...

is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions..."

15. 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).
16. The trial court held as follows –‘*CW1 told this court vide his adopted statement before the court that the Respondent having failed to deploy him to work stations, he was forced to resign from employment on 09.08.2021. However, according to paragraph 10 and 11 of the Claimant's Memorandum of Claim, he worked with the Respondent until on or about May and June 2021, when the Respondent forced the Claimant to go on unpaid leave.*

*On Returning to work in July 2021, the Respondent unlawfully forced the Claimant to write a resignation letter on 06.07.2021; resigning from employment.*

*What the foregoing reveals is the lack of candour as he has approached the court. In his statement he alleges that he was forced to resign on 09.08.2021 as the Respondent failed to deploy him to work stations, whereas in his Memorandum of Claim, he alleges that he was forced to resign by the Respondent on 06.07.2021. So, did the Respondent force the Claimant to resign or did the Claimant resign as he was not deployed to a work station(s). Again, it also appears that the Claimant resigned twice i.e., on 06.07.2021 and 09.08.2021. These inconsistencies were not explained at trial. In the absence of such explanation, the court is unconvinced with the credibility of the Claimant, that he was unfairly dismissed from work. In my view, people forced to resign from work don't mix themselves up as the Claimant has done and fail to explain the mix-up. How is the adjudication of the merits of his dismissal possible, if he is not clear when he resigned and the reasons behind such resignation, how is the court to gain clarity when the one supposed to give such clarity is clearly not sure? In light of this, the court finds there is insufficient evidence owing to a lack of clarity and credibility on the part of the Claimant. My findings are fortified by the decision of Ndiema Samburi Soti v Elvis Kimtai Chepkeses [2010] eKLR the Court of Appeal said as follows on the issue: - ".....where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial the appellate court will hardly interfere with a conclusion made by the trial judge after weighing the credibility of witnesses. [.....] The court will however interfere when the findings of fact are based on no evidence or on a*

*misapprehension of evidence or where it is shown that a trial judge has acted on wrong principles in arriving at the finding in issue"*

17. It was not in dispute that the appellant had been employed by the respondent. The case was undefended. The appellant pleaded that he was employed by the respondent on the 1<sup>st</sup> October 2000 as a security guard earning Kshs.6000. In his witness statement he stated the salary was Kshs. 13000. He established he was employed by the respondent through uncontroverted documents. The appellant stated he was forced to proceed on unpaid leave in May to June 2021. On return on 6th July 2021, he was forced to resign. In a witness statement, the appellant stated that he was forced to resign on 9th August 2021. During the formal proof hearing, the claimant adopted his witness statement dated 19th October 2021 as his evidence in chief and produced his document under list dated 5<sup>th</sup> November 2021. It is true that the averments in the statement of claim and witness statement were contradictory. The court is guided under section 20 of the Employment and Labour Relations Court Act as follows: *'In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.'* The appellant produced documents under his list of documents and contradicted himself on the date of the alleged forced resignation. The court then upheld the trial court's finding, that the appellant failed to prove unlawful dismissal based on the doctrine of constructive dismissal.

18. The fairness of termination is two-fold, substantive based on reason, and procedural fairness. The employment relationship was not in dispute as evidenced in documents produced in court. It is the duty of the employer to bring an employment relationship to an end consistent

with section 41 of the Employment Act to wit- Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.(2)Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.” Thus even if there was no resignation and the claimant did not resume duty after the unpaid leave the employer ought to have issued notice of intention to terminate the employment in compliance with section 41. The employer did not enter evidence to prove how the relationship ended yet there was evidence it ended through the unpaid leave and lack of payment of salary. The allegation that the appellant was forced to proceed on unpaid leave in May and June 2021 was not controverted. The allegation of unpaid leave is supported by the bank statement of the claimant for 5<sup>th</sup> October 2021 with last salary remittance of 6<sup>th</sup> April 2021 and C-exhibit 4, being a dispatch slip of unpaid 52 leave days from 2<sup>nd</sup> may 2021 to 26<sup>th</sup> June 2021. Based on the foregoing evidence before the trial court the allegation of the appellant that he was forced to proceed on unpaid leave in May 2021 was proved on a balance of probabilities . For lack of procedural fairness in the termination the court finds that the trial court erred in failing to apply its mind on the provisions of section 41 of the Employment Act. The termination was held unfair for lack of procedural fairness.

**Whether the trial court erred in law and fact in its decision on reliefs sought in the claim.**

19. Compensation for unfair termination- the court on appeal held the that appellant did not prove the forced resignation on account of great inconsistencies on the alleged date of resignation and failure to produce the resignation letter. The case of constructive dismissal failed. The court found it is the duty of the employer to end the employment relationship and for lack of compliance with section 41 of the Employment Act, the court awards 1 month salary notice payment as per the lawful minimum wages as at June 2021 Kshs. 15,141.95
20. On claim of unpaid leave for 8 years- Annual leave is a statutory right under section 28 of the Employment Act. The employer ought to have filed record on the leave as custodian of employee records as per section 10 and 74 of the Employment Act in response to the claim for leave. This court applied section 28 (4) of the Employment Act to wit—*‘The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.’* The appellant is awarded annual leave of 18 months which was what he could have carried forward during his employment under section 28(4) of the Employment Act having not placed before the trial court evidence of having applied for the leave and the employer having declined the same. Thus award of **Kshs. 19,500.**
21. Salary arrears for April, May and June 2021. The appellant produced his bank statements as evidence of salary paid by the respondent as at termination. The dispatch slip (C-exhibit 4)

stated he was on unpaid leave from 2<sup>nd</sup> May to 26 June 2021 meaning no salary was paid. The appellant discharged his burden of prove and the burden passed to the employer to prove salary payment. There was no response. The trial court erred in fact and law in failure to award the salary as claimed. It is awarded for the 3 months on appeal Ksh, 39,000.

22. Service pay- the court agreed with the trial court that the claimant had produced his NSSF statement for the complete years served and even through there were some months not remitted he was not entitled to service pay pursuant to section 35(6) of the Employment Act. The appellant ought to pursue his claims for the unremitted months with the NSSF as the regulator which has mechanism to enforce compliance.

23. Claim for under payment. – The court agreed with the finding of the court that- *‘On or about the year 2000 he was offered a job as a security guard by the Respondent earning a salary of Kenya Shillings Thirteen Thousand (Ksh. 13, 000/=) which was being paid via my bank account’*. The trial court based its decision to decline the claim for underpayment based on inconsistencies in the statement of claim with lower figures of payments before 2013. The court finds that the since the claimant adopted his witness statement as his evidence that was the evidence the court ought to have considered, being salary of Kshs. 13,000. The claim of payment of salary of Kshs. 13,000 was believable taking into account the appellant produced bank statement which had remittance of salary less than 13000. The court finds that the only period of underpayment was, under the Minimum wages orders of 2017-2021. Section 26 (2)of the Employment Act provides-*‘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 wages of the appellant as secure guard were regulated under the Minimum Wages Orders. The trial court erred in not establishing whether the salary of Kshs 13,000 pleaded in witness statement adopted as evidence in chief by the appellant was lawful. The minimum wages orders are published in Kenya Gazette hence public documents. It is unlawful to pay an employee holding a regulated position below the wages prescribed in the minimum wages orders. The court awards on appeal the lawful minimum wages as pleaded from May 2017 to May 2021 as follows-

May 2017 To April 2018(14,420.90 X 115/100) - 13000 X 12 Months- Ksh 43,008.42/=

May 2018 To May 2021(15141.95 X 115/100) - 13000 X 36 Months -Ksh 158,876.73/

Total sum awarded on underpayment is Kshs. 201,885.15/-

### **CONCLUSION**

24. The appeal is allowed. The Judgment and Decree of the Hon. E. Kagoni (PM) delivered on 22<sup>nd</sup> August 2022 in Nairobi MCELRC E1926 of 2021 is set aside and substituted as follows-

- a. Notice pay for unfair termination Kshs. 15,141.95
- b. Untaken Leave pay Kshs. 19,500
- c. Salary arrears – April, May and June 2021 Kshs. 39,000
- d. Underpayment May 2017 -May 2021 Kshs. 201,885.15

**Total award Kshs. 275,527.10**

- e. Cost and interest at the court rate from the judgment date.

25. The appellant is awarded costs on appeal.

26. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11<sup>TH</sup>  
DAY OF DECEMBER, 2025.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – Kimathi

Respondent- Muhuyu

ORIGINAL