

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E148 OF 2025

NEWMATIC KITCHEN KENYA LIMITED.....APPELLANT

-VERSUS-

ISABELLA ATIENO OKODERO.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. T.M. Orlando (PM)
delivered on 23rd April 2025 in Nairobi MCELRC No. E879 of 2024)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. T.M. Orlando (PM) delivered on 23rd April 2025 in Nairobi MCELRC No. E879 of 2024 filed a Memorandum of Appeal dated the 14th of May 2025 seeking the following orders: -
 - a) **The Judgment and Decree made by the subordinate court in Milimani in Employment Cause No. E879 of 2024 by Hon. Tom Mark Orlando on 23rd April 2025 be and is**

hereby set aside and be substituted with an order dismissing the Respondent's claim and allowing the Appellant's Counterclaim dated 20th June 2024 with costs.

b) **The Costs of the Appeal be awarded to the Appellant.**

2. The Respondent filed a cross-appeal vide a memorandum of cross-appeal dated 13th June 2025 seeking the following orders:

a) **The award of compensation for unfair termination be enhanced from six (6) months' salary to twelve (12) months' salary.**

b) **The costs of this cross-appeal be awarded to the Respondent.**

c) **Any other relief that this Honourable Court may deem just and fit to grant.**

GROUND OF THE APPEAL

3. The Honourable Magistrate erred in law and fact in finding that the Respondent's employment was unlawfully terminated despite evidence demonstrating that the Respondent was subjected to disciplinary proceedings.

4. The Honourable Magistrate erred in law and fact in finding that the Claimant was not issued with notice as required by law despite evidence demonstrating issuance of the same.

5. The Honourable Magistrate erred in law and in fact by shifting the burden of proof to the Appellant contrary to the provisions of the Employment Act.

6. The Honourable Magistrate erred in law and in fact in awarding the Respondent gratuity without any statutory or contractual basis.
7. The Honourable Magistrate erred in law and in fact in awarding the Respondent excessive damages without taking into account the Respondent's conduct and/or mitigating circumstances of the case.
8. The Honourable Magistrate erred in law and in fact by making adverse findings against the Appellant based on the conduct of a third party who was neither a party to the suit nor subjected to cross-examination.
9. The Honourable Magistrate erred in law and fact in failing to consider the written submissions by the Appellant on both the law and facts and the binding authorities hence arrived at an erroneous and unjust determination.
10. The Honourable Magistrate erred in law and fact in disregarding and/or failing to consider the evidence and submissions before her in totality hence arrived at an erroneous determination.

GROUND OF THE CROSS-APPEAL

11. The Honourable Magistrate erred in law and in fact by failing to award the maximum twelve (12) months' salary as compensation for unfair termination notwithstanding the circumstances of the case, including the manner of termination, the Appellant's conduct, and the impact on the Respondent's livelihood.

12. The Honourable Magistrate exercised its discretion unreasonably by awarding only six (6) months' salary as compensation without adequate justification, thereby occasioning a miscarriage of justice.
13. The Honourable Magistrate failed to consider or accord sufficient weight to the aggravating factors surrounding the Respondent's termination, including lack of procedural fairness and absence of valid reasons for termination and more so the Appellant's malicious act of raising a false alarm which led to the Respondent's unlawful arrest and detention without charge. At the time, the Respondent was a breastfeeding mother of a toddler and suffered immense emotional distress, reputational harm, and disruption to her dignity and family life-all of which ought to have informed a higher compensatory award.
14. The award of six (6) months' salary was manifestly low, given the Respondent's length of service, the humiliating circumstances of termination, and the difficulty in securing alternative employment.

BACKGROUND TO THE APPEAL AND CROSS-APPEAL

15. The Respondent filed a suit against the Appellant vide a statement of claim dated 24th May 2024 seeking the following orders: -
 - i. A declaration that Claimant's contract of service with the Respondent was unfairly, unlawfully and wrongfully terminated.

- ii. Payment of the Claimant's terminal benefits, underpayments and compensation for unfair termination of employment amounting to Kshs. 915,733.50/= as tabulated under paragraph 27 of this Statement of Claim.
- iii. Certificate of Service.
- iv. Costs of this suit with interest.
(pages 3-7 of Appellant's ROA dated 24th June 2025).

14. The Respondent filed her witness statement dated 24th May 2024; and list of documents of even date with the bundle of documents attached (pages 10-22 of ROA).

15. The claim was opposed by the Appellant who entered appearance and filed a defence and counterclaim dated 20th June 2024 seeking the following orders:

- a) Kshs. 214,000/- and interest thereon until payment in full.
- b) Costs of and incidental to the counterclaim.
- c) Costs of the suit and counterclaim and interest on costs.
- d) Any other relief the court may deem fit and just to grant.

(pages 23-26 of ROA).

16. The Appellant also filed a list of witnesses dated 20th June 2024; a witness statement of H Aidan Li of even date; and a list of documents of even date with the bundle of documents attached (pages 27-51 of ROA).

17. In response to the defence and counterclaim, the Respondent filed a reply dated 2nd July 2024 (pages 52-56 of ROA).
18. The Respondent's case was heard on the 28th of November 2024 with the Respondent testifying in the case. She relied on her filed witness statement as her evidence in chief and produced the documents attached to her list of documents. She was cross-examined by counsel for the Appellant, Mr. Isahi (pages 136-139 of ROA).
19. The Appellant's case was heard on the same day, with the Appellant calling one witness: Haidan Li, as DW1, who testified on behalf of the Appellant. She relied on his filed witness statements as her evidence in chief, and produced the Appellant's documents. She was cross-examined by counsel for the Respondent Mr. Sichangi (pages 140-142 of ROA).
20. The parties took directions on filing of written submissions after the hearing, and complied.
21. The Trial Magistrate Court delivered its judgment on the 23rd of April 2025 allowing the Claimant/Respondent's claims to the tune of Kshs. 652,843/- comprising of one month's salary in lieu of notice, unpaid salary for March-April 2024, gratuity, unpaid public holidays worked, and 6 months' salary as compensation for unfair termination (judgment at pages 143-146 of ROA).

DETERMINATION

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

Issues for determination

23. The Appellant submitted generally on the grounds of appeal in their submissions dated 16th October 2025.

24. On her part, the Respondent identified the following issues for determination in her submission dated 21st October 2025:

- i. W
Whether the trial Court erred in finding that the Respondent's employment was unfairly, wrongfully, and unlawfully terminated.
- ii. W
Whether the trial Court improperly shifted the burden of proof to the Appellant contrary to the provisions of the Employment Act.
- iii. W
Whether the Respondent was entitled to the reliefs awarded, and the collateral issue of whether the trial Court erred in the exercise of its discretion by awarding six (6) months' salary instead of the full twelve (12) months' salary as provided by law.

25. The court, having considered the grounds of appeal and cross-appeal finds the issues to be considered in the determination of the appeal and cross-appeal to be-

a. Whether the trial Court erred in finding that the Respondent's employment was unfairly, wrongfully, and unlawfully terminated.

b. Whether the trial court erred in reliefs granted

- c. *Whether the trial Court erred in the exercise of its discretion by awarding six (6) months' salary instead of the full twelve (12) months' salary as provided by law.*

Whether the trial Court erred in finding that the Respondent's employment was unfairly, wrongfully, and unlawfully terminated.

Appellant's submissions

26. Grounds 1 & 2: Erroneous finding that termination was unlawful despite evidence -The Appellant is aggrieved with the trial Court's finding that the Respondent was not issued with notice as required by law. Refer to the judgment at page 145 of the Record. This finding totally disregarded the evidence tendered by the Appellant to demonstrate that due process was followed including issuance of requisite notice to show cause, inviting representations and conducting a disciplinary hearing. was issued. It is noteworthy that the following facts are uncontested as expressly admitted by the Respondent during cross-examination: - a. That the Respondent was on 5th March 2024 issued with an invitation to show cause why disciplinary action should not be taken against her. b. That the said invitation was accompanied by a list of queries highlighting the issues where clarification was needed to enable the Respondent prepare in advance. That the Respondent did attend a disciplinary hearing on 15th March 2024, after 10 days' notice where she made her representations on the allegations constituting gross misconduct on her part. That the outcome of the disciplinary hearing and reasons for her termination were duly communicated to the Respondent on 3rd April 2025. That the Respondent did not raise any issues/complaints arising out of the disciplinary hearing. Refer to the lower Court proceedings at page 138 of

the Record. The effect of this finding in, turn influenced the Court to arrive at an erroneous finding that the termination was unfair and consequently award damages.

27. Ground 5: Awarding damages without taking into account the Respondent's conduct - The Appellant's disciplinary committee having found the Claimant liable for gross misconduct proceeded to terminate her services. The Appellant subsequently sought to hold the Respondent accountable for the stolen items by lodging a formal complaint with the police under OB No. 20 dated 28th March 2024. 20. Section 44 of the Employment Act allows an employer to summarily dismiss an employee who wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly. Subsection (g) thereof further allows summary dismissal where an employee engages in criminal conduct or conduct that is likely to put into jeopardy the property of the employer. In this case, The Respondent's negligence occasioned double validation and unauthorized release of goods through the system putting the Appellant's property in jeopardy and occasioning loss to the Appellant. This amounts to gross misconduct and would warrant summary dismissal. Having been found liable for gross misconduct, the Claimant was ripe for summary dismissal and was therefore not entitled to notice of termination or payment in lieu of notice. The trial Court completely disregarded this mitigating aspect in its computation and award of damages. Reliance is placed on *Mumbo v Oduol t/a Time Sharp Enterprises* [2023] KEELRC 1195 (KLR), where the Court stated: - "Where the employee is found to be of such gross misconduct, summary dismissal is allowed without notice or with less notice due to breach of contract through acts of gross

misconduct....". Making adverse findings based on the conduct of third parties -The Appellant faults the learned trial court for making adverse findings against the Appellant company based on the alleged conduct of third parties who were neither parties to the proceedings nor subjected to cross-examination, thereby violating the rules of natural justice and the Appellant's right to a fair hearing under Article 50(1) of the Constitution. The Court proceeded to infer wrongdoing on the Appellant based on the Respondent's unsubstantiated claims of alleged discrimination and favouritism by the Appellant's junior staff who were not parties to the proceedings. We submit that Court proceedings should not be used to settle personal scores between disgruntled staff and their supervisors. Notably, the Respondent confirmed on cross-examination that she has never escalated the alleged instances of discrimination to the company's top management for remedial action. At any rate, high level decisions such as hiring and termination of staff are not the prerogative of the said Faith Nyamisa.

Respondent's s submission's

28. GROUND 1: THAT the learned trial Magistrate erred in law and fact in finding that the Respondent's employment was unlawfully terminated despite evidence demonstrating that the Respondent was subjected to disciplinary proceedings. - The Appellant takes issue with the trial court's finding of unfair termination on the ground that disciplinary proceedings had been undertaken. This position fails to appreciate that a court may still find a termination unfair notwithstanding procedural compliance, where substantive justification has not been proved. At page 144 of the record of appeal which captures the Judgment of the trial court, the trial court observed that; "The respondent proved that the claimant was

taken through the disciplinary procedures and given a hearing before she was terminated. The only question therefor is whether the grounds for termination were fair and justified” Accordingly, Ground 1 not only fails but also demonstrates the Appellant’s clear misunderstanding of the applicable law and principles governing unfair termination. In Daniel Kiplagat Kipkeibut v Smep Deposit Micro Finance limited (2016) eKLR where the court cited with approval decision in Walter Ogal Anuro v Teachers Service Commission (2013) eKLR where the court held that:- Substantive justification has to do with establishment of reason for the termination. Upon re-evaluating the evidence presented by the Appellant in support of the grounds for termination, this Honourable Court will inevitably arrive at the same conclusion — that the Appellant failed to prove the substantive justification for the Respondent’s termination. In the notice to show cause dated 5 th March 2024 captured at page 44 to 46 of the record of appeal, a list of queries concerning three of the Appellant’s clients was attached, namely; a) Solviet Securities Limited b) Adaram Monic Enterprises c) Rhodher Stovers. The queries raised regarding these three clients pertained to the alleged loss of items and/or double release/validation. However, the Appellant did not produce any complaints from these clients indicating that they did not receive the products they ordered, nor did they provide any evidence that the clients received items they were not supposed to, as a result of double release. In an attempt to prove wrongdoing on the part of the Claimant, the Appellant produced Exhibit 2, a delivery-note for Solviet Securities Limited dated 25th October 2022. However, as per paragraph 7 of the Respondent’s own Statement of Response, this date is clearly outside the period during which the stock is alleged to have been lost. Moreover, it pertains to a separate transaction and cannot, in any way, substantiate wrongdoing by the Claimant in

August 2023. The fact that an item transacted in October 2022 became the subject of inquiry in August 2023—almost a year later—with allegations that the Respondent failed to post the delivery in the AP work group, is a clear indication of a targeted witch-hunt by the Appellant’s HR officer, one Faith Nyamisa, against the Respondent. Similarly, for the other two client, Adaram Monic Enterprises and Rhodher Stovers, in attempt to show evidence of wrong doing, the Respondent produced as exhibit 3 and 4 what appeared to be screenshots of items ordered by the said Appellant’s said Clients on 8th August 2023 and on 9th August 2023. The documents in question listed items such as Hood Wall, Microwave, Hob Glass, Oven, Chopping Board, Double Basket, BK 4127 Hardware, among others. However, none of these documents identified the specific products alleged to have been lost, how the loss occurred, or whether these clients erroneously received the products. 18. Furthermore, the Appellant did not clarify whether any of the clients failed to receive the products they had ordered and paid for. At page 141 of the Record of Appeal, which captures the proceedings before the trial court, it is evident that when the Appellant’s director was pressed on these documents during cross-examination, her responses were as follows: “We do not have any evidence that the customer did not receive the goods.” “There is a document which we did not file which said that the items were double released.” “These are contradicting documents.” “I cannot pinpoint the product which was double released.” “In Exhibit 2, there is a delivery showing someone sent the items, but he is not the one on the order of Kshs. 214,000/=.” These responses during cross-examination clearly demonstrate the absence of credible evidence to establish substantive justification. The Appellant could neither identify the specific products allegedly “double released” nor prove any wrongdoing on the part of the Respondent including the alleged stock theft. That the

Appellant, in its letter of termination dated 3rd April 2024, stated as follows:“Regrettably, the explanation you provided regarding the circumstances surrounding the loss of the items was not satisfactory and did not align with the evidence gathered by the audit team.”The critical question then arises: where is this evidence allegedly gathered by the audit team, and why was it not produced before the trial court? The only logical inference is that such evidence was never produced because it did not, in fact, exist. 22. In view of the foregoing, and upon consideration of the totality of the evidence, it is clear that the Appellant failed to discharge its statutory burden under Section 47(5) of the Employment Act, 2007, to prove valid and fair reasons for termination. Consequently, the dismissal of the Respondent was unfair, wrongful, and unlawful, and the trial court’s finding in that regard cannot be faulted.

Decision

29. The grounds of appeal under the issue were-
- A. The Honourable Magistrate erred in law and fact in finding that the Respondent's employment was unlawfully terminated despite evidence demonstrating that the Respondent was subjected to disciplinary proceedings.
 - B. The Honourable Magistrate erred in law and in fact by shifting the burden of proof to the Appellant contrary to the provisions of the Employment Act.

- C. The Honourable Magistrate erred in law and in fact by making adverse findings against the Appellant based on the conduct of a third party who was neither a party to the suit nor subjected to cross-examination.
- D. The Honourable Magistrate erred in law and fact in failing to consider the written submissions by the Appellant on both the law and facts and the binding authorities hence arrived at an erroneous and unjust determination.
- E. The Honourable Magistrate erred in law and fact in disregarding and/or failing to consider the evidence and submissions before her in totality hence arrived at an erroneous determination.
30. 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).

31. On procedural fairness the trial court held –*‘The respondent proved that the claimant was taken through the disciplinary procedures and given a hearing before she was terminated.’* The only question, therefore, is whether the grounds for termination were fair and justified.’ I find the ground of appeal on the process was mistaken as the trial court held there was compliance with disciplinary process.

32. On substantive fairness as regards the validity of the reason for the termination the trial court held –*‘The only question therefor is whether the grounds for termination were fair and justified.*

Section 47 (5) of the Employment Act provides that" for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. Section 107 of the Evidence Act Cap 80 Laws of Kenya is clear on this point; the said section provides that 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.

section 107 (2)provides that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In this case the claimant testified that she was not the one responsible for the release of the goods, she stated that one Kevin was the one in charge of the branch and thus responsible for the loss of goods. On the other hand, the defence witness admitted that

they never tender evidence in court to show what goods were lost or who released the goods without authority. The defence witness did not deny that Kevin was the one responsible for the dispatch and as such he was the one who was responsible for any loss. I agree with the advocate for the claimant that this was a clear case of which hunt since Kevin who was head of the branch was never held liable for the loss which in any event was not proved before the court.

I am convinced that the claimant was telling the truth since the respondent who is the custodian of the documents could not tender any evidence to prove that the claimant is the one who released the goods and not Kevin, who was in charge of the branch. As stated in the case of Liz Anyango vs Leisure Lodge limited (2018)eKLR

It was the duty of the claimant in this case to prove his case on a balance of probabilities.

Section 107 of the Evidence Act Cap 80 Laws of Kenya is clear on this point; the said section provides that 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.

section 107 (2) provides that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

find it hard to believe the evidence of the respondent's witness that the claimant was responsible for the loss which was not substantiated the defence witness stated that she did not have the documents to saw who released the goods or a list of the goods released without authority.

The only conclusion I can arrive at is that the claimant was unlawfully terminated as the allegations of theft were not substantiated.

I find that the claimant proved her case on a balance of probabilities on unlawful termination.”

33. The termination of the employment was not in dispute and the court was satisfied that the respondent laid information and evidence before the lower court to challenge the validity of the reason for the termination and thus the burden shifted to the appellant to prove the reason for the termination in compliance with the provision on prove of employment claims under section 47(5) of the Employment Act to wit- ‘For any complaint of unfair termination of employment or *wrongful dismissal* the burden of proving that an unfair termination of employment or *wrongful dismissal* has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or *wrongful dismissal* shall rest on the employer.’ The burden of proof of the reasons for the termination is as per section 43 of the Employment Act to wit- ‘43 **Proof of reason for termination**

(1)In any claim arising out of termination of a contract, the employer shall be required to prove 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 are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’ The reason for termination of employment ought to be related employees conduct, capacity or compatibility; or based on the operational requirements of the employer. (see section 45 of the Employment Act).

34. The reason for the termination were stated in the letter by the appellant to the respondent dated 3rd April 2024 – ‘Re: *TERMINATION OF EMPLOYMENT*

Reference is made to the above.

Following conclusion of our investigation into the recent cases loss of goods from our inventory, missing stocks and unauthorized release of goods through the system at the Kisumu branch and upon careful consideration of the facts presented and your explanation provided during the investigation hearing conducted on 15th March 2024, we have determined that your continued employment with the company is no longer viable.

Regrettably, the explanation you provided regarding the circumstances surrounding the loss of the items was not satisfactory and did not align with the evidence gathered by the audit team. It is imperative that all team members uphold the values and standards of integrity and honesty that are central to our company's operations.

Given the seriousness of this matter and our commitment to maintaining a trustworthy and accountable work environment, we have no choice but to terminate your employment

effective immediately. This decision is not taken lightly but is necessary to uphold the integrity of our operations and to protect the interests of our clients, stakeholders, and fellow employees.

Please be advised that any outstanding benefits or entitlements will be promptly processed and sent to you in accordance with company policy. Additionally, we shall arrange for the return of any company property or assets currently in your possession. Please be further advised that as part of our standard procedure, an audit process is ongoing to ascertain the full extent of the loss. Upon the conclusion of the audit, the company will proceed with the necessary steps to recover the lost items.

Should you have any questions or require further clarification regarding this decision, please do not hesitate to contact the undersigned”

35. Prior to the termination the respondent had been issued by the appellant with invitation to the hearing stating as follows- *‘RE: INVITATION TO MAKE REPRESENTATIONS & SHOW CAUSE WHY DISCIPLINARY ACTION SHOULD NOT BE TAKEN AGAINST YOU REGARDING INCIDENTS OF DOUBLE RELEASE OF ITEMS FROM THE SYSTEM*

Reference is made to the above and numerous correspondence on the subject over the last few days.

Reference is made to the above and numerous correspondence on the subject over the last few days.

It has come to the company's attention that there have been incidents of double release of items from the system under circumstances that suggest possible negligence and/or misconduct on your part. Our preliminary investigations into this matter point to your involvement in among others, the loss of two ovens (MODEL NUMBER: FM672) and two microwave ovens (MODEL NUMBER :28EPS) worth approximately Kshs.214,000. This to notify you that the recently released report on items requiring further clarification is incomplete. The value amounts are yet to be fully determined. Consequently, we will share a similar report once we receive the final reporting from the audit team. We take matters of integrity seriously as they directly impact our operations and overall efficiency.

Consequently, the company invites you to a disciplinary hearing to discuss your involvement in the afforested incidents, provide an opportunity for you to respond to any queries or concerns and show cause why disciplinary action should not be taken against you.

The disciplinary hearing is scheduled to take place on 15th March 2024 at the company's head office along James Gichuru Road as from 0930hrs. During this meeting, you will have the opportunity to make your representations and address any questions or evidence that may arise during the course of the investigation. We encourage you to come prepared with any relevant information or documentation that you believe may assist in clarifying the situation. You are allowed to have another employee or union representative of your choice present during this hearing.

Please be advised that attendance at this disciplinary hearing is mandatory. Failure to attend will result in further disciplinary action being taken without any further reference to you.

Should you have any questions or require further clarification regarding the disciplinary hearing or the investigation itself, please do not hesitate to reach out.” During the cross-examination of the respondent, she told the court she was a salesperson and supervisor of the Mombasa branch of the appellant. She told the trial court her problem started with an Order related to Solviet IT security Ltd. She told the trial court that the sales order was made in November 2023 and Kelvin was hired in December 2023. That the order was in progress when Kelvin was employed. That there was a policy on how orders would proceed. She confirmed there were working groups, and she posted the order in the group. That the item was delivered by Kelvin. She was asked to clarify on the order, and she did. She admitted she was issued with issues by the employer to respond to and did. She denied having received the termination letter. At re-examination, the respondent said Kelvin was in charge of the release of goods. The appellant called as their witness Hydell. At cross-examination, she said they did not have evidence that the customer did not receive the goods. He could not pinpoint the goods which had been double released. He told the court that in exhibit 2 there was a delivery to someone who was not in the order. The date of delivery was August 2023.

36. The jurisprudence on the reasons for termination was restated by the Court of appeal decision in

Ondari v National Hospital Insurance Fund [2025] KECA 687 (KLR) as follows-‘... it was not for the court to audit the truth of the reasons for termination of employment contrary to the requirements of section 45 of the Employment Act..

The appellant complained that the termination process was unfair; he also blamed the trial court for finding that the court's duty was not to verify the truth of the reasons advanced for terminating employment. According to him, the trial court's reasons are contrary to and contradict Section 45 of the Act. In several of its decisions, this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed. In the case of Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR, this Court stated, albeit in a redundancy case, that: “As long as the employer genuinely believed that there was a redundancy situation, any termination was justified, and it was not for the court to substitute its business decision of what was reasonable. The Court has no supervisory role.”

In the case of Kenfreight (E.A.) vs. Benson K. Nguti Civil Appeal No 31 of 2015 2016 KECA 688 (KLR), this Court had this to say: “The next and more critical question is whether the termination was unfair. It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee’s conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. Section 43 specifically places the burden to prove that the

termination was fair on the employer”. From the above chronology of events, starting with the interim audit report, which was discussed in the presence of the appellant, the appellant was given opportunities to make representations and to be heard on the allegations. In the end, the respondent found the appellant had not exonerated himself and believed that there were reasons to terminate his services. We agree with the trial court that indeed it is not for the court to interrogate the said reasons. Further, we are satisfied that the processes leading to the appellant’s termination were fair.’’

37. The trial court blamed one Kelvin for the loss of the goods and being in charge of the branch, yet in cross-examination, the respondent admitted she was the head and supervisor of the branch. She did not dispute that she made two sale orders. The charge disclosed in the invitation letter was involvement in the loss of the ovens. The Respondent admitted having made the 1st order of the items in August 2023 before Kelvin joined the company. The Court of Appeal(Ondari , supra) held that the court has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed. Due process was followed. The claimant admitted she generated sale orders twice and was required to post the orders in the working group and from the questions posed to her the same had not been posted(page 45 Of ROA). The Respondent was asked, ‘Why did you reprint a previous delivery order AP/OUT00657 DATED 25TH OCTOBER 2022 FOR Kelvin to release? The other question was she was solely in charge of the branch. The court found that the appellant had demonstrated to court that it had valid basis to suspect the respondent was involved in the loss of the items by her conduct. The standard of prove was that of balance of probabilities and

not one of beyond reasonable doubt. The trial court found due process was followed. On appeal, the court, having evaluated the evidence before the trial court, holds that the trial court erred in finding the reason for the termination was not valid, hence unfair termination(Mbogo v Shah). The trial court decision is set aside and replaced with a decision that the termination was lawful and fair.

Whether the trial court erred in relief sought

38. Notice pay was not due as the termination is held on appeal to be lawful and fair. Same fate follows the compensation for unfair termination. The award for notice pay and compensation is set aside.

39. On award of gratuity the trial awarded the same for lack of payment of pension. The appellant submitted that it faults the trial Magistrate for awarding the Respondent gratuity without any statutory or contractual basis. Notably, the trial Court acknowledged in its judgment that gratuity is payable where the employment contract provides for the same or where the employer does not contribute to any registered retirement benefit scheme. (Refer to the last paragraph of the judgment at page 146 of the Record). The trial Court then proceeded to hold that the Appellant who is the custodian of documents did not demonstrate payment of contributions on behalf of the Respondent to a registered scheme. It then awarded the Respondent 1 month's salary for each year worked which award totaled Kshs. 175,260/-. It is submitted by the appellant that this award is erroneous in both law and fact for the following reasons:- That there was in fact evidence on record showing payment of contributions by the Appellant on behalf of the Respondent into the National Social

Security Fund (NSSF). Attached to the Respondent's own List of Documents are itemized pay slips which indeed show that NSSF was being deducted from the Respondent's earnings on monthly basis. Refer to copies of pay slips at page 17 of the Record. Pursuant to section 35 (6) (d), the Respondent was not entitled to any gratuity as she was a member of NSSF. Further, it is uncontested that her contract of employment had no provision for service gratuity. The appellant submitted that while reversing a superior Court's findings on party's eligibility for gratuity, the Court of Appeal in Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] KECA 759 (KLR) held as follows: "There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement. Severance pay on the other hand, is only payable under Section 40(g) of the Employment Act where an employee is terminated on account of redundancy. See Hema Hospital vs Wilson Makongo Marwa [2015] eKLR. In the current appeal before us the respondent was entitled to severance pay at the rate of not less than fifteen days' pay for each completed year of service." "...We are persuaded by the above reasoning and would further add that for an employee to claim gratuity, it must be provided in the contract of employment or provided for in a Collective Bargaining Agreement or a statute. Suffice to state that the Employment Act of 2007 does not make it mandatory for employers to pay gratuity to employees". (Emphasis supplied). Further reliance is placed on this Court's holding in the case of Ouru v Eveready Security Guards Co. Ltd [2023] KEELRC 3049 (KLR) thus: "Whereas service pay is statutorily provided for under Section 35(5) of the Employment Act, 2007 and is only triggered where the provisions of Section 35(6) of the Act are inapplicable, service gratuity is contractual and

the Appellant did not demonstrate that his contract of employment had a provision for service gratuity. The prayer is unsustainable." (Emphasis supplied).

40. Conversely, the respondent submitted - section 35 (5)(c) provides that an employee whose contract of service has been terminated under subsection (1)(c), such as the one before this court, is entitled to service pay for every year worked, the terms of which shall be fixed. Accordingly, the Claimant is entitled to service/gratuity pay. That at the hearing, the Appellant produced no evidence that the Respondent is a member of NSSF nor that it indeed remitted NSSF contribution to warrant the denial of this remedy. Now, the Appellant seeks to rely on the pay slips produced by the Respondent which pay slips cannot be treated as conclusive evidence of membership of the Claimant to NSSF nor remittance.

41. The court on perusal of the court record found the respondent produced her payslips which indicated she was registered under NSSF. A payslip is prepared by the employer under section 20 of the Employment Act, which states- '**20. Itemised pay statement**

(1)An employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.(2)The statement specified in subsection (1) shall contain particulars of—(a)the gross amount of the wages or salary of the employee;(b)the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and(c)where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.' The payslip issued by the employer is thus a legal document evidencing wages paid and deductions. The same was sufficient prima facie

evidence that the claimant was under NSSF. The court noted the prayer before the court was not for service pay, which is not payable where an employee is under the NSSF scheme under section 35(6) of the Employment Act. The prayer was of gratuity at gross salary for each year worked. Gratuity is not equivalent of service pay. As the name connotes, it is a gratuitous payment, meaning it is not statutory and can only be granted by the court if it is proved that it was provided for in the contract of employment or CBA. There was no such evidence before the trial court, and the award is set aside.

42. On public holidays, the appellant submitted as follows - The Appellant faults the trial Magistrate for totally disregarding its evidence, submissions and binding authorities on both law and fact thereby arriving at an erroneous and just determination. Below are particularized aspects of blatant disregard by the trial Court: - Completely disregarding the Appellant's submission on the claim for unpaid public holidays days and binding precedent from the Court of Appeal on the issue as espoused in *Ngunda v Ready Consultancy Limited* 92022) e KLR . The appellant submitted that the effect of this was that the trial Court arrived at an unjust finding by shifting the burden of proving entitlement to unpaid holidays to the Appellant yet the Respondent had not made any attempt to substantiate this claim. (Referred to paragraph 50 of the Appellant's written submissions at page 104 of the Record).

43. Conversely, the respondent submitted - Under Section 74(1)(b), these mandatory documents include those specified under Section 10(3) of the Employment Act. Section 10(3) provides as follows: "The statement required under this section shall also contain particulars, as at a

specified date not more than seven days before the statement, or the instalment containing them, is given of— (a) any terms and conditions relating to any of the following— (i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee’s entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated).” Section 10 (7) goes further to provide that; 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. It is therefore evident that the Employment Act expressly requires the employer (Appellant) to maintain accurate records of an employee’s entitlements, including public holidays and holiday pay. Consequently, the trial court cannot be faulted for drawing an adverse inference against the Appellant for its failure to produce these mandatory employment records. Such an inference was justified and cannot be construed as a shifting of the burden of proof. In any event section 10(7) clearly provides that the employer bears the burden, if the documents are not produced. We humbly submit that any decision suggesting that the employee bears the obligation to produce these records is per incuriam—made in disregard or forgetfulness of the law—and should not guide this Honourable Court in its determination.

44. On perusal of the statement of claim before the trial court, this court found only a prayer for payment of 9 public holidays for the 4 years worked. The claimant's witness statement was silent on the claim for public holidays. The working hours were defined under the employment contract to be 08.30 hours to 17.30 hours Monday to Friday and 0900 to

1700 hours on Saturdays. It was stated that there was a possibility of the claimant being called to work outside the stipulated hours due to exigencies of work. The burden of proof was on the Respondent to prove having worked beyond the stipulated hours of work under her contract. Besides the prayers in the claim, the claimant never specified which holidays she worked. The employer having stipulated working hours in the contract, it was the burden of the Respondent to state the particular holidays worked, not just a blanket claim of 9 public holidays. The burden of proof never shifted to the employer to produce employment records to counter the claim. The award was thus based on erroneous interpretation of the law and specifically section 47(5) of the Employment Act and section 107 of the Evidence Act. It is trite that he who asserts proves. The award for public holidays is set aside.

45. The cross-appeal fails as a consequence of the court holding the termination was lawful and fair.

CONCLUSION

46. The appeal is allowed. The Judgment and Decree of the Hon. T.M. Orlando (PM) delivered on 23rd April 2025 in Nairobi MCELRC No. E879 of 2024 is set aside and substituted with a judgment that the claim is dismissed with costs to the respondent.

47. Costs of the appeal to the appellant.

48. 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 –Isahi

Respondent – Sichangi