



REPUBLIC OF KENYA



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**Muli v Kabriya t/a Varniraj Hardware and Tools Limited (Appeal
E162 of 2025) [2025] KEELRC 3558 (KLR) (10 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3558 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E162 OF 2025
JW KELI, J
DECEMBER 10, 2025**

BETWEEN

DANIEL MULINGE MULI APPELLANT

AND

**NITIN KABRIYA T/A VARNIRAJ HARDWARE AND TOOLS
LIMITED RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. M. Nanzushi
(SPM) delivered on 14th May 2025 in Mavoko MCELRC E221 of 2024)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. M. Nanzushi (SPM) delivered on 14th May 2025 in Mavoko MCELRC E221 of 2024 between the parties filed a Memorandum of Appeal dated the 23rd May 2025 seeking the following orders: -
 - a) This Appeal to be allowed.
 - b) The judgment and decree of the Honourable Trial Court delivered and issued on 14th May 2025 be set aside and the same be substituted with a judgment in favour of the Appellant in terms of the Statement of Claim dated 16th May 2024.
 - c) The costs of this Appeal and costs of the Lower Court be awarded to the Appellant.
 - d) Any other relief that the Honourable Court may deem fit to grant.

Grounds of the Appeal

2. The Honourable Magistrate erred in law and in facts by dismissing the Appellant's claim with costs while ignoring the evidence adduced by the Appellant and Appellant's submissions.



3. The Honourable Magistrate erred in law and in facts by failing to appreciate and find that the Respondent had not proved the alleged desertion of duty/work by the Appellant.
4. The Honourable Magistrate erred in law and misdirected herself by concluding that the Appellant had absconded duty contrary to evidence adduced by the parties and well known legal principles on desertion of employment.
5. The Honourable Magistrate erred in law and in facts and thus arrived at a wrong conclusion by ignoring and failing to consider the documentary evidence such as the medical records adduced into evidence by the Appellant.
6. The Honourable Magistrate erred in law and in facts by failing to conclude that the Appellant had established a case against the Respondent for unfair and unlawful termination of employment.
7. The Honourable Magistrate erred in law and misdirected herself by shifting the burden of proof to the Appellant by requiring him to prove matters pleaded and alleged by the Respondent contrary to well-known legal principles.
8. The Honourable Magistrate erred in law and in facts and thus arrived at a wrong decision by failing to find that the Appellant was underpaid as a heavy commercial driver and thus entitled to salary arrears in the nature of salary underpayments.
9. The Honourable Magistrate erred in law and in facts by failing to find and appreciate that the Appellant had established a case against the Respondent on the required standard for payment of terminal benefits.
10. The Honourable Magistrate erred and misdirected herself thus arrived at a wrong conclusion by failing to assess and award terminal benefits due and payable to the Appellant.
11. The Honourable Magistrate erred in law and in facts by failing to find that the Appellant was entitled to a certificate of service and compensation for unfair termination.
12. The Honourable Magistrate erred and misdirected herself by rendering a decision that was contradictory and inconsistent with both the evidence and pleadings filed.

Background to the Appeal

13. The Claimant/Appellant filed a claim against the Respondent vide a statement of claim dated the 16th of May 2024 seeking the following orders: -
 - a) A declaration that the Respondent unlawfully and unfairly summarily dismissed the Claimant from his employment.
 - b) An order/award for payment of the Claimant's terminal dues being payment in lieu of leave, notice pay, salary arrears, service pay, overtime and salary underpayments as particularized at paragraph 15 at KES 1,835,604/-
 - c) Interest on (b) above at court rate until payment in full.
 - d) An order for issuance of a Certificate of Service.
 - e) Costs of the suit.
 - f) Any other and /or further relief that this court may deem just and fit to grant in the circumstances.



(pages 8-11 of Appellant's ROA dated 31st May 2025).

14. The Claimant filed his list of witnesses dated 16th May 2024; witness statement of even date; and list of documents of even date with the bundle of documents attached (see pages 14-32 of ROA).
15. The claim was opposed by the Respondent who entered appearance and filed a response to the statement of claim dated 2nd December 2024 (pages 33-36 of ROA). They also filed a list of witnesses dated 2nd December 2024; witness statement of NITIN KABRIYA RUDA of even date; and list of documents also dated 2nd December 2024 with the bundle of attached (pages 37-45 of ROA).
16. The Claimant/Appellant's case was heard on the 12th of February 2025 where the claimant testified in the case, relied on his witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Respondent Mr. Mwangi (pages 201-203 of ROA).
17. The Respondent's case was heard on the same day with the Respondent calling one (1) witness, Nitim Ruda Kabriya, to testify on its behalf. He relied on his filed witness statement, and produced the Respondent's documents. He was cross-examined by counsel for the claimant Mr. Njuguna (pages 203-205 of ROA).
18. The parties took directions on filing of written submissions after the hearing, and complied.
19. The Trial Magistrate Court delivered its judgment on the 14th of May 2025, dismissing the Appellant's claim in its entirety, with costs (judgment at pages 207-210 of Appellant's ROA).

Determination

20. The appeal was canvassed by way of written submissions. The Appellant complied.

Issues for determination

21. In his submissions dated 21st September 2025, the Appellant identified the following issues for determination:
 - i. Whether the trial court erred in dismissing the Appellant's suit with costs.
 - ii. If the answer in (a) is in the affirmative, what reliefs is the Appellant entitled to.
 - iii. Who should bear costs of the Appeal.
22. The respondent entered an appearance and appointed the firm of Wachira Alex & Associates Advocates, but they did not file submissions despite being granted 21 days to do so on September 22, 2025, when they were represented in court by Maina Advocate.
23. The court, on perusal of the grounds of appeal, was of the considered opinion that the issue placed before it for determination in the appeal were-
 - a. Whether the trial court erred in fact and law in failing to find an unfair termination.
 - b. Whether the appellant was entitled to relief sought before the lower court.



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

Appellant's submissions

24. We shall address the first issue together with grounds 1,2,3, 4,5, 6, and 11 of the appeal, and submit that the learned trial magistrate erred in dismissing the appellant's suit while ignoring the evidence on record, particularly the evidence adduced by the appellant. These grounds of appeal essentially fault the learned trial magistrate for rendering a decision that went contrary to well-known legal principles and the evidence on record. We submit that the learned magistrate failed to correctly interpret and apply provisions of the law and known legal principles to the facts, pleadings, and evidence on record hence rendering a wrong a decision . In dismissing the appellant's claim, the learned trial magistrate in her judgment delivered on 14th May 2025 held inter-alia as follows at pages 209 and 210 of the Record: - "...From the evidence adduced, the employment of the claimant wasn't terminated as alluded in the statement of claim, the claimant absented himself from duty with the claim he was unwell and had been seeking medication. The claimant has not produced any evidence of him being unwell or even the letter calling for indulgence from dusty duties...The respondents have proved that the claimant absconded duty. This suit came as an afterthought." emphasis mine 9. Your Ladyship, we submit that the learned trial magistrate erred in concluding that the appellant had absented himself from work when the respondent had not proved allegations of desertion within the required standard. We submit that there was no basis for this finding which went contrary to the evidence on record and well known legal principles on desertion of work by an employee. Moreover, the trial magistrate failed to find that the onus was on the respondent having pleaded a defence of desertion to prove the same on the required standard. We submit on ground 11 of the appeal that the decision of the learned trial magistrate was contradictory and inconsistent with the evidence on record. Whereas the learned magistrate concluded that the appellant had not availed any medical record in support of his case, this was erroneous and a misapprehension since the appellant had adduced a medical report as the appellant's exhibit 4 at pages 30 and 31 of the Record. Therefore, these omission or oversight by the trial magistrate in considering this evidence was greatly prejudicial to the appellant's claim. We humbly submit that had the learned trial magistrate properly applied known legal principles to the evidence adduced by the appellant and the pleadings filed, the trial magistrate would have arrived at correct finding and concluded that the appellant had established his case against the respondent on a balance of probabilities. Also, we submit that the totality of the evidence adduced by the parties clearly showed that the appellant had established his case on the required standard and was thus entitled to the reliefs sought. Therefore, we submit that the learned magistrate erred in law and in fact by dismissing the appellant's suit against the overwhelming evidence tendered by the appellant in support of his case. Also, we submit that the learned trial magistrate failed to consider the appellant's submissions and authorities cited and thus arrived at a wrong conclusion. Therefore, we submit that the decision contains glaring errors and thus ought to be set aside for justice to prevail. Therefore, the decision to dismiss the appellant's suit was erroneous and ought to be corrected and set aside by this appeal. From the evidence tendered by parties, it was not in dispute that the appellant was employed by the respondent for a period of three years and two months as a driver of heavy commercial vehicle on a gross monthly salary of KES 25,000/-. on 12th February 2025, the appellant testified in support of his case whereby he adopted his witness statement dated 30th May 2024 as his evidence in chief. Further, the appellant produced into evidence and marked his bundle of documents dated 16th May 2024 as the claimant's exhibits 1 to 5. Further, it was the appellant's case that the salary paid to him by the respondent of KES 25,000/- was below the minimum wage for a heavy commercial vehicle driver operating with Mavoko area which was gazetted by the Wage Order 2021 at KES 37,122/-, inclusive of a house allowance hence a claim for salary arrears in the nature of underpayments from



to 1st January 2021 to 26th February 2024. It was the appellant's evidence that on 24th February 2024, he was verbally summarily dismissed by the respondent after he fell sick on 14th February 2024 and brought a doctor's report that recommended for him to avoid working in dusty environment. The appellant sought to rely on medical report as appellant's exhibit 4. The appellant took issue with respondent for failing to issue him with a dismissal letter or pay his terminal dues or issue a certificate of service. The appellant thus sought to be paid a one months' notice in lieu of notice, salary arrears, underpayments, overtime and compensation for unfair and unlawful dismissal. On the other hand, the respondent alleged that the appellant absconded/deserted work on 7th February 2024 and took up employment with someone else. He also alleged to have paid his dues via m-pesa and even added him an extra five thousand shillings (KES 5,000). The respondent alleged to have called the appellant and his uncle to find out the whereabouts of the appellant. However, the trial magistrate failed to find that no single evidence was adduced by the respondent in support of these allegations. Furthermore, the respondent failed to adduce any letter of dismissal and termination to support when the appellant left his employment. Thus in absence of such a letter from the respondent, we submit that the appellant was dismissed verbally on 26th February 2024. Moreover, we submit that the respondent during cross-examination admitted that despite alleging that the appellant's salary was paid on 7th February 2024 via m-pesa, he admitted not to have adduced any m-pesa statements or records to confirm the alleged payment and thus the respondent's version of events was dishonest, unreliable, inconsistent and full of gaps. At paragraph 3, 4 and 10 of the response to statement of claim dated 2nd December 2024, the respondent pleaded as follows: - 3. "The Respondent admits the Claimant was employed as a driver of a heavy commercial vehicle at a net salary of KES 25,000/- per month" 4. ".....the Claimant deserted his employment without notice and is entitled to any relief of an alleged dismissal" "The Respondent states that the Claimant deserted work without notice forcing the Respondent to treat the actions as gross misconduct under *Employment Act*" ...emphasis mine, See pages 34 and 35 of the Record. We submit that appellant's evidence was consistent, cogent and reliable while the respondent's evidence which was overly misleading, exaggerate, contradictory, unreliable and inconsistent. Therefore, we submit that the learned magistrate failed to find despite the overwhelming evidence that the appellant had proved on a balance of probabilities that he was verbally summary dismissed by the respondent from work, which dismissal was unfair and unlawful for want of procedural fairness and valid reasons. We submit that the respondent was under a legal duty under section 41, 43 & 45 of the *Employment Act* to show that the procedure adopted was lawful and justify the grounds for dismissal were valid/justified. During cross-examination, the respondent admitted that he had not given the appellant a show cause letter in order for him to offer his defense or conducted a disciplinary hearing. At pages 205 of the Record, the appellant admitted as follows: - "...I didn't do any disciplinary process. I didn't inform the union..." Even though the respondent alleged desertion and absconding of duty by the appellant, the respondent admitted and acknowledged during cross-examination that he had not taken any steps to trace the appellant or issued him with a termination letter or notified the labour office of the alleged desertion of duty. Moreover, the respondent despite alleging that the appellant had absconded duty and taken up another job at a petrol station, the respondent admitted during cross-examination didn't have evidence to back up his claim. Also, the respondent admitted he didn't have call logs or text messages sent to the appellant despite alleging to have called the appellant several times after he deserted work and his uncle. We submit that the respondent having raised a defence of desertion of work, it is trite that the burden of proof shifted to the respondent to prove his claim of desertion on the required standard. Therefore, we submit that the learned magistrate erred and proceeded on wrong principles by failing to find that the onus was on the respondent to prove his claim. Therefore, it was an error on the learned magistrate to shift the burden of proving or disproving the alleged desertion on the appellant contrary to well established maxim that whoever alleges, must prove. . We submit that the learned trial magistrate arrived at a wrong conclusion after failing to find that the



respondent was bound by its pleadings and thus under legal duty to prove his claims. Section 107(1) of the Evidence Act states: - “.Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..” We submit that the respondent was obligated to take several steps in case of desertion, which he admitted not to have taken. In the case of Central Furniture Shop Limited v Mohamed (Appeal E097 of 2023) [2025] KEELRC 199 (KLR), Mbaru J held as follows on the duty of an employer who pleads desertion of duty: - “.It is not sufficient for the employer to plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that reasonable steps were taken to find out the employee's whereabouts and require him to resume duty to no avail. The employer must, where possible, demonstrate that they addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels as held in the case of Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] KEELRC 141 (KLR). Desertion, being a unilateral act of abandonment of the contract, cannot operate to bring a contract of service to a close until the employer acts on it, as held in Kitumu v Simba Apparel Epz Limited [2023] KEELRC 1666 (KLR). In this case, the assertion by the appellant that the respondent was not noted on the Master Roll for the period absent from work is not sufficient. This is not envisaged under Sections 41 and 44 of the Employment Act. Absence from work is gross misconduct, and the employer must notify the employee to attend and address. Where the employee remains absent or fails to respond to the notice issued, the employer has the legal duty to issue a notice terminating employment. Where the employee cannot be traced through the known address, recourse is to submit the notice terminating employment to the Labour Once under the provisions of Section 18(5) of the Employment Act..” (emphasis added). We submit that the onus to prove compliance with minimum standards and fairness before dismissal of the appellant rested on the respondent, which onus the respondent failed to discharge. Article 41 of the Constitution of Kenya, 2010 provides as follows: - “Every person has the right to fair Labour practices. (2) Every worker has the right to-(a) to fair remuneration; (b) to reasonable working conditions;” Section 45 (2) of the Employment Act No. 11 of 2007(the Act) provides that:-“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; an (c) That the employment was terminated in accordance with fair procedure.” Section 41 (1) of the Act also provide as follows:- “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.” Further, section 43 of the Employment Act provides that;- “In any claim arising out of termination of a contract, the employer shall be required to provide the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. (2) The reason or reasons for termination of a contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.” We humbly submit that even in cases of gross misconduct such as desertion of duty, an employee is still entitled to a notification and a fair hearing as envisioned by section 41 of the Employment. We submit that desertion of duty by an employee amounts to a gross misconduct and thus an employee must be given a notice and a hearing. From the evidence on record, it is not in dispute and has been acknowledged by the respondent during cross-examination, that despite alleging desertion, the respondent failed to undertake any disciplinary process, notify the lab our office or issue a letter of dismissal In the case of Moi Teaching and Referral Hospital v James Kipkonga (2019) eKLR, the Court of Appeal held that: - “although there is nothing that stops an employer from summarily dismissing an employee, section 44 of the Employment Act requires an employer to demonstrate that



the employee has by his conduct indicated that he has fundamentally breached his obligation under the contract of service.” “an employer must comply with the provisions of section 41 of the Act, which provides the procedure for notification and hearing before termination on grounds of misconduct.” Therefore, we submit that the appellant’s verbal summary dismissal was unfair and unlawful for want of procedural fairness of notification and hearing, and substantive justification. In the case of *Standard Group Limited v Jenny Luesby (2018) eKLR*, the Court held that:- “an employee must be given a hearing as the law made it mandatory even in the worst case scenario where an employee grossly misconducted himself or herself. That the right to hearing is what amounts to compliance with the true tenets of natural justice. That however senior an employee is, where the case is that of misconduct, the seniority is no justification for failure to meet the mandatory provisions of the law”. Therefore, we humbly submit that the dismissal of the appellant from respondent’s employment was unlawful and unfair for failing to meet the minimum standards set by the law. Further, the appellant was able to discharge his burden of proof and show that the respondent unlawfully and unfairly verbally dismissed him from employment. On the other hand, the respondent’s allegations of desertion of work was not proved by the respondent within the required standard on a balance of probabilities, and thus these assertions by the respondent remain mere statements that is not backed by any evidence. Therefore, we submit that the learned trial magistrate erred in dismissing the appellant’s case.

Decision

25. The grounds of appeal under the issue were –
- a. The Honourable Magistrate erred in law and in facts by dismissing the Appellant’s claim with costs while ignoring the evidence adduced by the Appellant and Appellant’s submissions.
 - b. The Honourable Magistrate erred in law and in facts by failing to appreciate and find that the Respondent had not proved the alleged desertion of duty/work by the Appellant.
 - c. The Honourable Magistrate erred in law and misdirected herself by concluding that the Appellant had absconded duty contrary to evidence adduced by the parties and well known legal principles on desertion of employment.
 - d. The Honourable Magistrate erred in law and in facts and thus arrived at a wrong conclusion by ignoring and failing to consider the documentary evidence such as the medical records adduced into evidence by the Appellant.
 - e. The Honourable Magistrate erred in law and in facts by failing to conclude that the Appellant had established a case against the Respondent for unfair and unlawful termination of employment.
 - f. The Honourable Magistrate erred in law and misdirected herself by shifting the burden of proof to the Appellant by requiring him to prove matters pleaded and alleged by the Respondent contrary to well-known legal principles.
26. The threshold 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).

27. In the instant case, the appellant pleaded before the lower court that on 26th February 2024, he was summarily dismissed for employment by the respondent without justification (paragraph of claim at page 9 of ROA). He sought compensation for unfair termination. In witness statement adopted at trial court as his evidence the appellant stated that he was dismissed on 26th Feb 2024 when he returned to work after being unwell from 14th February 2024 (page 15 of ROA). On the converse, the respondent stated the appellant deserted work without notice forcing it to treat the case as gross misconduct and that the matter was settled with the union. (Pages 34-35 of ROA). The respondent produced a letter by the Transport Workers Union Kenya which stated that the appellant was sick from 14th February 2024 and was unable to continue with his duties and sought for terminal dues (page 44 of ROA). During cross-examination, the appellant told the trial court that he had worked for the respondent for 3 years and 2 months, and that he was dismissed after he brought a letter from the hospital. The appellant informed the respondent he could not work. He had left on 14th February on being given off duty to go to hospital. He did not know how long it will take in the hospital, the doctor said he should be given another job which should not have dust. The foregoing was the evidence at cross-examination. On re-examination the appellant told the trial court that he asked for other duties following the doctor’s recommendation. That he was fired when he went to the union for dues. The witness for the respondent told the trial court the claimant left without leave and failed to return to work after 14th February. The Respondent’s witness stated that it did not inform the union or carry out any disciplinary process.

28. The trial court held- ‘From the evidence adduced the employment of the claimant wasn’t terminated as alluded in the statement of claim, the claimant absented himself from duty with the claim that he was unwell and had been seeking medication. He even said he had been advised against working in dusty conditions hence the employer was to reallocate him other duties.

The claimant has not produced any evidence of him being unwell or even the letter calling for indulgence from dusty duties.

The claimant didn’t deny having been to respondent and claimed his money which he was paid 5,000/=. Has not denied having abandoned the vehicle in the first instance and still have been taken back into employment despite the misconduct of leaving the vehicle unattended and not reporting his whereabouts.

By acquiescence, the claimants character depicted that he actually walked out on his job he wasn’t fired he did it himself. I find that the respondent didn’t terminate the claimant’s employment the claimant terminated himself.”

29. The court finds that the foregoing facts and findings of absconding were true. The only issue was that it was the duty of the employer to comply with section 41 of the Employment Act to bring the employment relationship to an end, as held by this court in several decisions, including one cited by the appellant in *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] KEELRC 141 (KLR). Desertion, being a unilateral act of abandonment of the contract, cannot operate to bring a contract of service to a close until the employer acts on it, as held in *Kitumu v Simba Apparel Epz Limited*



[2023] KEELRC 1666 (KLR). In this case, the assertion by the appellant that the respondent was not noted on the Master Roll for the period absent from work is not sufficient. This is not envisaged under Sections 41 and 44 of the *Employment Act*. Absence from work is gross misconduct, and the employer must notify the employee to attend and address. Where the employee remains absent or fails to respond to the notice issued, the employer has the legal duty to issue a notice terminating employment. The employee was unionized and the respondent admitted they did not issue the union with a notice and there was no notice on disciplinary. The Court on appeal finds that the reason for the termination was valid, but the process was flawed.

Whether the appellant was entitled to relief sought before the lower court

The Appellant's submissions.

30. We shall address this issue together with grounds 7,8, 9 and 10 of the appeal, and submit that having shown that the learned trial magistrate erred and proceeded on wrong legal principles while ignoring the evidence tendered by the appellant, the decision rendered on 14th May 2025 should be set aside and the appellant's statement of claim dated 16th May 2024 allowed. We submit that the respondent didn't controvert the claim by the appellant for payment of terminal dues. Moreover, the learned trial magistrate erred in law by failing to tabulate and award terminal dues to the appellant. We submit that having shown the glaring errors on the finding of fact and law by the trial Court, this appeal is merited and the decision of the learned trial magistrate delivered on 14th May 2025 should be set aside and substituted with an order allowing the appellant's claim in terms of the statement of claim dated 16th May 2014. The respondent despite alleging making payment of terminal dues to the appellant as assessed by the Kenya Transporters Workers Union in his pleadings, during cross-examination, he admitted that he had not availed any evidence in support of these assertions³. Therefore, we submit that the trial magistrate erred when she failed to find that the appellant had established a claim for terminal dues on a balance of probabilities as follows: - One month's salary in lieu of notice. We humbly submit that the appellant is entitled to a one month's salary in lieu of notice at KES 37,122/- pursuant to section 36 of the *Employment Act*, which provides that: - "Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section" We submit that the appellant was dismissed abruptly without notice or a month's salary in lieu of notice. Therefore, we submit that the appellant is entitled to this claim based on the salary he was entitled to be earning as per the regulation of wages, Minimum Wage Order 2024.
31. Unpaid leave days. We submit that section 28 of the Act states as follows regarding annual leave: - 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. We submit that the respondent didn't dispute this claim though leave records. In fact, the respondent being custodian of employment records didn't avail leave application forms to controvert this head of claim. We submit that the respondent failed to controvert this claim via leave records as required by the law. 58. We thus submit that the appellant is entitled to unpaid leave for three years. This works out at $37,122/26 \times 21 \times 3$ at KES 89,949/-. In the case of Victor Sendeu Omwenga Vs General Timothy Misiani Orwenyo t/a GMT service [2019] eKLR, where O.Makau J held as follows: "I also award him leave for 11.75 years worked because the Respondent never disproved the claim by leave records."



32. Service pay We submit that this claim was not controverted by the respondent. We submit that section 35(5) of the Act provides that: - “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” We submit that from the appellant’s N.S.S.F statement of contribution produced and marked as the appellant’s exhibit 5 at page 32 of the Record, the respondent despite alleging remittance of statutory contributions on behalf of the appellant, the respondent had not made any single NSSF contribution on behalf of the appellant for a period of three years. We thus submit that the appellant had proved this claim on a balance of probabilities and thus the learned magistrate erred in dismissing this claim despite the overwhelming evidence tendered by the appellant. The claim for service pay works out as KES 37,122/26*15*3.2years at KES 74,957/-
33. Overtime- We submit that the appellant’s evidence that he used to report to work at 4am and work until 8pm translating to an average of four (4) hours per day was clear, reliable and consistent. On the other hand, the respondent did not offer any cogent evidence in form of employment records such as master roll to controvert this head of claim. 64. In fact, the respondent did not give any evidence as to when the Claimant reported to work daily. At page 205 of the Record, the respondent states as follows: - “ ..I don’t have a muster roll...” We submit that the respondent did not file any employment records such as the master roll in respect to the employment of the appellant that would have shown when the appellant reported and left work. Therefore, the evidence by the appellant could only have been challenged by a master roll kept by the respondent. Under section 10(7) of the *Employment Act* places the burden of proving or disproving an alleged terms of employment on the Respondent.“. If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”. We submit that hours of work constitute an employment term which the respondent has a statutory duty to approve or disprove. We thus submit that the respondent being the employer is obliged to keep and produce employment records in legal proceedings. Therefore, we submit that in the absence of employment records to controvert the appellant’s evidence, the evidence and assertions by the appellant are to be taken as the gospel truth. In the case of Meshack Kii Ikulume Vs Prime Fuels Kenya Limited [2013] eKLR, the Court held that it is the duty of an employer to keep employment records and file the same in Court:- “..The Respondent relied on mere and bare denials and put the Claimant to strict proof but gave no indication it had evidence to dispute the truth of the Claimant’s allegations. Bare denials can never suffice to give rise to a dispute of fact where the facts averred fall within the knowledge of the denying party. . .I just need to note that in the employment relationship the employer is obliged to keep and produce records in legal proceedings pursuant to sections 10(2) (3), (7) and 74 of the *Employment Act*.. The practice of mere denials and putting Claimants to strict proof is not the practice or procedure of or applicable in the Industrial Court. This is borne out by the statutory obligation placed upon employers in sections such as the one referred to and sections 43, 45 and 47 of the Act in claims for unfair termination. This was not such a claim but it is true that it is employer who keeps attendance logs, muster rolls and such other documents..(emphasis added. In the case of Phillemon Oseni Kidavi Vs Brinks Security Ltd[2018] eKLR , Hon. Lady Justice M. Mbaaru held as follows with regards to a claim for overtime and employment records:- “..The Respondent as the employer opted not to submit any work records with regards to the claimant’s employment contrary to section 10(7) of the *Employment Act*, 2007... on the claim of overtime pay, I find no material challenge to the claims that the claimant had 3 hours overtime work each day... without any records filed by the Respondent in this regard, a reasonable computation of the same would be to remove a month pay in each year based on the last gross salary wage earned by the Claimant...emphasis added We submit that the respondent failed to controvert the appellant’s evidence by way of employment records and thus the appellant is entitled to this head



of claim. In Caleb Ochieng Gogo v Oil Seals and Bearing Center Limited [2021] eKLR, Nduma J held as follows:- “In terms of Section 74(1):- “An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars.....” This Court has held previously and it so holds that the Court shall make an adverse presumption against an employer who fails to produce records they are by law mandated to keep that if the records were before Court, they would not support their specific allegations before Court which otherwise would have been vindicated by production of the document(s)..” Therefore, we submit that the respondent cannot purport to put the appellant to strict proof of matters within its knowledge. The respondent is the custodian of work records which it is obligated to file them in Court. We submit that the respondent despite alleging paying the appellant overtime, the respondent didn’t avail any evidence in support of his claims. Therefore, we submit that the appellant is entitled to overtime pay at 1.5(37,122/48) *800 hours at KES 928,050/-.

34. Salary underpayments 76. On this head of claim, we submit that the respondent admitted and acknowledged that the appellant was a driver of a heavy commercial vehicle on a monthly salary of KES 25,000/-. We submit that the appellant was underpaid during his employment period with the respondent. It is not in dispute that the appellant was earning a sum of KES 25,000/- per month despite being designated as a heavy commercial driver whose gazetted minimum wage under the Wage Order, 2021,2022,2023 and 2024 was a gross pay of KES 37,122/-. 78. In Central Furniture Shop Limited case(supra), Mbaru J held as follows on underpayments: - “In this case, the trial court assessed the due underpayments based on the fact that the respondent was a heavy commercial driver. The due wage under the Wage Orders was Ksh.35, 222, but the appellant paid Ksh. 30,000 each month. Employment terminated on 23 May 2020. The applicable Wage Orders provided a monthly minimum wage of Ksh.30, 628.45. This was the wage applicable from 1 May 2017 to 23 May 2020, when employment terminated.” . According to the applicable minimum wage for a commercial driver under the Regulation of Wages (General) (Amendment) (Order), 2022, which came into effect in the year 2021, the appellant was entitled to a basic wage of KES 32,280 exclusive of house allowance. Therefore, adding a 15 per cent of basic pay as house allowance at 4,842 thus giving a gross pay at 37,122/-. 80. We rely on regulations 3(1)(2) and 4 of the Regulations of Wages and Conditions of Employment Act, Legal Notice No. 120, which enjoins an employer not to pay an employee salary that is below the minimum wage as prescribed by minimum Wage Order. 81. Therefore, we submit that the Claimant was underpaid for a period of thirty-seven (37) months at KES 37,122-25,000p/m/* 37months - at KES 448,514/-.
35. Salary arrears, rest days and public holidays 82. We further submit that the appellant had also proved a claim for rest days and public holidays within the required standard and those claims should be allowed as prayed. In addition, we submit that the appellant is entitled to salary worked upto 26th February 2024 at KES 37,122/-. The respondent didn’t avail any evidence in support of the payment of February salary despite alleging that he sent the same to the appellant via mpesa.
36. Whether the appellant is entitled to a claim of compensation for unfair dismissal? Having established that the appellant was wrongfully and unfairly dismissed/terminated by the respondent, we submit and urge your Ladyship to grant compensation under the omnibus prayer no. f, “Any other and/or further relief that this Court may deem just and fit to grant in the circumstance” We urge your Ladyship to grant a relief of compensation for unlawful and unfair dismissal. We submit that six (6) months’ salary as compensation for unfair dismissal will be adequate given the period of appellant’s service and the manner he was treated by the respondent, who has to date failed to issue him with a certificate of service. 85. The appellant also testified that he has not secured an alternative employment. Therefore, we propose compensation at KES 37,122/pm* 6 months - at KES 222,732/-.



37. We submit that the appellant has not secured an alternative employment given that the respondent has failed to issue him with a certificate of service. Certificates of service. The respondent failed to issue the appellant with a certificate of service contrary to section 51 of Act which provides: “An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks” We rely on the decision of the Court in the case of Angela Wokabi Muoki –vs- Tribe Hotel Limited (2016) eKLR , where the respondent was ordered to pay the Claimant a sum of KES. 100, 000/- after the respondent willfully refused to comply with the mandatory provisions of Section 51 of the Employment Act.
38. On Costs - costs of appeal and costs before the subordinate Court, we submit that it is a well-established principle that costs follow event and are awarded to the successful party. The respondent was served with a demand notice and failed to respond or pay the appellant his dues. 89. We urge the Court to award costs of this appeal and costs before Lower Court to the appellant.

Decision

39. Underpayment claim-The trial court stated the appellant was employed as a heavy commercial driver at a salary of Kshs. 25000 on in January 2021. The appellant submitted he was paid below the minimum wage of Kshs. 37,122. He produced the Wages Order of 2022, monthly salary of 34302.75, which after addition of 15% housing (page 165 of ROA) the court finds the appellant was underpaid. The trial court erred in fact and law by failing to consider the relief sought on merit. Underpayment is awarded Kshs. 37122 less Kshs25000 for 3 years thus Kshs. 436,392.
40. On Compensation -The court upheld the finding of the trial court of absconding. The court will not compensate an employee where there is a valid reason for termination. For lack of procedural fairness, the appellant is awarded 1 month notice pay for Kshs. 37122
41. Leave days was sought for 3 years - Section 28 of the Employment Act provides for annual leave of 21 days but limits the days to be carried forward to 18 months under section 28(4) thus – ‘(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 appellant is awarded payment leave in lieu of 18 months thus Kshs. 55683/-
42. Rest days- The respondent said the appellant was working 26 days, he thus had his rest days. The appellant was unionized, and they had made a demand. The demand had no rest days and thus the court concluded this was an afterthought claim. The same applies to overtime and public holiday pay as it was not under demand by the union. The union is a proper representative of the union members and made the demand in that capacity.
43. Service pay was sought for 3 years complete years of service. The claimant was not under NSSF or other pension. He is entitled to 15 days of service pay for the 3 years and the same is awarded on appeal as sought Kshs. 64,250/-
44. Certificate of service to issue under section 51 of the employment act thus –
- ‘(1)An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.(2)A certificate of service issued under subsection (1) shall contain—
(a)the name of the employer and his postal address;(b)the name of the employee;(c)the date when employment of the employee commenced;(d)the nature and usual place of



employment of the employee;(e)the date when the employment of the employee ceased; and(f)such other particulars as may be prescribed.(3)Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.” The Respondent is ordered to comply.

Conclusion

45. The appeal is allowed. The Judgment and Decree of the Hon. M. Nanzushi (SPM) delivered on 14th May 2025 in Mavoko MCELRC E221 of 2024 is set aside and substituted as follows-

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

- a. The termination is held as unfair for lack of procedural fairness.
- b. Notice pay of 1 month notice for lack of procedural fairness – Kshs. 37122
- c. Untaken leave awarded for 18 months for Kshs. . 55683/-
- d. Service pay -Kshs. 64,250/-
- e. Underpayment claim - Kshs. 436,392.
- f. Total award (b-e above)Kshs. 593,447 with interest from judgment date.
- g. Cost of the suit.

46. Appellant is awarded costs of the appeal.

47. It is so Ordered.

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

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Njuguna

Respondent- absent

