



**Mwangi v Twinriver 1 Estate (Appeal E304 of 2024)  
[2025] KEELRC 3557 (KLR) (10 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3557 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E304 OF 2024  
JW KELI, J  
DECEMBER 10, 2025**

**BETWEEN**

**MAINA MWANGI ..... APPELLANT**

**AND**

**TWINRIVER 1 ESTATE ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. Y.B. Mukhula (PM) delivered 11th October 2024 in Thika MCELRC E004 of 2022 (formerly Milimani MCELRC No. E364 of 2021))*

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. Y.B. Mukhula (PM) delivered 11th October 2024 in Thika MCELRC E004 of 2022 (formerly Milimani MCELRC No. E364 of 2021) between the parties filed a Memorandum of Appeal dated the 23<sup>rd</sup> October 2024 seeking the following orders: -
  - a) This Appeal against the judgment delivered on 11<sup>th</sup> October 2024 in Thika MCELRC Cause No. 4 of 2022 be allowed.
  - b) Costs of this Appeal and those of the Trial Court be awarded to the Appellant.

**Grounds Of The Appeal**

2. The Honourable Magistrate misdirected himself in law and fact and arrived at a wrong decision in finding that the Appellant had not proven that he resigned from employment at the Respondent Company thereby making it a basis for denying the Appellant the reliefs sought in his claim when the evidence on record clearly showed that the Appellant's resignation was not in dispute by either party.
3. The Honourable Magistrate erred in law and fact in failing to award the Appellant off-duty allowances in accordance with section 37(2) of the *Employment Act*, 2007 despite finding that the Appellant's



casual employment had indeed converted to term contract by dint of Section 37 of the [Employment Act](#).

4. The Honourable Magistrate erred in law and fact in failing to take into account the evidence on record that the Respondent had not produced the Appellant's leave records and wrongly denied to award the Appellant annual leave and pro rata leave.
5. The Honourable Magistrate erred in law and fact in his assessment of the evidence before the Court and the Appellant's submissions and thus arrived at a wrong conclusion and dismissed the Appellant's Claim in its entirety.

### **Background To The Appeal**

6. The Claimant/Appellant filed a claim against the Respondent vide a memorandum of claim dated the 21<sup>st</sup> of December 2020 seeking the following orders: -
  - a) A declaration that the termination was unlawful, unfair, untimely and harsh and an order that the Claimant be paid his dues and benefits of Kshs. 202,834/- as aforesaid.
  - b) A declaration that the Claimant is entitled to a Certificate of Service.
  - c) Costs of the claim plus interest therein.(pages 6-9 of Appellant's ROA dated 17<sup>th</sup> April 2025).
7. The Claimant filed his list of documents dated 21<sup>st</sup> December 2020 with the bundle of documents attached, list of witnesses of even date, and witness statement of even date (see pages 11-16 of ROA).
8. The claim was opposed by the Respondent who entered appearance and filed a memorandum of response dated 3<sup>rd</sup> June 2021 (pages 17-19 of ROA). They also filed a witness statement of POLYCARP GITHAIGA dated 24<sup>th</sup> April 2023; and a list of documents of even date with the bundle of attached (pages 26-31 of ROA). The Respondent later filed a further witness statement of the same witness dated 28<sup>th</sup> February 2024 (pages 37-38 of ROA).
9. To counter the Respondent's response to the claim, the Appellant filed a response dated 3<sup>rd</sup> May 2023 (pages 32-33 of ROA).
10. The Claimant/Appellant's case was heard on the 5<sup>th</sup> of June 2024 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. Macharia (pages 65-67 of ROA).
11. The Respondent's case was heard on the same day with the Respondent calling one (1) witness, Polycarp Githaiga Njuguna, 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 Ms. Mideva (pages 67-69 of ROA).
12. The parties took directions on filing of written submissions after the hearing. The parties complied.
13. The Trial Magistrate Court delivered its judgment on the 11<sup>th</sup> of October 2024, dismissing the Claimant's claim with an order that each party pays their own costs (judgment at pages 58-61 of Appellant's ROA).



## Determination

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

## Issues for determination

15. In his submissions dated 21<sup>st</sup> October 2025, the Appellant identified the following issues for determination:
- i. Whether the trial court erred in finding that the Appellant had not proven that he resigned from employment at the Respondent Company when the evidence on record clearly showed that the Appellant's resignation was not in dispute by either party.
  - ii. Whether the trial court erred in law and fact in failing to award the Appellant off-duty allowances in accordance with section 37(2) of the *Employment Act*, 2007 despite finding that the Appellant's casual employment had indeed converted to term contract by dint of Section 37 of the *Employment Act*.
  - iii. Whether the trial court in law and fact in failing to take into account the evidence on record that the Respondent had not produced the Appellant's leave records and wrongly denied to award the Appellant annual leave and pro rata leave.
16. On their part, the Respondent submitted on the grounds of appeal generally in their submissions dated 4<sup>th</sup> July 2025.
17. The court took into consideration the grounds of appeal.

**Whether the trial court erred in finding that the Appellant had not proven that he resigned from employment at the Respondent Company when the evidence on record clearly showed that the Appellant's resignation was not in dispute by either party.**

## The appellant's submissions

18. The Appellant resigned from employment on 1st March 2018. It was not disputed at the hearing of the Appellant's case that the employment relationship between the Appellant and the Respondent came to an end on 1st March 2018. The Appellant did not claim to have been terminated from employment but categorically stated that he resigned from employment out of his own free will. Section 61 of the *Evidence Act*, Cap 80 Laws of Kenya states that: -

“ 61. Facts admitted in civil proceedings.

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.” The Court in *Kisilu & 2 others v Kiluva & another* [2024] KEHC 15720 (KLR) stated thus:

“ 11. The above provisions of the law are unequivocal and clear that admitted facts are not required to be proved. It



is my position and the position of the law, that where a claim is admitted, it does not matter whether the other part of the claim stands on strong rock foundation or a quick sand. An admission does not call for any proof.". The fact that the Appellant resigned on 1st March 2018 was not before the Court to consider as the same was not disputed by the Respondent. The Respondent's witness Polycarp Githaiga in his Statement dated 28th February 2024 at Paragraph 5 states:"At the time of his resignation, no service pay was pending payment..." The said statement was adopted as the Respondent's evidence in chief and by such admission, it is clear that the Appellant was not required to prove that he resigned from employment. We thus submit that the Trial Court erred in finding that the Appellant had not proven that he resigned from employment at the Respondent Company.

19. The Appellant is entitled to off-duty allowances by dint of Section 37 of the *Employment Act*. The Court in its Judgment dated 11th October 2024 stated at Page 3 that:"His contract therefore automatically converted to a term contract and the provision of section 35(1)(c) will apply." It goes without saying that the Court in finding that the Appellant's casual employment had converted to term contract, it was obligated to award the Appellant off-duty pay (allowances) which he was not paid as a casual employee. Section 37(3) of the *Employment Act* provides as follows: -(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee." RW-1 admitted that the Appellant as a casual employee and he claimed to have paid the Appellant even on his off-days but admitted not to have produced the Master roll in Court. We reiterate the holding in the case of *Empire Feeds Ltd v King'ou* (Appeal 6 of 2020) [2022] KEELRC 1501 (KLR) Rutto, J stated as follows regarding the provisions of section 37 of the *Employment Act*: -"Section 37 of the *Employment Act* empowers the court to convert the contract of service of an employee engaged on a casual basis, to a regular term contract. This conversion is significant in that, such an employee becomes entitled to the safeguards available to an employee on a regular contract of employment. Such safeguards include, termination with notice or payment in lieu thereof, protection from unfair termination, benefits such as leave, rest days and issuance of certificate of service." The Appellant was not paid during his off-days. The Respondent had a duty to produce the Master roll to show that he was paid but failed to do so. We submit that the Appellant is entitled to be paid off-duty allowances and the Learned magistrate erred in finding that the Appellant was not entitled to this relief because he did not produce a copy of his resignation letter.
20. The Appellant is entitled to unpaid leave and pro-rata leave for the period worked. Section 28 of the *Employment Act* provides that:-"28. Annual leave
- (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;" According to Section 74 of the *Employment Act*, an employer is required to keep a record of an employee's annual leave entitlement, days taken and days due. RW-1 admitted in his testimony that the



Appellant was not entitled to leave days because he was a casual labourer. By dint of Section 37 of the *Employment Act*, the Appellant was entitled to leave. We therefore submit that the Learned Magistrate erred in denying the Appellant annual leave pay and pro-rata leave for the year 2018.

### **The Respondent's submissions**

21. GROUNDS 1- The learned trial Magistrate misdirected himself in law and fact and arrived at a wrong decision in finding that the Appellant had not proven that he resigned from employment at the Respondent company thereby making it a basis for denying the Appellant the reliefs sought in his Claim when the evidence on record clearly showed that the Appellant's resignation was not in dispute by either parties. We reiterate that this being a first appeal, this court is under a duty to subject the entire evidence and the Judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. In carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. The court has also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell, a first appellate court must, of necessity, proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course, such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. For these propositions, generally refer to Section 78 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which requires a first appellate court "to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions by the superior courts among them Peter M. Kariuki -vs- Attorney General [2014] eKLR where the court held inter alia as follows:-"We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI -vs- REPUBLIC [1984] KLR 729 and SUSAN MUNYI -vs- KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)." This being the first Appellate Court there is need to give a fresh look at the evidence adduced before the lower court bearing in mind that the Honorable Court had no benefit of having seen or hearing the witnesses as they testified. This is the principle espoused in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court of Appeal stated the following with regard to the duty of a first appellate court:-"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held, inter alia, that:-"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence." In Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] Eklr the Court of Appeal stated as follows of the role of the first appellate court:".....The above is also true for the High Court sitting on a first appeal. The learned Judge should have reconsidered the evidence, evaluate it herself and drawn her own conclusions. In doing so she should have therefore considered the application to strike out the defence, the affidavit and evidence in support as well as the reply by the respondent. She failed to do this and therefore failed to consider matters she should have considered." It is our humble submissions that the burden of proof is upon



the Claimant pursuant to Section 107 of the Evidence Act. It is not disputed that the Claimant failed to produce in court a copy of the resignation letter which was the notice for resignation to back up his allegations as enumerated on (page 6 of the Record of Appeal) paragraph 6 of the Memorandum of Claim. The Honorable trial magistrate just restated what was uncontested in his judgment (page 60 of the Record of appeal). We submit that the Respondent's submission (on page 47-48 basically reaffirm the trial court's position in regards as to who should discharge the burden of proof, which strategically and solely lied on the Claimant/Appellant herein and he failed. We urge this honorable Court to rely on the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows with regard to the burden of proof: "....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; ie. into the account provided..... The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant..... The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein."

22. The learned trial Magistrate erred in law and fact in failing to award the Appellant off-duty allowances in accordance with section 37(2) of the Employment Act, 2007 despite finding that the Appellant's casual employment had indeed converted to term contract by dint of Section 37 of the Employment Act. It is our humble submissions that the learned trial Magistrate did not fail to appreciate the meaning of Section 37(2) of the Employment Act, 2007 and did not grossly misdirect himself on a point of law and fact that the Appellant had to prove that he was not paid off duties allowance despite finding that the Appellant's casual employment had converted to a term contract by dint of Section 37 of the Employment Act and he was therefore entitled to be paid off-duty allowances in accordance with the said section. We invite this court to analyze the trial Magistrate's Judgment and the Respondent's submissions (on page 44-61 of the Record of Appeal) as it is our contention that the learned magistrate was persuaded to consider the weight of the evidence adduced therein and the Judicial authorities tendered in our submissions before the court in support of the Respondent case thus arriving at the right decision and holding above. The Honorable magistrate rightly distinguished a casual employee with the Claimant/Appellant herein and he rightly stated that according to section 37 of the Employment Act, his employment had converted to a Term contract. Further in terms of the off duty claim under this Ground of Appeal, we submit that claimant could not show the trial court the 216 days he claimed he was owed off duties allowances. Further it is our humble submissions that Section 108 of the Evidence Act provides that burden of proof in a suit lies on that party who would fail if no evidence at all were given on Wither side. To avoid falling short of discharging his burden, the Claimant/Appellant was required to provide proof of the not paid off duty allowances. It is not contested that he failed discharge that duty in the trial court as evidenced by his pleadings and thus the trial magistrate could not address himself on a claim not properly substantiated at the honorable trial court. We reiterate that the onus of proof lies with the Claimant as was held in Evans Otieno Nyakwana s Cleophas Bwana Ongaro (2015) eKLR. Justice Majanja held; "...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides: "107. (1) 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..." Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows: 109. The burden of proof as to any particular fact lies on the person who



wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. We humbly submit that the Respondent demonstrated by providing Respondent's Exhibit 1- summary of Claimant's wages (on page 28-31 of the Record of Appeal). We urge the Honorable Court to find that there is the need for this court to have a wholesome examination at the evidence and pleadings on record, we take a personal interest on the trial magistrate Judgment and Respondent's pleadings as filed in the lower court. We submit that this ground fails in its entirety and the finding of the lower court should remain undisturbed where off duty allowances were not awarded and the Claimant fell short in discharging his burden of proof and thus this Ground should be dismissed.

23. Grounds 3- The learned trial Magistrate erred in Law and fact in failing to take into account the evidence on record that the Respondent had not produced the Appellant's leave records and wrongly denied to award the Appellant annual leave and pro-rata leave. We submit and place huge reliance to the trial magistrate's Judgment specifically addressing this issue in its entirety as can be seen on (page 53 of the record of appeal) Section 107 of the Law of Evidence Act need not be restated but a party who alleges must prove. The onus to prove the claim for leave on pro rata basis fell squarely on the Claimant/ Appellant and did not at any time change to the Respondent herein. We submit that the Respondent's submissions on (page 44-57 of the Record of appeal) has reiterated the above position. We humbly submit that the production of leave records was not the purview of the Respondent, the claim as rightly before court filed by the Claimant was one deserving of tendering of evidence to show that the Claimant was not given leave, and thus it was important that the Claimant tender records of leave sought and not granted by the Respondent for his claim to be allowed by the trial court. We submit that the appellant has not shown good grounds why this court should interfere with the discretion of the lower court and we urge this Honorable Court to uphold what the learned trial magistrate directed in his Judgment in terms of the pro rata basis leave.
24. GROUNDS 4- The Learned trial magistrate erred in Law and fact in his assessment of the evidence before the Court and the Appellant's submissions and thus arrived at a wrong conclusion and dismissed the Appellant's Claim in its entirety. We submit that the Claimant/Appellant was required to prove his claim against the Respondent on the balance of probabilities. In the case of Kirugi & Anor. v Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that the burden was always on the Plaintiff to prove his case on the balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof. The maxim has been grounded in law under Section 107 of the Law of Evidence Act. The same was enunciated by Justice Majanja in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR when he said that: "... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:"107. (1) 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..." A this point, reference is made to Section 108 and 109 of the Evidence Act which states that the burden of proving the presence or absence of a fact in issue lies with the person alleging existence or non-existence of such a fact in issue. The Court in Margaret Ngina Kamau v Christpoher Karanja & Another (2021) e KLR quoted with approval the case of Puo on v Lau Fu (1978) which provided that the Defendant had to prove she protested the coercion, and that she took adequate steps to avoid the contract after she was coerced into signing it. The question that follows then is whether the Defendant has discharged her burden of proving she was coerced of threatened into entering an agreement with the Plaintiff. It is trite law that the rule of Evidence is clear that "He who alleges must prove" and the onus herein lies with the Defendant to prove any payments that they claim to have made and we humbly submit that she has



not discharged this mandate. It thus goes without saying that the Claimant's pleadings on the Record of Appeal as raised indeed remained unproved and required corroboration by witnesses' testimonies and production of Exhibits in support. The Claim as filed was not available for consideration having not been proved by evidence which was thoroughly cross examined upon and had inconsistencies thus was just mere allegations without any material proof. This is made further clear in the case CMC Aviation LTD VS. Crusair LTD (NO.1) (1987) KLR 103 as follows:- "The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents." (Emphasis mine) We submit that the Claimant/Appellant failed to discharge the legal burden placed on him by the law to prove his case against the Respondent herein. The burden is discharged by way of evidence and the Respondent did rebut by filing documents to prove the contrary (on page 28-of Appeal) and it is only for this reason that the Claim was dismissed in its law to fully prove his case against the Respondent herein and has not corroborated his evidence entirety. We submit that the Appellant did not discharge the legal burden placed on him by the by tendering documents. The same. We humbly agree with the Learned magistrate that the Claimant's claim be dismissed It goes without saying that costs follow the events and there are a myriad of cases that support with no orders as to costs as the discretion of a trial magistrate is provided for under the law. We invite this Honorable Court to rely heavily on the Respondent's Submissions ( On page 49-50 of the Record of Appeal) in so far as the issue of costs is concerned. We finally submit that in civil proceedings, the order on costs is governed by the provisions of Section 27 of the Civil Procedure Act which provides that; -(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (2)The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such." We further rely on the case of Punchlines Limited v Joseph Mugo Kibaria & 10 others [2018] eKLR, the Court of Appeal quoting with approval the decision of the High Court in Party of Independent Candidates of Kenya v Mutula Kilonzo & 2 others, HC EP No. 6 of 2013, had the following to say on the issue of costs under section 27 of the Civil Procedure Act, "It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion.... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so. "The Court of Appeal in Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006), had the following to say when the court was called upon to deal with a case where the trial court had failed to pronounced itself on the issue of costs; -"Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. See Section 27 (1) of the Civil Procedure Act. We thus submit that enough reasons were provided by the trial magistrate in denying the Respondent Costs of the suit and thus no misdirection in his assessment of the evidence before the trial court and thus he did not arrive at a wrong decision as alleged. We submit that this ground equally should be dismissed in its entirety.



## Decision

25. The court, on re-evaluation of the evidence before the trial court, and on perusal of the judgment found it was not in dispute that the employment of the appellant terminated on 1<sup>st</sup> March 2018.

**Whether the trial court erred in law and fact in failing to award the Appellant off-duty allowances in accordance with section 37(2) of the *Employment Act*, 2007 despite finding that the Appellant's casual employment had indeed converted to term contract by dint of Section 37 of the *Employment Act*.**

26. The trial court erroneously held that, for lack of proof of resignation it could not have considered the relief sought. The court correctly held the employment of the appellant from 2014-2018 continuously hence converted under section 37 of the *Employment Act*. The Court was of the opinion that the trial court erred by holding that, for lack of resignation evidence, it would not consider the reliefs, while it was not in dispute that the employment was terminated on the 1st March 2018. On termination of employment, the appellant was entitled to terminal dues. The court proceeds to consider the merit of the awards sought before the trial court.
27. Off days – The defence was that the claimant was not entitled to off days. The claimant testified he was paid per day. The wages schedule produced before the lower court had an overtime allowance for each week. The claimant told the trial court he had no documents to prove the off-duty claim. The respondent told the trial court the claimant was paid for 7 days. The court, in view of the undisputed overtime paid and wages for 7 days, finds that the claim for off-duty was not proved on a balance of probabilities.
28. On leave- the respondent's witness told the trial court that the claimant, being a casual, was not entitled to leave. The trial court found the employment had converted. The claimant was thus entitled to be awarded leave under section 28 of the *Employment Act* which is a statutory right of employee- '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 claimant worked for undisputed 3 years and 4 months. He was this entitled to prorated leave award of 63 days (3 years) and 7 days(4 months). Thus awarded as sought Kshs. 30960.
29. Salary arrears after 2 years of increment- The respondent told the trial court the salary was not increased from 260 to 360 per day. The court perused the applicable wages order and found the minimum daily wage as of May 2017 was 349.50. The court then found the claim by the claimant was merited as the daily rate of 260 was way below the Minimum Wages Order and the Kshs 360 was also below. The claim for Kshs. 62400 was merited and is allowed on appeal.
30. Service gratuity – the claimant was under NSSF as admitted at cross-examination. Section 35(6) of the *Employment Act* applies and the claim for service fails.
31. The claim for uniform allowance is not statutory. It ought to have been proved and was not. It is disallowed.



## **Conclusion**

32. The appeal is allowed. The Judgment and Decree of the Hon. Y.B. Mukhula (PM) delivered 11th October 2024 in Thika MCELRC E004 of 2022 (formerly Milimani MCELRC No. E364 of 2021 is set aside and substituted as follows-

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

- a. Annual and prorated leave is awarded for Kshs. 30960.
- b. Salary arrears awarded for Kshs. 62400
- c. Interest awarded on a and b above at court rate from judgment date.
- d. Costs of the suit.

33. Costs of the appeal is awarded to the appellant

34. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10<sup>TH</sup> DAY OF DECEMBER, 2025.**

**J. W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant – Kibet h/b Mideva

Respondent- Macharia

