

REPUBLIC OF KENYA

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

CIVIL APPEAL NO. E254 OF 2024

MATCH MASTERS LIMITED..... APPELLANT

**TOM JUMA NYONGESA.....1ST
RESPONDENT**

**FRANCIS GITAU.....2ND
RESPONDENT**

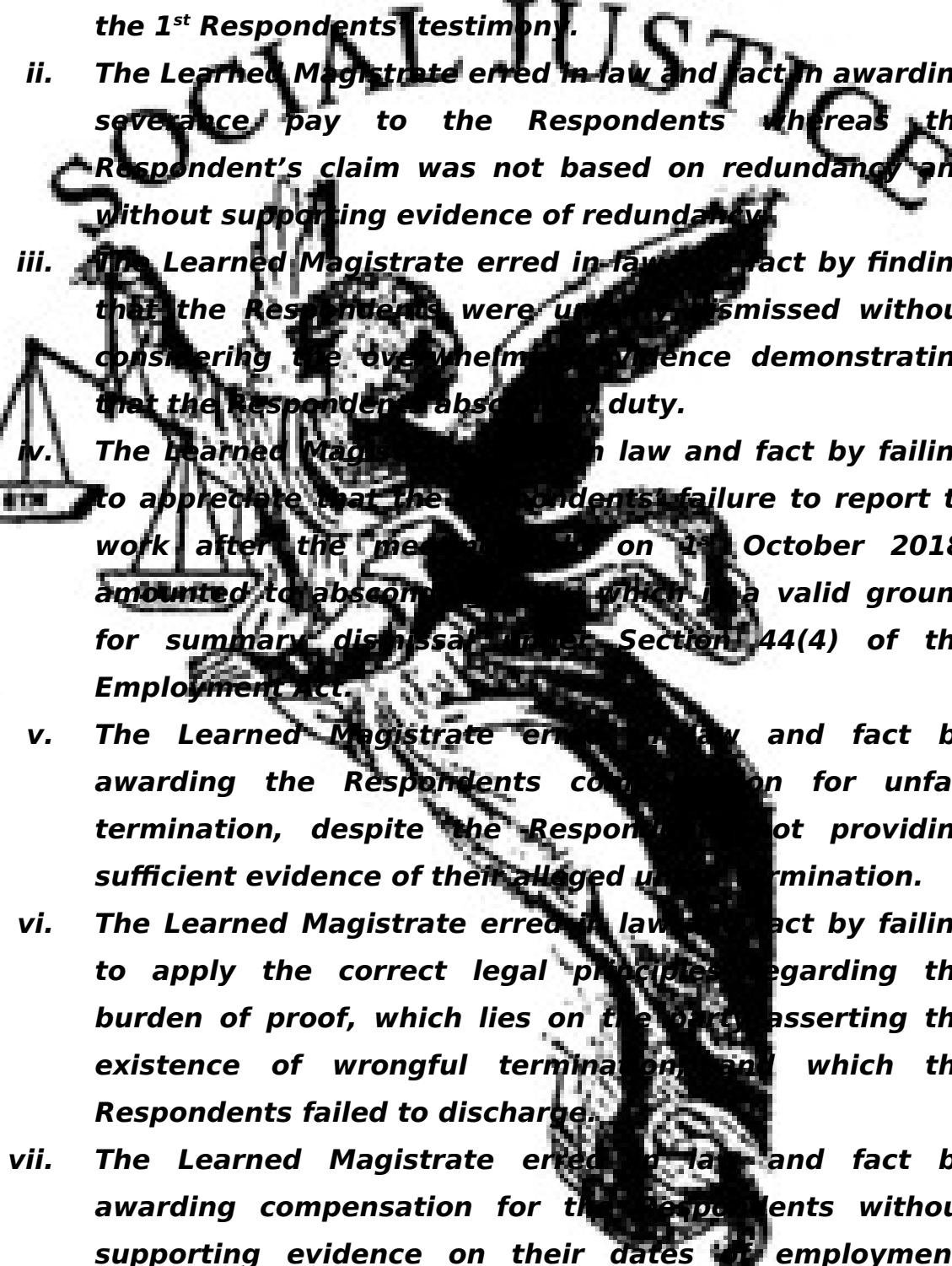
**HURRISON NAMBAKHA WANJALA.....3RD
RESPONDENT**

**PAUL MACHARIA KONGO.....4TH
RESPONDENT**

(Being an appeal from the Judgment of Hon. Catherine Mburu (PM) in Kikuyu CMELR No.154 of 2024 at the Chief Magistrate Court of Kenya in Kikuyu delivered on the 22nd day of July 2024)

JUDGMENT

1. Through the Memorandum of Appeal dated 15th August, 2024 the Appellant appeals against the Judgment of Honourable Hon. Catherine Mburu (PM) delivered on 22nd July 2024.
2. The Appeal was based on the grounds that:

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- i. The Learned Magistrate erred in law and fact by awarding compensation to the 1st Respondent without the 1st Respondent's testimony.**
- ii. The Learned Magistrate erred in law and fact in awarding severance pay to the Respondents whereas the Respondent's claim was not based on redundancy and without supporting evidence of redundancy.**
- iii. The Learned Magistrate erred in law and fact by finding that the Respondents were unjustly dismissed without considering the overwhelming evidence demonstrating that the Respondents absconded duty.**
- iv. The Learned Magistrate erred in law and fact by failing to appreciate that the Respondents' failure to report to work after the meeting held on 1st October 2018, amounted to absconding duty which is a valid ground for summary dismissal under Section 44(4) of the Employment Act.**
- v. The Learned Magistrate erred in law and fact by awarding the Respondents compensation for unfair termination, despite the Respondents not providing sufficient evidence of their alleged unfair termination.**
- vi. The Learned Magistrate erred in law and fact by failing to apply the correct legal principles regarding the burden of proof, which lies on the party asserting the existence of wrongful termination, and which the Respondents failed to discharge.**
- vii. The Learned Magistrate erred in law and fact by awarding compensation for the Respondents without supporting evidence on their dates of employment, positions held, and salaries earned contrary to the**

provisions of the Employment Act requiring such claims to be substantiated by documentary evidence.

viii. The Learned Magistrate erred in law and fact by finding that the Respondents were entitled to a salary of Ksh 12,000/= for September 2018 without supporting evidence.

ix. The Learned Magistrate erred in law and fact in failing to consider and appreciate the Appellant's submissions and evidence, thereby arriving at an erroneous conclusion.

x. The Learned Magistrate erred in law and fact by awarding the Respondents time and untaken leave without supporting evidence.

xi. The Learned Magistrate erred in law and fact in awarding the Respondents the amount of compensation of 12 months salary for all employees on termination/dismissal in the circumstances.

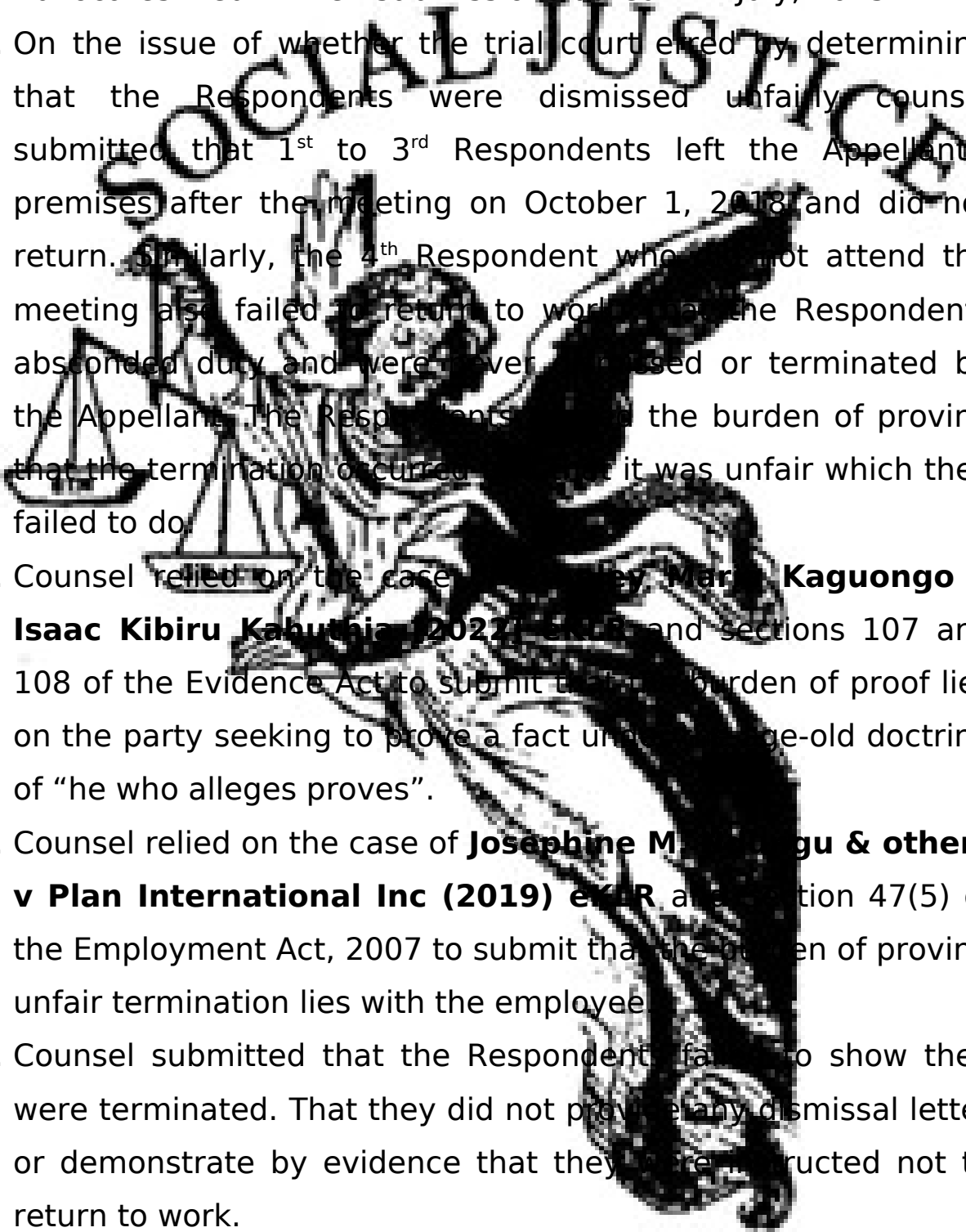
xii. The Learned Magistrate erred in law and fact in awarding the Respondent one month's salary in lieu of notice without proof of unfair termination.

xiii. The Learned Magistrate erred in law and fact in allowing the Respondents' claim without supporting evidence.

3. The Appellant prayed that the Appeal be allowed with costs of this appeal and trial court, the Judgment of the Chief Magistrate's Court at Kikuyu delivered on 22 July 2024 be set aside and substituted with an order dismissing the Respondents' claim with costs and setting aside the awards given by the lower court.

4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

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5. The Appellant's Advocates Ochieng' Ogutu & Company Advocates filed written submissions dated 14th July, 2025.
6. On the issue of whether the trial court erred by determining that the Respondents were dismissed unfairly, counsel submitted that 1st to 3rd Respondents left the Appellant's premises after the meeting on October 1, 2018 and did not return. Similarly, the 4th Respondent who did not attend the meeting also failed to return to work. The Respondents absconded duty and were never dismissed or terminated by the Appellant. The Respondents bore the burden of proving that the termination occurred and that it was unfair which they failed to do.
7. Counsel relied on the case of **Mary Kaguongo v Isaac Kibiru Kabuthia (2022) eKLR** and sections 107 and 108 of the Evidence Act to submit that the burden of proof lies on the party seeking to prove a fact under the age-old doctrine of "he who alleges proves".
8. Counsel relied on the case of **Josephine Mwangi Mwangi & others v Plan International Inc (2019) eKLR** and section 47(5) of the Employment Act, 2007 to submit that the burden of proving unfair termination lies with the employee.
9. Counsel submitted that the Respondents failed to show they were terminated. That they did not provide any dismissal letter or demonstrate by evidence that they were instructed not to return to work.
10. Counsel relied on the case of **Wangereka v Rupra (Cause 2473 of 2017) [2023] KEELRC 625 (KLR)** and Section 44(4)

(a) of the Employment Act to submit abscondment of duty is recognised in law as a form of gross misconduct that may justify summary dismissal.

11. Counsel relied on the case of **Simon Mbithi Mbane v. Inter Security Services Limited [2018] eKLR** to submit that an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.
12. Counsel submitted that the Appellant made several attempts to locate the Respondents but they were nowhere to be found. The Appellant did not issue dismissal letters or notices of termination. There was no other way the Appellant would have looked for the Respondents that they did not utilize. The Respondents did not inform the Appellant how the Appellant would have searched for them, but neglected to do so.
13. Counsel relied on the case of **Joseph M. Ndungu & others v Plan International Inc eKLR** to submit that the Respondents did not discharge their obligation of proving unfair termination and therefore the Respondents' claim should have failed.
14. On the issue of whether the trial court was in awarding reliefs sought by the Respondents counsel on the claim of severance pay counsel relied on Sections 12 and 40(1) of the Employment Act to submit that severance pay becomes payable only in the event of a redundancy.
15. Counsel submitted that there was no claim that the Respondents were declared redundant but they alleged unfair

dismissal while the Appellant contended that they abandoned their duties.

16. On the claim for compensation for wrongful termination counsel submitted that the trial court erred and awarded the same without sufficient evidence. Counsel relied on among other cases, the case of **Stanley Maira Kagongo v Isaac Kibiru Kanuthia [2022] eKLR**, Sections 107 and 108 of the Evidence Act and Section 47(5) of the Employment Act to submit that the employee must show that an unfair termination occurred before the burden of proof shifts to the employer to justify the grounds for termination.
17. Counsel submitted that the Respondents did not provide documentary evidence, such as correspondence letters or notices, to support their claims of unfair termination. As a result, the trial court erred in awarding compensation without the Respondents meeting their initial burden.
18. On the award of maximum 12 months salary for unfair termination counsel submitted that the trial court erred in awarding the Respondents maximum compensation without regard to the considerations under section 49(4) of the Employment Act. That the Respondents did not present evidence of their date of employment, making it impossible for the trial court to assess their length of service under the said provision and the other factors outlined therein.
19. Counsel submitted that by failing to consider these statutory factors, the trial court exercised its discretion arbitrarily. The

award of the maximum 12 months' salary, in the absence of a reasoned justification amounts to an error in both law and fact.

20. On the award of salary of Ksh 12,000/= for September 2018 counsel submitted that the trial court erred by awarding the same without supporting evidence. Counsel relied on sections 107 and 108 of the Evidence Act to submit that the Respondents did not provide any pay slip that reflects Kshs.12,000/= as their monthly salary. Counsel were not entitled to the said amount as they failed to discharge the burden of proof.

21. On the award of one month's salary in lieu of notice and an award of overtime and untaken leave days, counsel relied on section 47(5) of the Employment Act to submit that the Respondents failed to meet the burden of proof of showing that their employment was terminated and demonstrating that they were entitled to untaken leave and compensation for overtime.

22. Counsel submitted that the Respondents did not verify the number of days or hours worked beyond regular working hours, nor the number of leave days earned and taken. Without such evidence, the court had no basis to grant the relief sought.

23. On the issue of whether a party that does not testify can be awarded compensation/damages, counsel relied on section 47(5) of the Employment Act and the case of **Josephine M. Ndungu & others v Plan International Inc** to submit that an employee is required to prove unfair termination. Without

the testimony from the 1st Respondent, the court had no basis to grant him any relief/compensation/damages.

RESPONDENTS' SUBMISSIONS

24. The Respondent's Advocates, MM Law Advocates filed written submissions dated 3rd October, 2025.
25. On the issue of whether the trial court erred by awarding compensation to the 1st Respondent who had not testified in court counsel relied on Rule 9 of the Employment and Labour Relations Court (Procedure) Rules 2016 to submit that a suit can be instituted by one party or more or other parties with a similar cause of action provided that that person shall in addition to the statement of facts equally file a letter of authority signed by all other parties.
26. Counsel submitted that the Respondent had permitted one of the Respondents to file the primary claim before the lower court and testify on behalf of his co-claimant provided that a letter of authority is signed by the said co-claimants.
27. Counsel submitted that a letter of authority dated 15th August, 2019 was filed in court on 17th October, 2019 which was signed by the 1st, 3rd and 4th Respondents in favour of the 2nd Respondent authorizing the 2nd Respondent to testify in the matter.
28. Counsel relied on among other cases, the case of **Okiro & 33 others v Rene Super Cleaning Services & another (Appeal E030 of 2021)[2023] KEELRC 1567 (KLR)** to

submit that since the 2nd Respondent was permitted by the law to testify as a sole witness in the matter, the Learned Magistrate cannot be faulted in relying on the oral testimonies of the witnesses who testified before the lower court and the totality of the evidence tendered by the Respondents in awarding the compensation to the 1st Respondent who did not testify in person.

29. On the issue of whether the trial was vitiated by awarding severance pay whereas the claim by the Respondents was not based on redundancy, counsel submitted that the Respondents' claim was that the Appellant had failed, neglected and/or refused to make the requisite statutory deductions during the pendency of the employment.

30. Counsel submitted that in paragraph 4 of the statement of claim, the Respondents had mislabeled service pay under sections 35(6) of the Employment Act as 'severance pay'.

31. Counsel submitted that there was no claim by the Respondents on redundancy as alluded to by the Appellant and that the mistitling by the Respondents of service pay as 'severance pay' is excusable and curable under article 159(2) (d) of the Constitution of Kenya which mandates the court to administer justice without undue regard to procedural technicalities.

32. Counsel submitted that the lower court awarded service pay which the Learned Magistrate correctly computed as fifteen days' salary multiplied by the years served by each of the

Respondents and based on monthly finding that the Appellant had failed, neglected and/or refused to remit the requisite statutory deductions (NSSF) during the salary for Kshs.12,000 following the pendency of the Respondents' employment.

33. On the issues of whether the learned magistrate erred in finding the Respondents termination of employment unfair in light of offence by the Appellant on absence of duty, failing to apply the correct legal principles on the burden of proof and failing to consider and appreciate the Appellant's evidence and submission, counsel relied on the case of **Selle & Another v Associated Milk Producers Co. Ltd & Another (1968) EA 123** on the duty of the appellate court.

34. Counsel submitted by summary that the 1st Respondent was employed on 6th May 2009 as a conductor, the 2nd Respondent was employed in 2010 as a driver, the 3rd Respondent was employed on 18th March 2013 as a conductor while the 4th Respondent was employed in August, 2013 as a driver. That they worked 6 days a week between 8.00am and 6.00pm earning Kshs 400/= per day which translates to Kshs 2,000/= per month. That this was not disputed by the Appellant.

35. Counsel further submitted that the Respondents worked diligently for the Appellant until on the 1st October, 2018 when it was alleged by the Appellant that the Respondents were stealing stock (matchbox outers) assigned to them to deliver to the Appellant's customers. That the allegation had allegedly arisen following complaints raised by several customers.

36. Counsel submitted that the Respondents were instructed to leave the Appellant's business premises to allow investigations to be carried out and that they would be contacted. However, according to the Respondents the said action of the Appellant was a scheme aimed at dismissing them as no communication was made thereafter.

37. Counsel submitted that the Respondents alleged absconding duty as alleged by the Appellant and stated that they were never served with any notice to show cause and/or subjected to the requisite disciplinary proceedings and no termination letters were issued by the Appellant to them.

38. Counsel submitted that in the course of the employment at the Appellant's company, the Appellant failed to remit the statutory deductions and failed to allow them to proceed on leave. Counsel relied on section 74 of the Employment Act to submit that although the Appellant failed to pay statutory deductions, it bears the responsibility of keeping the records.

39. Counsel relied on section 20 of the Employment Act to submit that the Appellant should favour the Respondents with itemised pay statement which shall contain information on statutory deductions. That during cross-examination in a trial court the Appellant's witness confirmed not having proof that the September salary was paid or remittance of SHIF and NSSF was made. The Appellant did not deny employing the Respondents that it acted on complaints of customers and held

a meeting of October 1, 2018 with all drivers and conductors including the Respondents.

40. Counsel submitted that at the hearing, the Appellant's sole witness testified that the issue of missing matchboxes was never reported to the police. Further, the witness testified that the Appellant did not issue the Respondents with notice to show cause or a termination notice. That the Appellant alleged that the Respondents after the meeting, returned amicably never returned to work hence they absconded duties and not entitled to reliefs sought.

41. Counsel relied on Section 41 of the Employment Act to submit that the Appellant failed to discharge its statutory obligation under section 41 of the Act as it did not adduce any notice to show cause minutes or disciplinary proceedings and/or the respective termination letter on the Respondents employment

42. Counsel relied on the case of **Kenfranco (A.) Limited versus Benson K. Nguti(2016) eKLR** to submit that the burden on the employee is limited only to alleging that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer.

43. Counsel submitted that although according to the Appellants, the Respondents had failed to report to work and therefore, purportedly absconded duty, the Appellant was statutorily required to invoke the due procedure of giving the notice to show cause and the conduct a hearing as provided for under section 41 of the Act because absconding duty amounts

to gross misconduct under section 44(4)(a) of the act. Counsel relied on the case of **Owudu versus Digital Sanitation services Limited (Appeal E109 of 2023) (2024) KEELRC 917(KLR) (18 April 2024)** on the issue of employee absconding duty that the employer must issue notice to the employee or the labour office.

44. Counsel submitted that the duty to terminate employment relationship was on the Appellant and the same could not be shifted to the Respondents. That the Appellant did not tender any evidence before the court that they complied with the due process above. That the termination of the Respondents was in all four corners unlawful and the trial magistrate cannot be faulted for making that decision.

45. On the issues of whether the learned Magistrate erred by awarding maximum compensation of one month's pay to the Respondents and the one month's pay in lieu of notice yet the Respondents did not demonstrate dates of employment and their respective monthly salaries, counsel submitted that the Respondents' case on dates of employment was illustrated before and they used to be paid Kshs 12,000 per month. That the Appellant did not deny employing the Respondents.

46. Counsel submitted that the Respondents produced in evidence their respective bank account statements showing partial payments of the agreed daily wages and notably the Respondents had pleaded that salary was irregularly paid the Appellant (by instalments) sometimes on weekly and/or monthly basis.

47. Counsel relied on the case of **Kenyan Union of Commercial Food Allied Worker versus Fralet Agencies (Employment and Labour Relations Claim 29 of 2023) [2023] KEEIRC 2208 (KLR)** and section 74 of the Employment Act to submit that the Appellant bears the statutory responsibility of keeping the employment records.

48. Counsel submitted that since the Respondents' claims regarding dates of employment, position and salary was not disputed by the Appellant, the said matters were not issues for determination by the court and the Appellant cannot raise them on appeal. That upon finding the Respondents were unfairly terminated the court was mandated to order for compensation in terms of section 35(5) and section 49(1) and (4) of the Employment Act.

49. Counsel relied on the case of **Liya versus Avic Intl. Beijing (E.A) Co. Ltd & another [2019]** to submit that on determining that the Respondents were unfairly terminated since they were not given the requisite statutory termination notice by the Appellant in accordance with the provisions of Section 35(1)(c) of the Employment Act, it follows that the Respondents were entitled to compensation of one month's pay and the Learned Magistrate cannot be faulted for awarding the same in the lower court judgment.

50. Counsel submitted that in regard to the award of the maximum statutory compensation for 12 months salary, it is trite law that the court has the mandate to award

compensatory damages to an employee whose services have been terminated unfairly.

51. Counsel submitted that the award was made as a consequence of the finding that the Respondents employment was unfairly terminated and the award was made in exercise of judicial discretion by the trial court.

52. Counsel relied on the case of **Mrao Ltd. v. First American Bank of Kenya [2005] eKLR** to submit that it is trite law that the Appellate court ought not to interfere with that discretionary award unless it is demonstrated by the Appellant that the trial court misdirected itself on the law or that it misapprehended the facts and thereby arriving at a wrong decision.

53. Counsel submitted that the award on maximum statutory compensation for unfair and unlawful termination was made squarely within the law under section 74 of the Employment Act and cannot be disturbed as the Appellant has not demonstrated any ground to merits interference by this Honourable court.

54. On the issue of whether the learned magistrate erred in awarding the Respondents salary for September 2018 and compensation for the untaken leave days, Counsel submitted that the Appellants witness during cross examination stated that he had not produced any proof that the claimants were paid the September salary.

55. Counsel relied on section 74 of the Employment Act to submit that the Appellant was required to tender employment

records to demonstrate its assertion that the Respondents had allegedly served their leave days because the Appellant bears the statutory responsibility of keeping employment records.

56. Counsel submitted that the Appellant did not discharge its statutory burden of submitting work records and evidence that annual leave was allocated to the Respondents and/or paid for as required under the law.

57. Counsel relied on the case of **Kenya Union of Commercial Food Allied Worker (supra)** to submit that where an employer fails to tender employment records, it gets to the disadvantage of such employer to disprove allegations by an employee concerning their terms of service and the court will therefore believe the Claimant.

58. Counsel submitted that the Appeal is unmerited and should be dismissed with costs.

ANALYSIS

59. The court has considered the pleadings and submissions filed by the both parties herein and proceeds to analyse them as follows. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and fact and come up with its own findings and conclusions as held in **Court of Appeal for East Africa in Peters -vs- Sunday Post**

Limited [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

13. In this case, the Judgment of the trial court was that judgment was entered in favour of the Appellant against the Respondent while finding that the termination was unfair in terms of one-month salary in lieu of notice, unpaid leave, computation of statutory dues of PF and NSSF, service/severance pay and 12 months' compensation for unfair termination with each party bearing their costs of the claim. The Appellant appeals on the whole of the Judgment

fronting 12 grounds of appeal which this court will frame in to two issues.

14. This court has therefore come up with two main issues: -

Whether the trial court erred by finding that Respondents' termination of employment was unfair and unlawful

ii. Whether the trial court erred in awarding the Respondents their terminal dues.

Whether the trial court erred by finding that Respondents' termination of employment was unfair and unlawful

15. The Appellant never disputed employment of the Respondents but the dispute is on how they left employment. The Appellant alleged that there were complaints from several customers that deliveries were missing some supplies. They had a meeting on 1st October, 2018 with the drivers and turn boys and the meeting ended amicably however the Respondents never showed up for work since then. The 4th Respondent who did not attend the said meeting did not also show up to work.

16. The Respondents on the other hand alleged that on the said date of 1st October, 2018 they were told to pack and go home as the Appellant undertakes investigations and they would be called back but they were never called back.

17. This court notes that the parties herein had an oral engagement whereas it is the duty of the Appellant to reduce the agreement into writing. The Appellant had a duty to disprove any fact alleged by the Respondents as the custodian of employment records under section 74 of the Employment Act.

18. The Appellant's ground of the trial court allowing the claim in favour of the 1st Respondent who did not testify it was clear where the Claimants are a number of Claimant can give approval for one or two of them to testify on their behalf. Rule 9 of **the Employment and Labour Relations Court (Procedure) Rules 2011** allows for this arrangement and it happened in this case. This ground therefore fails.

19. The courts have always held that for termination to pass fairness test there should be both substantive and

procedural fairness. This court refers to the holding in **Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR** among others.

20. This court is of the view that in as much as the Respondent had a duty under section 17(5) of the Employment Act to prove that termination occurred the trial court was right to find that the Respondent illustrated that the termination had occurred. The burden shifted to the Appellant to illustrate that the reasons for the termination were fair under the said provisions.

21. The Appellant alleged that the Respondents absconded duties after the meeting on 10 October, 2018. The Appellant did not prove the allegation of missing supplies since no investigation report was tendered. It relied on the defense of absconding of duties. Under Section 44(4) (a) of the Employment Act 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Appellant relied on the defence of desertion that the Respondents had no intention of returning to the place of work.

22. The Appellant had a duty under section 43 and 47(5) of the act to justify the grounds of termination and demonstrate the reasons were fair and valid which would lead to unfair termination under section 45 of the Act if there was no valid reasons and the procedure followed was unfair.

23. When it comes to desertion the court is well guided by the sentiments in the case of **Omwoyo Onchweri v Board of Management of Kenya YMCA Secondary School [2015] eKLR**, where the court held that:-

18. *Desertion can only take place when an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.*

24. This court has in a number of times pronounced itself on issues of absconding of duties by an employee with recently the court in the case of **Owudu v Digital Sanitation Services Limited (Appeal No. 09 of 2023) [2024] KEELRC 917 (KLR) (18 April 2024) (Judgment)** holding as follows:-

17. First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer.

18. Further, under Section 18(5) (b) of the Act, where the employer cannot trace the employee, notice must be served to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken its legal duty to properly end employment.

25. In this particular case, notice was issued to the Respondents upon abscondment, a report to the labour office and their terminal dues deposited there. In addition, if the Respondent absconded, does the Appellant did not demonstrate that it commenced any disciplinary action against the Respondents under Section 41 of the Employment Act after they allegedly failed to report on duty.

26. In **Joseph Nzioka v Smart Gratings Limited**

[2017] eKLR Nduma J. observed that
“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee

calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

27. In this present case, the Appellant did not illustrate any effort of contacting the Respondents to inform them that they were considering terminating their services due to absconding of duties. The court is not satisfied that the Appellant was on a balance of probabilities discharged its onus of establishing that the Respondents absconded/deserted duty. The Appellant did not issue any show cause letter to the Respondents hence it also failed on the procedural fairness under section 41. This court agrees with the trial court finding that the Appellant terminated the Respondents services unfairly.

Whether the trial learned Magistrate was wrong in awarding the Respondents their terminal dues.

28. The trial court having found the termination to be unfair it was justified in awarding damages for unfair termination. On the issue of the trial court awarding the Respondents the maximum 12 months' the Appellant is that this was excessive in the circumstances.

29. This court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of **Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018)** eKLR where the court held:

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was wrong in the exercise of discretion and occasioned injustice.

30. This court will therefore award the awards herein if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court notes that the award of compensation is discretionary to the court but the court should be guided by considerations set out under Section 49(4) of the Employment Act in awarding the damages herein.

31. This court notes that the trial court failed to properly justify the reasons for the maximum compensation as was held in the Court of Appeal in **Kenya Road casting Corporation v Geoffrey Wakio(2019)** eKLR that;

[22] This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In **Ol Pejeta Ranching Limited vs. David Wanja Muhoro [2017] eKLR** this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.

32. This court in while aware of the considerations under section 4(4) of the Act makes compensation on the length of service of each of the Respondents with the 1st Respondent being employed in 2007, 2nd on 2011, 3rd on 2013 and the 4th on 2017. The Respondents worked 11 years, 8 years, 5 years and 1 year respectively. The compensation in this case ought to be awarded as per years of service and the fact that the Respondents did not have previous disciplinary issues apart from the 1st Respondent who had a warning letter in 2015 and the issue was resolved.

33. This court will therefore interfere with the trial court discretion on the award and award the 1st Respondent 10 months' salary as compensation, the 2nd Respondent 7 Months salary as compensation, the 3rd Respondent 4 months Salary as compensation and the 4th Respondent one-month Salary as compensation.

34. The award of one-month salary pay in lieu of notice was also justified after finding the Respondents were unfairly terminated without notice as provided for under section 36 of the Employment Act. The Respondents were also entitled to salary for the month of September, 2018 since the Appellant's witness confirmed that there was no proof of the payment.

35. On the claim for severance pay which it is clear ought to be service pay this court upheld the trial court decision that the Respondents were entitled to the same as no evidence was tendered to show the Appellant remitted their NSSF deductions or any pension to fail save the exception of section 35(6) of the Employment Act.

36. The Appellant ought to produce itemized receipt slip showing the deductions of the statutory obligations as required by section 20 of the act. Without any proof this court agrees with the trial court however after allowing the prayer for service pay the court should not have allowed for computations of the statutory dues to NHIF and NSSF. The same should fail.

37. On the claim for leave pay this court appreciates that it is continuing injury which the Claimants must file their suit within 12 months after cessation of employment as per section 90 of the Employment Act. This court notes that the employment relationship herein ended in October, 2018 and the claim was filed in April, 2019 which is within 12 months as required.

38. In among other cases, the court in Appeal in **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR**, the court held as follows:

Regarding 'a continuing injury', the provision to Section 90 of the Employment Act requires that the claim be filed within 12 months next after the cessation thereof. The learned Judge erred to determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

39. This court appreciates that leave is an entitlement for an employee under section 28 of the Employment Act. The Appellant as the custodian of employment records under section 74 ought to have produced records showing the Respondents proceeded on leave. Failure to tender such

evidence leads to the conclusion that the Respondents were entitled to the said leave. This court therefore agrees with the trial court on this position.

40. In the upshot the Appeal partially succeeds as follows: -

a. 12 Months salary as compensation for unfair termination is reduced as follows: -

i. 1st Respondent - 12 Months' Salary...Kshs 120,000/=

ii. 2nd Respondent - 7 Months' Salary...Kshs 84,000/=

iii. 3rd Respondent - 4 Months' salary...Kshs 48,000/=

iv. 4th Respondent - 1 Month Salary.....Kshs 12,000/=

b. Prayer 4 of the computation of NSSF dues is disallowed.

c. All the awards of the trial court are upheld.

d. Each party to bear the costs of the Appeal.

41. It is so ordered.

Dated at Nairobi this 5th day of December 2025

Delivered virtually this 5th day of December 2025

Abuodha Nelson Jorum
Presiding Judge-Appeals Division

