



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISII**

**APPEAL NO. E047 OF 2025**

CHERUIYOT ROBERT NGENO.....

....**APPELLANT**

**VERSUS**

PRIDE KINGS SECURITY  
SERVICES LTD.....

....**RESPONDENT**

*(Being an appeal from the judgment of Hon. G. N. Barasah  
(SRM) delivered on 16<sup>th</sup> July 2025 in Kisumu CMELRC No. E235  
of 2024)*

**JUDGMENT**

1. Dissatisfied with the entire Judgment of the trial court in  
***Kisumu CMELRC No. E235 of 2024, Cheruiyot Robert  
Ngeno v Pride Kings Services Ltd***, the Appellant filed a

Memorandum of Appeal dated 21<sup>st</sup> July 2025 raising the following grounds:

- a. That the Learned Magistrate erred in law and fact in finding that he voluntarily resigned, whereas the totality of the evidence on record demonstrated that the resignation was as a result of persistent non-payment of salaries, unpaid terminal and contractual dues and adverse working conditions amounting to constructive dismissal.
- b. That the Learned Magistrate erred in law and fact by failing to properly apply the principles governing constructive dismissal, particularly in cases where the employer consistently failed to pay salaries in a timely and regular manner and neglected to honour statutory entitlements including annual leave, public holidays, overtime, rest days, and housing allowance, which failure led to a wrongful conclusion that he voluntarily resigned.
- c. That the Learned Magistrate erred in law and fact in holding that he was not entitled to compensation for unfair termination through constructive dismissal.

- d. That the Learned Magistrate erred in law and fact by holding that he was only entitled to underpayment for the last 6 months before resignation without a proper computation under the relevant Regulation of wages (General) (Amendment) Orders and the Employment Act.
- e. That the Learned Magistrate erred in law and fact by failing to award him his terminal and contractual dues as guaranteed under the provisions of the Employment Act and the relevant Regulation of Wages, (General) (Amendment) Orders, thereby erroneously tying the determination of these entitlements to the outcome of the issue of unfair termination, instead of determining them independently on their own merit.
- f. That the Learned Magistrate erred in law and fact by failing to appreciate and give weight to his testimony and supporting documentary evidence, which supported a declaration that his employment was unfairly terminated on account of constructive dismissal.

g. That the Learned Magistrate erred in law and fact by disregarding his evidence, which was neither challenged nor controverted by the Respondent and which the trial court ought to have relied upon in arriving at a just and fair determination.

2. On the basis of these grounds, the Appellant prayed that the appeal be allowed, the judgment of the trial court be set aside, and in its place an order be issued allowing the suit. The Appellant also sought costs of both the appeal and the trial court, together with any other order the Court may deem fit to grant.

3. The Appeal was canvassed by way of written submissions.

#### Appellant's Submissions

4. The Appellant identified the following issues for determination:

(i) Whether the Learned Magistrate erred in law and fact in finding that the Appellant voluntarily resigned from

employment instead of finding that he was constructively dismissed.

(ii) Whether the Learned Magistrate erred in law and fact by failing to independently consider and determine the Appellant's claim for terminal and contractual dues, which were distinct and separable from the issue of unfair termination, contrary to the provisions of the Employment Act.

5. On the first issue the Appellant submitted that the Respondent's failure to pay salaries resulted in his resignation which amounted to constructive dismissal. He asserted that the Respondent's persistent non-payment of salary constituted a repudiatory breach going to the root of the employment contract, rendering continued employment intolerable. In support of his position, he relied on the case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 222**, where Lord Denning MR held that an employee is constructively dismissed if the employer is guilty of conduct amounting to a significant breach going to the root of the employment contract, or conduct that demonstrates an intention not to be bound by one or more of the essential

terms of the contract. He also cited **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, in which the court articulated the essential elements of constructive dismissal as follows:

- (1) *What are the fundamental or essential terms of the contract of employment?*
- (2) *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*
- (3) *The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*
- (4) *An objective test is to be applied in evaluating the employer's conduct.*
- (5) *There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved. An employee may leave with or without*

*notice so long as the employer's conduct is the effective reason for termination.*

(6) *The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*

(7) *The burden to prove repudiatory breach or constructive dismissal is on the employee."*

(8) *Facts giving rise to repudiatory breach or constructive dismissal are varied.*

6. Further reliance was placed on the case of **Lokamiti & 4 others v Olsuswa Farm Limited [2025] KEELRC 992 (KLR)** which affirmed that persistent non-payment of wages for several months constitutes intolerable working conditions amounting to constructive dismissal, and **Oliyo v Pride Security Services Ltd [2024] KEELRC 487 (KLR)**, where the Court held that failure to pay wages constitutes a repudiatory breach of a fundamental term of employment, thereby justifying resignation on grounds of constructive

dismissal. The Appellant submitted the non payment of his salary for 8 months namely; August-December 2023, January 2024, May 2024 and June 2024, citing his bank statements produced as Cexh 2. He asserted that this evidence remained uncontroverted as the Respondent failed to produce employment records under sections 10(7) and 74(1) of the Employment Act. It was his contention that the Respondent's mere denials in its pleadings could not dislodge his evidence citing **Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009] eKLR**, which held that where a party fails to call in evidence in support of pleadings, they remain unsupported. He therefore contended that his resignation was unavoidable and precipitated solely by the Respondent's conduct, thereby amounting to unfair and unlawful termination.

7. On the second issue the Appellant submitted that the Learned Magistrate erred by failing to independently consider and determine his claim for terminal and contractual dues, separately from the issue of unfair termination. He cited **Nation Media Group Ltd v Munene [2025] KECA 114 (KLR)** which held:

*"The remedy of compensation for unfair termination is separate and distinct from any terminal dues that were due to the respondent as a result of the termination, whether by redundancy or otherwise. The terminal dues compensate the employee in view of the service rendered until the date of termination, and are set down by law and the contract of employment."*

8. The Appellant asserted that the claims for underpayment, unpaid wages, off days, leave, housing allowance, holidays, overtime, and service pay being continuing injuries under section 89 of the Employment Act, were rightfully filed within the stipulated one-year period. He relied on **The German School Society & another v Ohany & another [2023] KECA 894 (KLR)**, which cited with approval the Supreme Court of India in **M. Siddiq v Suresh Das (2020) 1 SCC 1** as follows:

*".... A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single*

*completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature. [...]Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no*

*continuing wrong arises even though the effect or damage that is sustained may endure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation."*

9. He also relied on **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR**, where unpaid terminal dues were held to constitute continuing injury. The Appellant further submitted that the trial court erred in dismissing his claims for dues on the basis that they had not been raised prior to resignation or before filing suit, asserting that no such requirement exists under the Employment Act. He relied on **The German School Society case (supra)** which confirmed that claims for continuing injury may be brought even after a long delay, provided they are filed within the statutory time after cessation.

10. With respect to unpaid wages the Appellant submitted that he was entitled to at least six months' unpaid salary. He highlighted his uncontroverted bank statements, the fact

that he was employed as a night security guard from November 2019 to 27<sup>th</sup> June 2024 and section 18 (2) (c) of the Employment Act that requires employers to pay wages at the end of each month. On underpayment the Appellant submitted that he was consistently underpaid throughout his employment. He asserted that having served between November 2019 and 27<sup>th</sup> June 2024 within Kisumu, the minimum wages as per the Regulation of Wages (General) (Amendment) Orders 2018 and 2022 were Kshs. 15,141.95/- and Kshs. 16,959/- respectively. He submitted that his bank statements evincing payment ranging between Kshs. 8,400/- and Kshs. 12,000/- clearly showed underpayment.

11. As for unpaid off days, the Appellant submitted that he worked seven days a week without rest contrary to section 27(1) of the Employment Act that prescribes at least one rest day every seven days. Regarding unpaid leave days, the Appellant submitted that he never proceeded on leave for the entire 4 years and 7 months of his employment contrary to section 28(1) of the Employment Act. He urged the court to award him unpaid leave on account of the Respondent's

failure to produce records under section 74(1)(f) of the Employment Act. On house allowance the Appellant submitted that his salary was not consolidated. He cited section 31 of the Employment Act which behoves the Employer to provide reasonable housing or in the alternative pay sufficient housing allowance. He maintained that the Respondent's failure to keep or produce statutory employment records justified an adverse inference against it. He relied on **Johnson Otsieno Ogola v Hatari Security Guards Ltd [2021] eKLR**, where the court awarded the Claimant unpaid housing allowance upon finding that the salary was below the minimum wage and the employer had failed to prove that the wages were consolidated. On unpaid public holidays he equally submitted that he worked during holidays for the entire employment period. He maintained that his evidence remained uncontroverted as the Respondent failed to provide records. Concerning, overtime the Appellant urged the court to award him the same as he worked 6.00pm to 6.00am daily. Additionally, he asserted that the Respondent did not produce evidence of payment. On service pay he maintained that he was entitled to the

same as the Respondent did not regularly remit NSSF contributions. In conclusion he urged the court to allow the appeal.

#### Respondent's Submission

12. The Respondent on its part identified the issues for determination as:
- (a) Whether the Appellant was unlawfully terminated.
  - (b) Whether the Appellant was entitled to the award of damages.
13. On the first issue, the Respondent submitted that the Appellant resigned voluntarily, noting that his resignation letter cited an emergency, not unpaid salary. It asserted that all salary arrears had been settled by the time of resignation.
14. As for the second issue, the Appellant submitted that the Respondent was not entitled to salary arrears as his salary was duly paid. It referenced the account statement, and the Appellant's concession in in cross-examination that the arrears were paid in line with the statement. Regarding

leave, the Respondent submitted that no evidence was tendered showing that the Appellant applied for leave and was denied. It further asserted that leave arrears dating back to 5 years ago were statute barred. On unpaid holidays, off days, and overtime, the Respondent submitted that no evidence was produced to justify the claims. On underpayment, the Respondent submitted that the Appellant earned Kshs. 12,000/-, while the applicable minimum wage under Gazette Notice No. 114 was Kshs. 15,600/-, hence no underpayment arose. In conclusion the Respondent urged the court to uphold the trial court's judgment and dismiss the appeal with costs.

#### Disposition

15. The court on appeal is required to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at my own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where the Court of Appeal outlined the duties of a first appellate court as follows:

*"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."*

[Emphasis supplied]

16. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have come to the following determination. I have duly evaluated the evidence they presented in the Trial Court, and which evidence and documents in support thereof, are before this Court. The issue of limitation is one that cannot be over-emphasised. The claims that were presented outside the statutory timelines are not payable and no amount of litigation can remedy the limitation that set in. As these sums were excluded, the Trial Court cannot be faulted. I

therefore uphold the decision on that score. The decision of the Learned Magistrate was correct in respect to the failure of the Appellant to avail any requests for the sums claimed as leave or the underpayment alleged. There was also no proof of the alleged constructive dismissal. As such the appeal is devoid of merit and accordingly dismissed. Each party will bear their own costs.

Orders accordingly.

**Dated and delivered at Kisumu this 15<sup>th</sup> day of**

**December 2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**