



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT KISII**  
**APPEAL NO. E006 OF 2025**

NEW OSHWAL DISTRIBUTORS  
LIMITED.....**APPELLANT**  
**VERSUS**

KALPANA AJIT  
BENJAMIN.....**RESPONDENT**

*(Being an appeal against the whole of the judgement delivered by Hon. C.A Ocharo SPM on 8<sup>th</sup> May, 2025 in Kisii MCELRC No. E025 of 2023)*

**BETWEEN**

KALPANA AJIT  
BENJAMIN.....**CLAIMANT**

**VERSUS**

NEW OSHWAL DISTRIBUTORS LIMITED.....  
.....**RESPONDENT**

**JUDGMENT**

1. Dissatisfied with the decision of the Learned Magistrate made on 8<sup>th</sup> May 2025, the Appellant herein who was the Respondent in the Court below filed an appeal asserting that the Learned Magistrate erred in both fact and law. The Appeal herein raised the following grounds which the Appellant termed 'general grounds':

- a. The Learned Trial Magistrate erred by failing to find and hold that he had no jurisdiction to entertain all claims made with respect to the period prior to 20<sup>th</sup> June, 2020, which was contrary to section 90 of the Employment Act.
- b. The Learned Trial Magistrate erred by failing to find and to hold that the claimant had not established that she was terminated, based on pleadings and evidence tendered.
- c. The Learned Trial Magistrate erred by failing to appropriately evaluate evidence tendered by the appellant notice, allegedly unpaid overtime pay, allegedly unpaid public holidays, allegedly unpaid leave, allegedly unpaid house allowance, allegedly unpaid service pay and NHIF contributions.

- d. The Learned Trial Magistrate erred by falling to find and to hold that the respondent was paid a consolidated salary and thereby misdirected himself on the awards he made.
- e. The Trial Magistrate erred by failing to find and to hold that the claimant, in the absence of a contract was not entitled to award of gratuity.
- f. The Learned Trial Magistrate did not consider legal authorities presented to him and other relevant factors in awarding the full extent of twelve (12) months pay as damages to redress alleged, albeit unproven unfair termination.
- g. The Learned Trial Magistrate's judgment and thereby either made awards which ought not to have been made or made awards which were excessive in the circumstances.

REASONS WHEREFORE the appellant prays that this honourable court do evaluate evidence tendered and do:-

- (a) Vacate the judgment entered and decree passed in Kisi MCELRC No. E025 of 2023 and do substitute

the judgment and decree with a judgment dismissing Kisii MCELRC No. E025 of 2023.

(b) Find and hold that the Trial Court had no jurisdiction to award reliefs claimed with respect to the period prior to 20th June, 2020.

(c) Review the awards made and do vacate the same entirely or in the alternative accordingly reduce the same.

2. The Appeal was disposed of by way of written submission.

#### Appellant's Submissions

3. The Appellant submits that this being a first appeal - the jurisdiction of this court has been judicially considered in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR)** where the court expressed itself as follows:-

*At the close of it all we now move to determine the appeals herein. Being the first appellate court, we are enjoined to follow the case of **Selle vs Associated Motor Boat Co. Ltd [1968] EA 123** where it was stated that:*

*“An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”*

4. It was submitted that this being a first appeal this Honourable Court has opportunity to re-look the evidence and arrive at its own findings, taking into account the fact that it did not have the benefit of observing the demeanour of the witnesses who testified before the Trial Court. The Appellant submitted that the Trial Court had no jurisdiction to award any of the sums claimed by the Respondent being gratuity, overtime, public holidays and cited in aid the case of **H. Young & Company (EA) Limited v Javan Were Mbango [2016] eKLR** which held that a court should not act on conjecture despite the provisions of section 20 of the Industrial Court Act (now renamed the Employment and Labour Relations Court Act) permitting the Court to act without undue regard to technicalities per the determination

of Githinji JA in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where he stated as follows:-

*By section 20(1) of the Industrial Court Act, the Industrial Court is required to act without undue regard to technicalities and is not strictly bound by the rules of evidence except in criminal cases. That however does not warrant the court to act on conjecture and misapplication of the law..."*

5. The Appellant submitted that no gratuity was due to be awarded to the respondent. No contract was produced to support the said award. The court of appeal was categorical that gratuity is paid at the discretion of an employer - it cannot be imposed on an employer by the court. It submitted that the Respondent merely pleaded that she was entitled to payment for public holidays and that she did not demonstrate the days she worked and those she did not work. This, it was submitted, can hardly be the sort of evidence that can be stated to establish entitlement to pay for working on public holidays. The Appellant submitted that

having pleaded the same, the Respondent had a legal burden to prove the same and that the Respondent had a duty to demonstrate that she worked overtime and how damages sought for the alleged relief arose. It submitted that she merely pleaded the same but did not prove the same. The Appellant submitted that the Respondent led evidence that there are days and times during which she did not work - this was a relevant factor for the Trial Court to consider in making its award. It was clear that the Respondent did not work on all days and times she pleaded. It was submitted that upon this foundation the Trial Court could not make awards as pleaded.

6. It was submitted that by purporting to produce calendars whose source was unestablished, the respondent cannot be held to have established that she was entitled to pay for overtime and public holidays - in any event a calendar is just that, a calendar. The Appellant submitted that the purported calendar was an electronic record whose probative value is zero in the absence of a certificate as to electronic evidence. It cited the case of *Ogembo v Yongo* [2024] KEHC 11889 (KLR) where the court favourably cited the Court of Appeal

decision in the case of **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR** in which the Court of Appeal stated that;

*“Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.” In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced...”*

7. It was submitted that the calendar produced was not admissible as it was an electronic record. The Appellant thus urged the Court to vacate the determination of the Trial

Court on work on public holidays asserting there was no judicial reasoning in the judgement of the Trial Court supporting awards made for allegedly working during public holidays, overtime and for gratuity. The Appellant submitted the Trial Court merely enumerated the same and went ahead to award the same.

8. On leave days, the Appellant submitted that the Respondent merely pleaded the same, but did not establish how the same arose. It was not sufficient for the respondent to plead the same - per the decision of the court in the case of **George Orito Kuya v Faharia Fatuma Mohamed t/a Heroes Grill [2022] KEELRC 949 (KLR)**. The Appellant submitted that the claim for unpaid house allowance and NHIF contributions was untenable. The Appellant submitted that its witness testified to the fact that the Respondent was paid a consolidated salary and that there was no other evidence that house allowance was separately payable. The Appellant submitted that its evidence on this account was not materially challenged. It submitted that it is telling that the Respondent did not lead an iota of evidence that she had

approached her employer for the several years she worked to request for payment of purported house allowance and unremitted NHIF contributions - if at all the same had been agreed upon as stand-alone benefits. The Appellant submitted that the same ought to be set aside entirely and that the claim is an afterthought conveniently made in the environment of a claim. On costs the Appellant cited the case of **Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited [2021] KECA 402 (KLR)** and submitted that costs follow the event and it should be awarded costs.

#### Respondent's Submissions

9. The Respondent submitted that the issues for determination where whether:
  - a. The Trial Court had jurisdiction to entertain claims made prior to June 2020
  - b. The Respondent was terminated fairly and lawfully
  - c. The Respondent was entitled to the reliefs sought
  - d. Who should bear the costs of the Appeal.

10. The Respondent submitted that on the authority of the decision in **Jackson Nzuvu Mulei v Total Kenya PLC (Appeal E001 of 2023) [2024] KEELRC 1743 (KLR)** and **Vipingo Ridge Limited v Swalehe Ngonge Mpiita [2022] KEELRC 309 KLR** the issue of limitations *is guided by the court on appeal holding in Vipingo Ridge Limited v Swalehe Ngonge Mpiita [2022] eKLR* to the effect that *the Appellant's suit having been lodged within three years after his separation with the Respondent means that the claim for house allowance that accrued in 2019 could still be validly entertained.* The Respondent submitted that the claims made were for 3 years in line with section 90 of the Employment Act thus the Trial Court had jurisdiction. She submitted that the decisions cited above were binding on the Trial Court.

11. The Respondent submitted that she proved her claim on a balance of probability on her claim for unfair termination. It was submitted that the Appellant was approbating and reprobating by pleading the Respondent was not its employee and that she was placed in agency and was paid a

consolidated salary and on the other hand that she deserted her work and that there were complaints from the customers. The Respondent submitted that on the basis of the decision in the case of **Mary Mumbi Kariuki v Director, Pamoja Women Development Programme [2015] eKLR** she was entitled to be given a show cause for the alleged absenteeism from work. She also cited the case of **Paul Maina Macharia v Reliance Air Charter (Cause 85 of 2019) [2023] KEELRC 1758 (KLR)** where it was held

*As has been held severally by this Court, it is not enough for an employer to state that an employee has absented himself from work without lawful authority. The onus is on the employer to demonstrate the action it took upon ascertaining the employee' absence from work. In this case, for instance, there is no evidence that the respondent attempted to contact the claimant to establish his whereabouts and explain his absence from work. It is apparent that the parties herein largely used electronic mail to correspond. Why didn't the respondent reach out to the claimant through email to enquire his whereabouts*

*or put him on notice that it was contemplating terminating his services on account of his absence from work?*

12. The Respondent submitted that the termination she faced was not fair or procedural. She cited the cases of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, **Muthaiga Country Club v KUDHEIHA Workers [2017] eKLR** and the decision in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where it was held that before an employer exercises the right to terminate the contract of an employee there must be grounds of misconduct, poor performance or physical incapacity. The Respondent submitted that her termination was ergo unfair and the Trial Court did not misdirect itself in making a finding in her favour. The Respondent finally submitted that she was entitled to the reliefs sought and cited the case of **Richard O. Moseti & another v Radar Security Company Limited [2015] eKLR** which held that normal working hours are 8 hours per day and where an employee remains at work over and above the legal normal working hours, every hour worked beyond that period

attracts extra pay. The Respondent therefore urged that the Appeal be disallowed with costs.

### Disposition

13. The Court, being the first port of call on the Appellate side, has a mandate to do the following, as held in the case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where it was stated that:

*“An appeal from the High Court is by way of a re-trial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.”*

14. This being a first appeal I am dutybound look at the evidence, evaluate it and arrive at my own findings, taking into account the fact that I did not have the benefit of observing the demeanour of the witnesses who testified before the trial court and make due allowance for it. Having

sufficiently warned myself of the same, I proceed to determine the matter as follows.

15. The Appellant was the employer of the Respondent and testimony was led that the Respondent was asked not to attend work and was even scolded for failure to adhere to the instructions. It is apparent the Appellant tried to be clever by a half in having its employee being told to stay away from work with the aim of alleging desertion. Where desertion is given as a reason for the termination of employment by an employer, the employer must demonstrate the efforts it made to contact the allegedly absconding employee. In the case of **Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] KEELRC 141 (KLR) (Judgment)**, the Court held as follows:-

*37. The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find*

out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels.

38. It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.

[Emphasis supplied]

16. The Appellant did not demonstrate the effort to comply with the tenets of the law and therefore the finding by the Learned Magistrate on the issue of unfair termination cannot be faulted. There was no formal invitation by the employer to the allegedly absconding employee to seek their explanation or attempt to ascertain the whereabouts of the employee. As

such the termination for the reasons advanced by the Appellant is found to lack foundation.

17. The evidence adduced shows that the Respondent was employed by the Appellant on or about 15<sup>th</sup> September 2012 as a supervisor at the Respondent's Kisii branch. She worked until when she reported to work on 10<sup>th</sup> May 2023 as usual but she was called by the Respondent's director one Prinal Kumar Chanderia who asked her why she had reported to work despite being informed not to go to work on 9<sup>th</sup> May 2023. It was the testimony of the Respondent that on 10<sup>th</sup> May 2023 in the evening, she was informed by her son, Akash Ajit Benjamin who is an employee of the Appellant that the Appellant's manager Mr. Kalpesh Haria had told him to inform her that she should not report to work as she will not be paid any salary at the end of the month. At the hearing before the Learned Magistrate, the Appellant's witness Mr. Kalpesh Haria testified that the Respondent left work on her own after her son, Kunal Ajit Benjamin was not reinstated to employment. The said testimony is inconsistent with the written statement, per paragraph 2 and 3 of the

witness statement dated 4<sup>th</sup> December 2023 where Mr. Haria states that the Respondent deserted work after being asked why she was not following instruction, and there were many complaints from customers, and that she did not report to work in the month of May 2023. If this was the case, why was the employee not issued with a Notice to Show Cause letter as to why she had deserted work or seek an explanation for the alleged failure to follow instructions and the alleged mistreatment of customers? The alleged misconduct in relation to the purported complaints from the Appellant's customers were not proved either by way of evidence adduced. Evidence was adduced to substantiate the termination of the Respondent's employ.

18. Regarding the reliefs made, the Learned Magistrate is accused of failing to give a reasoning for the awards made. The Court notes under section 50 of the Employment Act as read with section 49(1) of the Employment Act a court is required to do the following:

*49.(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an*

employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

[Emphasis supplied]

19. The Respondent was entitled to unpaid wages, allowances or other accrued benefits at the time of the unfair and unlawful termination. It does not aid the Appellant to cry foul when it was the employer and had a record to maintain in terms of section 74 of the Employment Act. When an employee makes an allegation of unfair termination, the burden to prove the converse is upon the employer. This reverse burden of proof is recognised in sections 43, 45 and 47 of the Employment Act. The Appellant was required to demonstrate it paid the Respondent the wages as and when they fell due. It asserts the salary was consolidated and offers nothing for it. There should have been demonstrated how the salary was consolidated to enable the Learned Magistrate determine the issue in favour of the Appellant. The payment of one month's salary in lieu of notice is payable where a termination of employment is found to be unfair as the one month's notice is what would ordinarily apply where there is a regular termination of employment where notice pay of one month is payable by either of the

parties who wishes to terminate the contract. This was found due and payable by the Learned Magistrate. Ground 2 of the general grounds of appeal fails miserably.

20. The foregoing is amply that the Appellant having failed to discharge its burden under the law, the Trial Court found on a balance of probabilities that the sums claimed by the Respondent were due and payable and an award made in her favour. In this Court's considered view, the appeal is therefore not merited and is accordingly dismissed with costs to the Respondent.

21. By way of obiter, the Court notes the colourful highlights on the submissions of the Appellant. It was repeatedly unclear whether the Appellant was keen to emphasise the parts coloured in yellow or those highlighted in teal. It was unclear whether the colours were meant to give the impression certain parts of the highlighted portions of the submissions and authorities held more weight. The highlights therefore did nothing to aid in the appreciation of salient

points. Usually, in order to emphasise a point, an underline or bold would do as was done herein.

Orders accordingly.

**Dated and delivered at Kisii this 10<sup>th</sup> day of December**

**2025**

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

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