REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. E252 OF 2024

LANDMARK HOLDINGS LIMITED……..……..……..APPELLANT

VERSUS

ALEX KIIO MUTISYA……..…..……RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable A.N. Ogonda (PM) delivered at Nairobi on the 26th day of July, 2024 in MCELRC No. E1542 of 2019)

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable A.N. Ogonda (PM) delivered at Nairobi on the 26th day of July, 2024 in MCELRC No. E1542 of 2019 between the parties filed a memorandum of appeal dated the 28th August 2024 seeking the following orders:-

    a) **The Appeal herein be allowed.**

    b) **The judgment delivered on 26th July 2024 and Decree dated 27th August 2024 in respect of MCELRC 1542/2019 Alex Kiio Mutisya vs Landmark Holdings Limited and any resultant orders be set aside.**

c) **The costs of this Appeal and the lower court's proceedings be awarded to the Appellant.**

d) **This Honourable Court be pleased to issue any order it deems just and fit to grant in the circumstances.**

GROUNDS OF THE APPEAL

2. That the Honourable Trial Magistrate erred in law and in fact by disregarding that the Respondent deserted work and therefore waived their right to seek redresses sought.

3. That the Honourable Trial Magistrate erred in law and in fact by shifting the burden of proof from the Respondent to the Appellant with regard to leave.

4. That the Honourable Trial Magistrate erred in law and in fact by holding that the Appellant pays service pay of Kshs. 142,800/- contrary to Section 35 (6) (d) of the Employment Act.

5. That the Honourable Trial Magistrate erred in law in applying wrong legal principles in determining the house allowance.

BACKGROUND TO THE APPEAL

6. The Respondent filed a claim against the Appellant vide a Memorandum of Claim dated the 26th of August 2019 seeking the following orders:-

a) A Declaration that the Respondent's dismissal of the Claimant from employment was unlawful, unfair and inhumane.

b) A Declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

c) An order for the Respondent to pay the Claimant his due terminal benefits totalling Kshs.1,418,480/-.

d) Interest on (c) above from the date of filing suit until full payment.

e) Costs of the suit.

(Pages 3-5 of the ROA dated 14th February 2025).

7. The Respondent filed his verifying affidavit, list of witnesses, witness statement, and list of documents all dated 26th August 2019 (pages 6-134 of ROA).

8. The claim was opposed by the Appellant who entered appearance and filed a statement of response dated 11th October 2019 (pages 11-14 of ROA). They also filed a list of witnesses (page 15 of ROA); list of documents (page 16 of ROA); and witness statement of one Stephen Mwangi Kamau (pages 17-18 of ROA), all dated the same date.

9. The Claimant's/Respondent's case was heard on the 16th of November 2023, and further on the 17th of April 2024, where the Claimant testified in the case relying on his witness statement, produced his documents, and was cross-examined by counsel for the Appellant Mr. Owira (pages 103-107 of ROA).

10. The Appellant's case was heard on the 16th of November 2023. The Appellant testified relying on his filed witness statement, and produced the Appellant's documents and appeared to have been cross-examined. (pages 104 of ROA. The proceedings of the trial court appeared to the court to be incomplete. The original proceedings were also incomplete and missed the typed the proceedings on the respondent's case which from the typed proceedings it is indicated the respondent called its witness who testified but the proceedings are missing).

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

12. The Trial Magistrate Court delivered its judgment on the 26th of July 2024 partially allowing the Claimant's claim and awarding him the sum of Kshs. 835,380/- made up of accrued leave days for 8 years, service pay and house allowance (Judgment at pages 93-94 of ROA).

DETERMINATION

13. The appeal was canvassed by way of written submissions. Both parties filed.

14. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [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."

15. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed 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

16. In their submissions dated the 17th of March 2025, the Appellant identifies the following issues for determination:-

    i. Whether the Trial Court erred in law and in fact by awarding the Respondent Kshs. 142,800/- as service pay.

ii. Whether the Trial Court erred in law and in fact by awarding the Respondent Kshs. 492,660/- as house allowance.

iii. Whether the Trial Court erred in law and in fact by awarding the Respondent Kshs. 199,920/- as leave days.

17. On his part, the Respondent raised the following issues for determination in his submission dated the 2nd day of April 2025:

i. Whether the Respondent absconded duty.

ii. Whether the Learned Magistrate erred in law by awarding terminal dues for leave.

iii. Whether the Respondent was entitled to service pay.

iv. Whether the Learned Trial Magistrate erred in awarding the claim for house allowance

18. The trial court entered judgment and dismissed the claim of unfair termination and awarded termination dues only. There is no cross-appeal; hence, the only issue for determination is the grounds of appeal related to the terminal dues awarded. The court adopted the issues as framed by the appellant.

i. Whether the Trial Court erred in law and in fact by awarding the Respondent Kshs. 142,800/- as service pay.

ii. Whether the Trial Court erred in law and in fact by awarding the Respondent Kshs. 492,660/- as house allowance.

iii. Whether the Trial Court erred in law and in fact by awarding the Respondent Kshs. 199,920/- as leave days.

Whether the Trial Court erred in law and in fact by awarding the Respondent Kshs. 142,800/- as service pay.

Appellant's submissions

19. It is the Appellant's submission that the trial court erred in awarding the Respondent herein Kshs. 142, 800 as service pay. Section 35(6) of the Employment Act pronounces itself on who is entitled to service pay. It states that:"(6) 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." Section 35 (1)(c) of the Employment Act states:

"(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 Court in Patrick Lumumba Kimuyu Prime Fuels (K) Limited [2018] KECA 198 (KLR), while elaborating the provisions of Section 35(6) stated the following:

"The import of the foregoing provisions is twofold; firstly, an employee whose salary is payable monthly and whose contract is terminable by notice is deemed to be under a contract of service and; secondly, such employee is entitled to service pay on such terms as 'shall be fixed'. The presumption here is that the terms of the service pay shall be fixed by the contracting parties themselves. However, looking at the employment contract herein, no mention has been made of such terms by the parties herein." Based on the foregoing, it is the Appellant's submission that the Respondent does not meet the threshold as provided in Patrick Lumumba Kimuyu (supra).

20. First, the Respondent was not paid a monthly salary. As per the Respondent's own pleadings as well as his testimony, confirmed that he was paid a daily wage of Kshs. 1,190 and not a monthly salary. Refer to the Respondent's witness statement on pages 8-9 of the Record of Appeal). It therefore follows that the Respondent was not earning a monthly salary but a daily wage. As such he is not entitled to service pay as set out in Section 35(6) of the Act.20. Further, the Appellant denies ever entering into a contract with the Respondent. The Respondent claims that he was employed on a contractual basis but has not adduced any such contract. The Court in Benedict Mbithi Kingoo v Director St Monicah Girls High School & 2 others [2019] KEELRC 1319 (KLR) stated that: "This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice." It therefore falls on the Respondent to prove that there was a contract and that the contract contained the terms of the service pay as was held in Patrick Lumumba Kimuyu (supra). It is on the weight of the above authorities and submissions that the Appellant beseechs this court to hold that the trial court erred in finding that the Respondent was entitled to Service pay and subsequently awarding the same.

Respondent’s submissions

21. The Appellant in trying to dismiss the Respondent's entitlement to service pay argues that the Respondent was being paid daily and not monthly. That begs us to look at the working relationship between the Appellant and the Respondent. 19. If the Appellant alleges that the Respondent was being paid daily, that is a direct reference of a casual labourer. First of all, the Respondent contends he was not a casual labourer by virtue of section 37(1) of the Employment Act, 2007, which states that one cannot be held as a casual employee for more than three months. When an employee has worked for at least three months, he or she has his terms of engagement with the employer converted into contractual terms and have been converted into full time employment by virtue of section 37(1) of the Employment Act, 2007. It is not disputed that the Respondent worked for the Appellant for at least 8 years. Legally, he was no longer a casual employee. He was a permanent employee and is entitled to such reliefs that a permanent employee is entitled to when he or she is terminated. When termination has been deemed unlawful or unfair by a Court of law pursuant to section 45 of the Employment Act, the court shall, subject to section 50, be guided by relevant provisions under section 49 of the Employment Act, 2007. One of the provisions under section 49 states that an employee who has been terminated unfairly shall be entitled to service pay. It is also well stated that an employee who has not enjoyed the benefit of a pension program, shall be entitled to service pay pursuant to section 35(5) of the Employment Act, 2007. Since the Appellant has not demonstrated terms of engagement between it and the Respondent as expected under section 10 of the Employment Act, the applicability of the Employment Act becomes inevitable in this case. Further, it has not been demonstrated by the Appellant that there were NSSF remittances made for the Respondent now that he was a permanent employee. It is our submission that since the Respondent was a permanent employee by virtue of

application of section 37(1), the Respondent was entitled to service pay and learned Magistrate was within the law in awarding the said prayer. The Appellant's claim and the Application of the Patrick Lumumba Kimuyu vs. Prime Fuels (K) Limited [2018] KECA 198 (KLR) cannot hold water in this case for the reasons stated above.

Decision

22. Service pay is provided for under section 35(5) of the Employment Act 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.'' The claimant pleaded he was employed in 2010 as a driver at daily wage of Kshs. 1190 paid monthly total sum of Kshs.35,700. The appellant relied on the decision in Patrick Lumumba Kimuyu Prime Fuels (K) Limited [2018] KECA 198 (KLR), which while elaborating the provisions of Section 35(6) stated the following: "The import of the foregoing provisions is twofold; firstly, an employee whose salary is payable monthly and whose contract is terminable by notice is deemed to be under a contract of service and; secondly, such employee is entitled to service pay on such terms as 'shall be fixed'. The presumption here is that the terms of the service pay shall be fixed by the contracting parties themselves. However, looking at the employment contract herein, no mention has been made of such terms by the parties herein." Based on the foregoing, it was the Appellant's submission that the Respondent does not meet the threshold as provided in Patrick Lumumba Kimuyu (supra). That the Respondent was not paid a monthly salary. As per the Respondent's own pleadings as well as his testimony, he confirmed that he was paid a daily wage of Kshs. 1,190 and not a monthly salary. Refer to the Respondent's witness statement on pages 8-9 of the Record of Appeal). It therefore follows that the

Respondent was not earning a monthly salary but a daily wage. As such he is not entitled to service pay as set out in Section 35(6) of the Act.20. Further, the Appellant denies ever entering into a contract with the Respondent. The Respondent claims that he was employed on a contractual basis but has not adduced any such contract.

23. Conversely, the respondent submitted that he was not a casual labourer by virtue of section 37(1) of the Employment Act, 2007, which states that one cannot be held as a casual employee for more than three months. When an employee has worked for at least three months, he or she has his terms of engagement with the employer converted into contractual terms and have been converted into full time employment by virtue of section 37(1) of the Employment Act, 2007. It is not disputed that the Respondent worked for the Appellant for at least 8 years. Legally, he was no longer a casual employee. He was a permanent employee and is entitled to such reliefs that a permanent employee is entitled to when he or she is terminated.

24. The trial court did not delve into the terms of employment. The respondent in response stated that the claimant absconded from duty. That he worked upto 4th December 2018. From the response, the court finds that the respondent's employment was a term contract, having worked continuously from 2010 to 2018, and paid a daily wage. His contract was converted to a term contract under section 37 of the Employment Act. The appellant could not have stated he absconded duty if he was not a term contract employee. The duty to issue a contract under section 9 of the Employment Act lies with the employer to wit- *'A contract of service—(a)for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or(b)which provides for the*

performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.(2)An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection'. The appellant, having admitted the respondent was their employee, cannot be heard to say there was no proof of contract yet it had the burden to draw the same. The court did not agree with the decision in *Patrick Lumumba Kimuyu Prime Fuels (K) Limited [2018] KECA 198 (KLR),* while elaborating the provisions of Section 35(6) stated the following:

"The import of the foregoing provisions is twofold; firstly, an employee whose salary is payable monthly and whose contract is terminable by notice is deemed to be under a contract of service and; secondly, such employee is entitled to service pay on such terms as 'shall be fixed'. The presumption here is that the terms of the service pay shall be fixed by the contracting parties themselves. However, looking at the employment contract herein, no mention has been made of such terms by the parties herein." The court takes a position that service pay is a statutory right and need not be under contract. On termination of employment an employee is entitled to service pay subject to the condition in section 35(6) of the Employment Act to wit- *''(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.''* Section 35(6)

did not apply to the respondent. The service pay is payable at fixed rate of 15 days for each complete year worked unless the employer provides for a more favorable rate which was not the case here. The trial court correctly awarded service pay for 15 days each year worked.I find no basis to disturb the award.

Whether the learned Magistrate erred in law by awarding terminal dues for leave?

Appellant's submissions

25. It is well established jurisprudence that the onus of proving that leave days were not taken lies with the one claiming. The Court in PJ Petroleum Equipment Limited v Gathecha (Appeal E105 of 2021) [2023] KEELRC 476 (KLR) on elaborating on whom the burden of proof lies, stated that: She had the onus of proving that she did not take leave at all during the 9 years she worked for the Appellant and that the Appellant did not pay P.W. I in lieu of 21 days leave the respondent was entitled to each year." This position was reiterated by the Court in Tialal & 2 others v Jubilee Party (Employment and Labour Relations Petition E180 & E177 of 2021 & E063 of 2022 (Consolidated)) [2024] KEELRC 1327 where the Court held that:

"By coming to court by way of a petition, the petitioners missed the opportunity to adduce any evidence in support of the large claims made in respect of payment in lieu of leave days not taken and house allowance not paid for a period of several years. The petitioners had the onus of proving these claims on a balance of probability vide oral evidence in terms of section 107 and 108 of the Evidence Act, cap 80 Laws of Kenya. The petitioners failed in this respect and the court correctly found that these claims were dismissed for lack of merit having not been sufficiently proved." Further, the Court erred in awarding leave days for all the seven years worked. It is trite law that leave days are

awarded up to the three years preceding the filing of the suit. In the case of Charles Muthusi Mutua v Kathi No Kakoka Services Limited [2022] KEELRC 756 (KLR), it the Court provided that: “Bearing in mind the provisions of Section 90 of the Employment Act, I can only grant untaken/unpaid for leave days for the three years preceding the date of filing this claim. Not the five years sought by the claimant."34. This position was upheld in the case of Protective Custody Limited v Temesi (Appeal E134 of 2024) [2024] KEELRC 13392 (KLR) where it was held that:

"This is a statutory requirement under section 28 of the Employment Act. However, this court notes that the same under section 90 of the Employment Act could only be claimed three years from the date of filing of the claim." Considering the above, the Appellant submits that the learned trial magistrate erred in awarding the Respondent he sum of Ksh. 199,920 as untaken leave days.

RESPONDENT’S SUBMISSIONS

26. Basically, the question herein begs a look at section 28 of the Employment Act. Pursuant to the said section, leave is a statutory entitlement and an obligation on the employer to ensure that the right is realized. Where the employee alleges that he did not enjoy the right to leave days during the tenure of his or her employment, the onus of proof to the contrary will lie with the Employer to disabuse the allegation to the contrary by tendering evidence before the trier Court. The Appellant claims that the onus lied with the Respondent to establish that he had not taken leave days. This allegation is not legally supported. The Respondent unequivocally stated before the Trial Court that the said leave

days were not taken. (See page 104 of the Record). The Employer being the custodian of employment records (See section 74 of Employment Act 2007) it is the Employer who is legally bound to provide relevant evidence showing that the Respondent had gone for leave, not once, not twice but for the entire period worked. None was provided. Taking leave is an easily documented process. It does not invite suppositions. Another issue of consideration is whether the amount adjudged for the leave days not taken was excessive. We submit that the amount adjudged as payable by the learned Magistrate was not excessive. In fact the amount awarded was lesser than the amount claimed by the Respondent. To buttress the above point, a Court of law when giving an award under section 49 of the Employment Act, is expected to exercise judicial discretion on what is fair in the circumstances. This was well stated by the Supreme Court in the case of Kenfreight (EA) Limited v Nguti (Petition 37 of 2018) [2019] eKLR. The Black's Law Dictionary 9th edition at page 534 was cited in this case to define judicial discretion as follows: "the exercise of Judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right". It is our humble submission that the award for leave days by the Learned Magistrate was within her powers pursuant to the doctrine of judicial discretion based on the reasons stated in the Judgement. The Magistrate cannot be faulted for exercising her judicial discretion, unless the same is proved to have been without any basis and outside of the law.

Decision

27. Annual leave is a statutory right of an employee under section 28 pf the Employment Act to wit- 28(1)An employee shall be entitled—(a)after every twelve consecutive months of

service with his employer to not less than twenty-one working days of leave with full pay;(b)where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.'' The court notes that section 28(4) states as follows-'*4)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 issue of leave was not contested in the pleadings specifically by the appellant. The appellant appeared to have treated the respondent as a casual worker paying daily wage thus not entitled to employee rights. Section 28(4) would thus not apply as the employee was never granted opportunity to proceed on leave. The employment was deemed to have converted to term contract (section 37 of the Employment Act) and the respondent was thus entitled to all accrued employee rights on termination which include 21 days of annual leave. The claim for leave was under continuing injury claims which was explained by Court of Appeal in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- *''There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of "a continuing injury" as contemplated by*

section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase "a continuing injury" and whether the respondent's claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes "a continuing injury." From the record, we note that the respondent's counsel only cited the definition of 'back pay" in the Black's Law Dictionary 9th Edition at page 159 which defines it as "the wage or salary that an employee should have received but did not because of an employer's unlawful action as setting or paying the wages or salary" to support her claim that back pay was a continuing state of affairs.'' The Court adopted with approval the elaborate definition of continuing injury claims in M. R. Gupta v Union of India, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of "continuing wrong" and "recurring wrongs" and reversed the decision. It held: "The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of

*difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....''*The claim was filed within 12 months of termination. The trial court awarded 21 days leave for the 8 years. I find no basis to disturb the award(Mbogo v Shah).

Whether the Learned Trial Magistrate erred in awarding claim for House Allowance?

Appellant's submissions

28. The trial court adopted the calculations of the Respondent and awarded him Kshs. 492,660 as House allowance. The Court however, did not show how it arrived at this decision. The Appellant therefore submits that the trial court erred in its decision.. The Appellant submits that the salary paid to the Respondent was a consolidated amount of his daily wages and therefore he was not entitled to house allowance.. Further, the Appellant denies ever entering into a contract with the Respondent. The Respondent claims that he was employed on a contractual basis but has not adduced any such contract. The Court in Benedict Mbithi Kingoo v Director St Monicah Girls High School & 2 others [2019] KEELRC 1319 (KLR) stated that: "This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the

employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice." It therefore falls on the Respondent to prove that there was a contract and that the contract contained the terms of the service pay as was held in Patrick Lumumba Kimuyu (supra).It is on the weight of the above authorities and submissions that the Appellant beseechs this court to hold that the trial court erred in finding that the Respondent was entitled to Service pay and subsequently awarding the same.

Respondent's submissions

29. The Appellant faults the trial Magistrate in his award of housing allowance directly on the claim that the Respondent/Claimant was a casual employee. That thing has been debunked above. The Appellant further shifts to fault the trial Court's decision that the Magistrate did not show how she had arrived at her computations but rather, just adopted the Respondent's computation. Basically, the Respondent used the following formula to compute the House Allowance: 15/100 x 35,700 x 92 months worked = 492, 660/= . Under the provisions of section 31 of the Employment Act, house allowance is defined to be 15% of the basic salary. The claim for House allowance in this cause was justified since the Respondent did not house the Respondent and neither has the Appellant adduced evidence to demonstrate that either the Respondent was housed, or the Respondent was paid house allowances or the Respondent was paid a consolidated pay inclusive of the House allowances. The onus of proof to the contrary lies with the

Appellant. It must be noted, Housing is both a constitutional right and a statutory right under section 31 of the Employment Act, 2007 which provides as follows: "31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to 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)." In Grain Pro Kenya Inc. Limited vs Andrew Waithaka Kiragu (Civil Appeal No. 228 of 2017) [2019] eKLR, the Court of Appeal in upholding the Claim for House Allowance held that the Judge could not be faulted for interpretation of engagement between the Appellant and the Respondent because house allowance is a benefit that is required under the Employment Act and the contract did not provide that house allowance was consolidated in the basic wage.. Similarly, in the instant case, the implied contract that subsisted between the Appellant and the Respondent did not provide any such terms to satisfy the requirement of section 31 of the Employment Act. As such, the Respondent was entitled to the House Allowance, and we pray that it be upheld by this Court.

Decision

30. Housing is a statutory right 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.''

Housing allowance is payable at the rate of 15% of basic salary under Section 4 of the Regulation of Wages (General) Order, 1982 to wit-

'4. Housing allowance

An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the First or Second Schedule, be paid housing allowance equal to fifteen per cent of his basic minimum wage''.The applicable minimum wages as per the May 2018 Regulations of Wages (amendment) Order for a driver of a medium vehicle daily rate was the sum of Kshs. 1108.80 which is inclusive of housing allowance. For Light vehicles it was Kshs. 880.30. The claimant was paid daily wage of Kshs. 1190. He was a routine driver so most probable under medium or light vehicles. The court finds that the daily wage paid was above the minimum wage for a driver and was inclusive of housing. The court finds that the award of housing was not justified and is set aside.

Conclusion

31. The appeal is allowed on the issue of the housing award only. All other awards are upheld. The Judgment and Orders of the Honourable A.N. Ogonda (PM) delivered at Nairobi on the 26th day of July, 2024 in MCELRC No. E1542 of 2019 is set aside and substituted as follows-

a. **Untaken leave Kshs. 199,920**

b. **Service pay Kshs. 142800**

Total sum awarded <u>Kshs. 342,720</u>

c. **Interest is awarded on the Kshs. 342,720 from date of filing the suit.**

d. **Costs of the suit**

e. **Certificate of service to issue.**

32. The appellant is awarded costs of the appeal.

33. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER 2025.

J.W. KELI,

<u>JUDGE</u>.

<u>IN THE PRESENCE OF:</u>

Court Assistant: Otieno

Appellant – absent

Respondent: Wanyangu h/b Namada