REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E018 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

STEPHEN OMONDI ONYANGO

.....APPELLANT

VERSUS

KISSPAG SECURITY SERVICES..... RESPONDENT

JUDGMENT

This is an appeal from the Judgment of Hon. E. Tsimonjero, SRM delivered on 13th February 2025 in Ukwala MCELRC No. E001/2021, **Stephen Omondi Onyango V Kisspag Security Services**.

The claimant's case was that he was employed by the respondent in December 2017 as a night guard within Ugunja Town at Kshs.5,000.00.

That sometime in January 2019, he was assaulted by a client, reported the matter to the police and the respondent took no action.

That after the incident, he was constructively dismissed without notice, reason or pay in *lieu* of notice.

The claimant prayed for underpayment of salary, overtime, house allowance, leave allowance, rest days, gratuity, salary in *lieu* of notice, 12 months compensation, and certificate of service, cost interest and any other relief the court deemed just.

The respondent's case was that it employed the claimant on October 1st 2019 as a night guard to a client named Erick Otieno at Grand Resort Ugunja at Kshs.6,000.00

That on 1st January 2020 at 9:00pm, Mr. Erick Otieno notified the respondent's director that the claimant had reported to work late and visibly drunk and when asked about traffic in the compound he became disorderly and assaulted Mr. Erick Otieno and police witnessed the brawl and the claimant did not report to work thereafter and did not pick calls.

The respondent's director was supposed to mediate between the claimant and Mr. Erick Otieno but the claimant did not show up and deserted duty.

The respondent produced letters dated 5th January 2020 and 15th January 2020 on the desertion. That he only reported after 4 months seeking the salary for January 2020 but had not rendered any services.
According to the respondent, the claimant worked for 3 months only.

After considering the respective cases and submissions by counsel, the learned trial magistrate found that the claimant did not prove his case against the respondent and dismissed it. Parties were to bear their own costs.

This is the Judgment appealed against.

The appellant listed six (6) grounds of appeal; that he trial court erred in law and fact by:

1. *Failing to find that termination of the appellant's employment was unfair.*
2. *Misconstruing the evidence on record.*
3. *Finding that the appellant could not claim damages for unlawful termination.*
4. *Failing to read and analyse all issues before the court, evidence and submissions.*
5. *Failing to properly analyse and appreciate all issues before the court.*

Finally, the trial court is also assailed for erring in its analysis and appreciation of the law and facts.
The trial court is thus faulted for having failed to appreciate and apply the evidence on record identify and properly analyse the issues and the relief of damages for unlawful termination of employment.

The pith and substance of the appeal is that the learned trial magistrate fell into error in every aspect of the case.

Appellant's submissions

On the first ground of appeal counsel argued that the employment relationship ended on 1st January 2020 and the report of the assault by Mr. Eric Otieno was made to the police and the police OB was corroborated by the respondent's evidence that the assault took place in January 2020.

Puzzlingly, counsel submitted that the documents produced did not affect the appellant's evidence on termination of employment in January 2020.

Reliance was placed on the decision in **Maroo Polymers Ltd V Winfred Kasyoki Wilis** [2023] KECA 84(KLR) and

Samuel G. Momanyi V Attorney General & another [2012] eKLR, on the unconstitutionality of Section 45(3) of the Employment Act.

That the date of employment was 2017 not 2019 as the trial court held and the respondent did not produce a contract of employment of the appellant.

That the court did not address other issues such as overtime, house and leave allowance, gratuity, rest days and underpayment.

The respondent did not file submissions.

Analysis and determination

The role of the court in a first appeal is as aptly captured by the Court of Appeal **in Gitobu Imanyara & 2 others V Attorney General** [2016] KECA 557 (KLR) thus:

"This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial … is by way of a 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 witness and should make due allowance in this respect…"

See also **Selle & another V Associated Motor Boat Co. Ltd** [1968] EA 123 and **Peters V Sunday Post** [1958] EA 424.

Since the court is assailed for misconstruction of the evidence on record, it behooves the court to address the issue in detail.

Significantly, during the hearing on 20th November 2020, counsel for the claimant amended the claimant's case to read that he was employed by the respondent until 10th January 2020 as opposed to January 2019 in the statement of claim and the witness statement.

That it was an honest error, which counsel only realised after the respondent's evidence hence the submissions before this court that the documents produced did not effect the claimant's case.

Regrettably, they did because the date of termination of employment alleged by the appellant was tied to the

assault which was reported to the police in January 2019 unless the police made an error as well.

Similarly, the card from Sub-County Hospital was dated 1st January 2019 and treatment was on 3rd January 2019.

It is highly improbable that the appellant, the police and the hospital made erroneous entries of the date, particular the event occurred and in the case of the hospital twice.

In the court's view, a possible scenario is that the respondent's dates are incorrect.

It is common ground that the claimant's employment by the respondent was by word of mouth and in the absence of a written contract of service or other credible evidence, the plausible inference is that the date cited by the employee carries the day on account of the provisions of Section 10(7) of the Employment Act and in this case, the respondent had no evidence to prove that the actual employment took place in 2019 as alleged.

In his witness statement the appellant stated that he was employed as a night guard at the Grand Resort. In court,

he added that he also worked at a day guard at Namsagodi Resort, which was new evidence but lacked supportive evidence.

Strangely, other than the written witness statement, the appellant had no other verifiable material about his employment by the respondent including, how he used to receive payment of salary and when.

The respondent's evidence was largely consistent that it employed the appellant on 1st October 2019 (an allegation it could not substantiate), and the worked until 1st January 2020 at Kshs.6,000.00, but had no evidence of proof of the salary and had no employment contract, appellant was not housed and according to RWI, the assault happened in January 2020.

The respondent's case remained consistent that the appellant deserted duty after the brawl on 1st January 2020 and the respondent filed letters addressed to the appellant dated 5th and 15th January 2020 on the misbehaviour and desertion respectively.

These letter show that the appellant was not at the work place after 1st January 2020, however, there was no evidence of service of the letters on the appellant.

A WhatsApp message to the claimant's cell phone number would have shown that effort was made to ensure that the letter was served even if the appellant was uncooperative, and ought to have been followed by a notice to show cause why his employment should not be terminated on account of the desertion and a dismissal letter.

Whether the appellant was constructively dismissed

Puzzlingly, the appellant's witness statement merely stated that he was constructively terminated from employment after the incident but fails to explain how the dismissal or termination took place.

The appellant availed no evidence to show that he reported to the workplace after 1st January 2020 and was denied access or told to go away by anyone.

He did not allege having spoken to anyone after the incident or made any effort to resume duty.

As explained by Lord Denning MR in **Western Excavating (ECC) Ltd V Sharp** [1978] QB 791 and the Court of Appeal in **Coca Cola East & Central Africa Ltd V Maria Kaggai Ligaga** [2015] KECA 394 (KLR). Constructive dismissal takes place when the employer commits a fundamental or repudiatory breach of the contract of employment, a significant breach that goes to the root of the contract thereby entitling the employer to consider himself or herself discharge from further performance of the contract.

It is grounded on the employer's conduct and the employee may leave with or without notice.

The appellant did not allege or testify that he left the place of work because of the assault by Mr. Erick Otieno or any other person and when.

According to his witness statement, he expected a notice of termination and reasons from the respondent, which is the reverse of constructive dismissal where it is the employee who leaves on account of the employers breach.

Finally, and as held in **Coca East & Central Africa Ltd V Ligaga** (supra), an employee who pleads constructive dismissal is bound to demonstrate on a balance of probabilities that the employers conduct constituted a redudiatory breach of the contract of employment. The appellant tendered no shred of evidence to prove his allegation.

The trial court did not address this issue, which, in the court's view was critical because it was the appellant's case of how the separation took place and no other method was provided.

To this extent the learned trial magistrate fell into error.

Still on the alleged termination of the appellant's employment, the respondent's case as adverted to elsewhere in this judgment was that the appellant deserted the work place and it availed the letters on record.

It is trite that for termination of employment to pass muster in accordance with the provisions of the Employment Act, it must be proved that the employer had a valid and fair reason to terminate the employee's

employment and did so in accordance with a fair procedure.

There must have been a substantive justification and procedural fairness as held in **Naima Khamis V Oxford University Press (EA) Ltd** [2017] eKLR and **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR.

Blacks Law Dictionary 10th Edition defines desertion as **"Wilfull and unjustified abandonment of a person's duties or obligation"**

See also in this regard the South African decision in **Seabolo V Belgravia Hotel** [1997] 6 BLLR 829 (CCMA).

Desertion essentially means that the employee leaves the work place with no intention of returning.

Cases of absconding duty arise where the employee absents himself or herself from duty without authority or lawful cause but returns after some time.
Both are serious administrative offences and may lead to termination of employment if proved by the employer.

The emerging jurisprudence of the Employment and Labour Relations Court on this issue is that an employer who relies on desertion or absconding of duty by an employee is required to demonstrate the reasonable steps it took to ascertain the whereabouts of the employee so that he/she could resume duty and is also required to issue a notice to show cause to the employee to explain why disciplinary action should not be taken against him/her absence from duty.

In **Felista Acheha Ikatwa Charles V Peter Otieno** [2018] eKLR Maurren Onyango J held:

"The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate the efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the grounds of desertion is being considered".

See also **Simon Mbithi Mbane V Inter-Security Services Ltd** [2018] eKLR and **Joseph Nzioka V Smart Coatings Ltd [2017]** eKLR.

Significantly, even in such circumstances, the employer is still required to prove that the separation was fair.

In **Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd** [2020] KEELRC 609 (KLR) Maureen Onyango J held:

"Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issue prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing".

In this appeal, RWI testified that the appellant deserted duty, and his calls to the appellant were unanswered. RWI admitted that he had no call logs of the call(s) made and one Mr. Benard who delivered the letter dated 15th January 2020 did not testify to confirm service of the letter. Such evidence would have established beyond peradventure that the appellant had deserted the workplace and did not responded to letters by the respondent.

In a similar vein, the letter dated 15th January 2020 on the desertion from 2nd January 2020 was a request to the

appellant to confirm having left employment and an appeal to him.

Although, the law requires a notice to show cause for the employee to show why action should not be taken for their absence from duty, the letter shows that the appellant was not at the workplace from 2nd January 2020 to 15th January 2020.

Relatedly and as adverted to elsewhere in this judgment, the appellant neither testified nor allege that he reported on duty on any other day after 1st January 2020 or communicated with the employer thereafter, and did not deny having received the letters dated 5th and 15th January 2020 respectively.

From the evidence on record, the court is satisfied that the respondent demonstrated on a preponderance of probabilities that the appellant deserted the work place after the incident on 1st January 2020 and was thus not terminated from employment.

Because the respondent pleaded and testified that the appellant deserted the workplace and thus, how the separation took place, as opposed to a termination of

employment as alleged by the appellant, it was incumbent upon the trial court to determine whether the defence had been demonstrated.

The trial court fell into error by failing to examine the issue of desertion.

As regards the finding that the appellant could not claim damages for unfair termination by dint of Section 45(3) of the Employment Act, it is trite law that the provision was declared to be unconstitutional by Lenaola J (as he then was) in **Samuel G . Momanyi V Attorney General & another** (supra) cited by the appellant's counsel, where the learned Judge held:

"(b) It is hereby declared that Section 45(3) of the Employment Act 2007 is inconsistent with the provisions of the Constitution of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1) as the said section purports to deny the Petitioner the rights and freedoms enshrined in the said Articles of the Constitution.

(c) Consequently, an order is hereby issued declaring Section 45(3) of the Employment Act 2007 invalid by reason of its violation of the rights and fundamental freedoms in the Bill of Rights of the Petitioner rights and fundamental freedoms."

The finding of the trial court contradicted the decision of Lenaola J (as he then was) and cannot stand as the trial court erred.

Concerning submissions, the court is satisfied that the trial court considered the respective submissions.

While the claimant's counsel focussed on the reliefs, the respondent's counsel paid attention to the appellant's evidence and proof of his case against the respondent, issues on which the case finally turned.

The trial court cannot be faulted on the issue of failure to consider submissions by the parties.

In light of the foregoing findings, the court is satisfied that the appellant has made out a case for interference with the judgment of the trial court dated 13th February 2025, as held in **Price and another V Hilder** [1996] KLR 95 and **United Insurance Ins Co. Ltd & 2 others V East African Underwriters (Kenya) Ltd** [1958] EA 898.

Appropriate reliefs

Having found that the respondent had demonstrated that the appellant deserted the workplace, thus, no unfair or unlawful termination of employment had been proved, it follows that the only claims that are recoverable are accrued rights, such as, underpayments, leave, rest days and overtime among others.

(i) Underpayment

The appellant testified that the respondent was underpaying him contrary to the law.

It is trite law that minimum wage is a prescription of law and the relevant Regulation of Wages Orders are binding on employers.

An employer who underpays an employee contravenes the law.

The court is in agreement with the appellant that he was underpaid and was entitled to the unpaid amount as per the relevant Regulation of Wages Orders.

Regrettably, the appellant's counsel's oral amendment of the date of separation as January 2020 in *lieu* of January 2019, contradicted the appellants documentary evidence of the events preceding the separation.

All the appellants documents from the hospital and the police are dated January 2019 and in all cases the date was entered by hand.

The appellant's statement dated 25th February 2020 barely a month after the event stated that the dismissal took place on 1st January 2019.

The respondent's documents on record were patently illegible.

It requires no belabouring that parties are bound to avail documents which a court of law can rely on. Illegible documents have no probative value.

December 2017 to November 2018

Under the Regulation of Wages (General) Order 2017 effective 1st May 2017, the Basic salary of a night guard was Kshs.14,420.9 + 15% house allowance Kshs.2163.14=Kshs.16,584.035

Less Kshs.5,000.000

Kshs.11,584.035 x 5=**Kshs.57,920.18**

May 2018 to January 2019

Under the 2018 Wages Order effective 1st May 2018, the basic salary of a night guard was Kshs.15,141.95 +% house allowance

Kshs.2,271.30=Kshs.17,413.24 -
5,000=12,413.24 x 8 months=Kshs.99,305.92

Total Kshs.157,226.086

(ii) Overtime

The appellant availed no verifiable evidence of having worked overtime on any day. The assumption that he worked from 6:00pm to 6:00am every day and did so without any interruption on any day is evidently not feasible bearing in mind that he testified that he used to work both day and night.

The claim was unproven and is declined.

(iii) House allowance

This claim is consolidated with the claim for underpayment and has already been computed.

(iv) Leave allowance

The respondent availed evidence to show that the appellant had proceeded on leave and is thus awarded payment for 21 days leave, Kshs.12,189.27.

(v) Rest days

The appellant rendered no evidence to prove that he worked on Sundays and public holidays.

Evidence of having worked 7 days a week for the entire duration of employment was vital in establishing this claim.

The claim is dismissed.

(vi) Gratuity

The appellant appeared to have confused gratuity with service pay. The two are not synonymous nor interchangeable.

While service pay is statutory, gratuity is contractual and gratuitous as the name suggest.

In **Bamburi Cement Co. Ltd V William Kilonzi [2016] KECA 546** (KLR) the Court of Appeal stated:

"Turning to the award of gratuity, the first thing that we must emphasize is that gratuity as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of the contract or upon resignation or retirement or upon death of the employee as a lump sum amount at the discretion of the employer. The employee does not contribute any sum or

portion of his salary towards payment of gratuity…"

In the instant case, the appellant adduced no evidence of having been promised gratuity by the respondent or avail a copy of Collective Bargaining Agreement (CBA) with a provision on gratuity.

The prayer is unmerited and it is dismissed.

(vii) Compensation for unlawful termination

Having found that appellant's employment was not unlawfully terminated by the respondent, the claim for compensation was unsustainable by dint of the provisions of Section 49(1) of the Employment Act which provides that the reliefs there under are only awardable where a summary dismissal or termination of employment is adjudged as having been unjustifiable.

The claim is dismissed.

(viii) Salary in *lieu* of notice

Having found as above, the claim for salary in lieu of notice is unsustainable and is declined.

(ix) Certificate of service

The appellant is entitled to a certificate of service by dint of Section 51 of the Employment Act.

In the end, Judgment is entered in favour of the appellant against the respondent as follows:

(a) Underpayment and leave days ***Kshs.169,415.35***

(b) Certificate of Service.

(c) Costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 1OTH DAY OF DECEMBER 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and

rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE