



**Perfect Scan Limited v Chuwi (Appeal E166 of 2025)
[2025] KEELRC 3677 (KLR) (18 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3677 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E166 OF 2025
M MBARÚ, J
DECEMBER 18, 2025**

BETWEEN

PERFECT SCAN LIMITED APPELLANT

AND

LEWA NGALA CHUWI RESPONDENT

*(Being an appeal from the judgment of Hon. Rose Ombeta delivered
on 18 March 2025 in Mombasa CMELRC No. E034 of 2024)*

JUDGMENT

1. The appeal arises from the judgment delivered on 18 March 2025 in Mombasa CMELRC No. E034 of 2024. Dissatisfied, the appellant is seeking that he judgment be set aside, and the claim by the respondent be dismissed with costs.
2. The background of the appeal is a claim filed by the respondent before the trial court.
3. The claim is that the appellant employed the respondent as a night guard in March 2021 and that the respondent worked until 10 September 2023, when his employment was terminated without notice or justification. He claimed that his gross wage was Ksh. 7,961 instead of Ksh. 16,595 is an underpayment of Ksh. 8,998 for 30 months. He claimed that employment was terminated unfairly and thus claimed the following termination dues:
 - a. Notice pay Ksh. 16,959.
 - b. Underpaid wages for 30 months Ksh. 269,940.
 - c. 12 months' compensation Ksh. 203,508.
 - d. Service/gratuity pay for 3 years Ksh.25,438.50



- e. Unpaid house allowance for 30 months Ksh. 76,315.50
 - f. Unpaid leave for 3 years, Ksh. 53,420.
 - g. Certificate of service.
 - h. Costs of the suit.
4. In reply, the appellant stated that the respondent was employed on probation for 2 months and then engaged on a fixed-term contract for 6 months. He absconded from duty on 10 October 2023 after being served with the 1st warning dated 9 October 2023. He was then found careless while on duty. There was no termination of employment as alleged. The appellant tried to reach him without success. Efforts to reach him by phone were unsuccessful. Colleagues reached his wife at 0104848--- several times, but no one answered. At the time, the respondent was a retiree aged 67 and thus only required to work 6 hours per day, from 1 pm to 4 pm. The gross wage was therefore Ksh. 7,961.54, commensurate with his productivity and working hours; hence, no underpayment. The parties negotiated the wage paid. Due to absconding from duty, the respondent was in breach of his employment contract; therefore, there was no unfair termination of employment as alleged. Notice pay and compensation are not due. The fixed-term contract did not provide for payment of gratuity. The application complied with section 35(5) (d) of the Employment Act (the Act), hence no service/gratuity pay is due. The wage paid included the house allowance, which cannot be claimed separately.
5. The learned magistrate heard the parties and held that the termination of employment was unfair and unlawful. The following awards were issued:
- a. Notice pay Ksh. 15,201.65
 - b. Underpaid wages ksh. 101,369.10
 - c. 2 months' compensation Ksh. 30,403.30
 - d. Certificate of service.
 - e. Costs.
20. Aggrieved by the judgment, the appellant's grounds of appeal are that the learned magistrate erred in law and fact by finding that there was unfair termination of employment through dismissal on 10 September 2023. The finding that no notice was issued under section 35 of the Act was in error. The findings that there were no valid reasons that justified the termination of employment or adherence to section 41 of the Act were in error.
7. Other grounds of appeal are that the trial court failed to appreciate that the employment term ended on 9 October 2023 and not 10 September 2023. Despite absconding from duty on 10 October 2023 and a warning dated 9 October 2023, these facts were not taken into account. Efforts to reach the respondent were fruitless; accordingly, the trial court's awards should be set aside with costs.
8. The appellant submitted that under section 47(5) of the Act, the respondent, the employee, had a duty to discharge the burden of proof that there was unfair termination of employment, which he failed to do. He deserted his duty, and efforts to trace him were unsuccessful. In *Puis Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the court held that the employee claiming that his employment was unfairly terminated had the burden of proof. Upon discharging this burden, the employer's duty under section 43 of the Act was to justify the reasons leading to termination of employment. In this case, the respondent did not discharge his burden.



9. The trial court did not take into account that employment terminated on 9 October 2023 and not 10 September 2023. Warnings and acts of misconduct had been noted, which noted the respondent had absconded from duty. Notice was issued to the respondent; hence, the award of notice pay and compensation is not justified.
10. The appellant submitted that compliance with section 41 of the Act was established. Warnings were issued, and a notice to terminate employment was issued on 9 October 2023.
11. The award of underpayments did not take into account the parties' written agreement. This accounted for the number of hours worked at 6 due to the respondent's age. The other claims were time-barred under section 90 of the Act, as held in *Great Lakes Trans (K) Limited v Yahya Mohamed ELRCA E147 of 2024*. Also, service pay was not a term of the contract. The appellant remitted the statutory dues; hence, under section 49 of the Act, the awards should have been justified.
12. The respondent submitted that there was no evidence of desertion of duty as alleged. No work records have been submitted to justify such a claim. In *Evans Ochieng Ouoch v Njimia Pharmaceuticals Limited [2016] eKLR*, the court held that where the employer relies on desertion, the employer must address efforts to trace the employee. None were addressed in this case.
13. The date of dismissal was 10 September 2023, when the appellant failed to assign any duties to the respondent. The records of duty rosters, shift allocations and attendance sheets were not produced. Under section 74 of the Act, the employer has the duty to produce.
14. Notice pay and compensation awarded are justified. The underpaid wage was assessed correctly and awarded. Gratuity pay is regulated under the Wage Orders for security guards, and is therefore properly evaluated and awarded.

The appeal has no merit and should be dismissed with costs.

Determination

15. As is the law and practice, this being a first appeal from the trial court's decision, the court is required to evaluate the evidence on record afresh to conclude the matters in dispute. However, even as this is discharged, the court must bear in mind that it did not have the benefit of hearing or seeing the witnesses in the cause testify. Therefore, it should only depart from the trial court's decision where it is clear that it is either contrary to the law or is inconsistent with the evidence that was tendered.
16. The respondent's case was that he was employed as a night security guard by the appellant, but his employment was terminated on 10 September 2023 without notice or justification.
17. The appellant's case is that the respondent absconded from duty; he was issued with a notice, and efforts were made to reach him by phone and through his wife, without success. Due to desertion of duty, employment was terminated on 9 October 2023.
18. To begin with, the appellant employed the respondent under various written contracts.
 - a. The contract dated 15 April 2022 was for the position of a day security guard for a wage of Ksh. 7,961.54 for two (2) months. The respondent signed his contract.
 - b. Contract dated 20 June 2022 for the position of day security guard for a term of 6 months at a wage of Ksh. 7,961.54.
 - c. Contract dated 19 June 2023 for 6 months for the position of day guard at the wage of Ksh. 7,961.54.



19. Therefore, the employment relationship was regulated under written terms. Employment under a fixed-term contract is lawful and valid under section 10(3) of the Act, as held in *Teresa Carlo Omondi v Transparency International- Kenya* [2017] KEELRC 1624 (KLR).
20. The last contract, dated 19 June 2023, was for 6 months. It was due to end on 18 December 2023.
21. The appellant asserts that the respondent deserted duty. He was issued a warning notice dated 9 October 2023 for carelessness while on duty. The response is that efforts were made to trace the respondent's whereabouts without success.
22. However, where the employee deserts duty, the duty to address vests on the employer. Where the appellant made efforts to trace him without success, under section 18(5) (b) of the Act, a notice terminating employment should have been issued to conclude the employment relationship. The notice should have been sent to the Labour Officer as evidence of desertion of duty, as held in *Komu v Sana Industries Limited* [2025] KEELRC 75 (KLR); *Musyoka t/a Jana Pestcon v Mnyika* (Appeal E186 of 2024) [2025] KEELRC; and *Tornado Carriers Limited v Okwomi* (Employment and Labour Relations Appeal E001 of 2024) [2024] KEELRC. Despite the alleged desertion, the employee cannot be left at large. The employer must bring the employment relationship to a close by issuing a notice of termination and giving reasons.
23. Without the employer discharging this duty, the claim that there was unfair and unlawful termination of employment stands correct. To this extent, the learned magistrate well assessed the provisions of section 41 of the Act and well established that there was no adherence to due process, hence, an unfair termination of employment.
24. Upon the finding that there was unfair termination of employment, notice pay and compensation are due under sections 35, 41, 45, and 49 of the Act.
25. The award of compensation is based on the discretionary power vested in the learned magistrate. This is not considered misapplied.
26. The applicable wage is KSh. 7,961 is challenged as being an underpayment.
27. The respondent claimed that he was employed as a night security guard. The appellant asserts that employment terms and conditions were negotiated, and that, due to the respondent's age, he worked for 6 hours and was paid Ksh. 7,961. However, parties to an employment contract cannot negotiate before the legal minimum wage set by the Minister, as held in *Digital Security Services Limited v Angatia* [2025] KEELRC 1929 (KLR), that to offer an employee a wage below the minimum allowed by the Minister is unfair labour practice. Whatever factors the appellant considered, such should have factored in the minimum wage under the Wage Orders. See *Omolo v Cobra Security Company Limited* (Employment and Labour Relations Cause 28 of 2015) [2025] KEELRC.
28. Under the written contract, the respondent was employed as a day security guard.
29. In his last contract dated 19 June 2023, a day guard was entitled to a wage of Ksh. 15,201.65 per month and a house allowance of 15% at ksh. 2,280.25 and gross wage ksh. 17,481.85.
There was thus an underpayment of wages by Ksh. 9,520.90.
30. An underpayment is a continuing injury as held in *German School Society v Helga Ohany* [2017] KECA 112 (KLR). It must be claimed within the provisions of section 90 of the Act within 12 months from the date of cessation. The respondent was last at the shop floor on 10 September 2023 when he



is alleged to have deserted duty. He filed his claim before the trial court on 2 February 2024. He can only claim underpayment of wages for 12 months. Under the last two contracts, these were converted under the Wage Orders, 2022.

48. On the underpaid wage of Ksh. 9,520.90 x 12 months = Ksh. 114,250.77 inclusive of the house allowance. This is due.
31. Regarding the service/gratuity claim, the respondent was employed as a security guard. Unlike other sectors, the protective services are regulated under the Regulation of Wages (Protective Security Services) Orders. These Wage Orders allow service pay to be paid at the end of employment, even if statutory dues are unpaid or the employment contract is silent.
32. The respondent worked for the appellant from April 2022 to September 2023. This is one (1) full year. Service pay is due at 15 days' pay for one year, based on the gross pay of Ksh. 17,481.85. The service pay due is ksh. 8,740.50.
33. Regarding the claim for unpaid leave days for 3 years, the appellant did not file any work records demonstrating how this benefit was addressed, as required under section 28 of the Act. However, where leave days are accumulated, section 28(4) of the Act caps them at 18 months. This is 33 days of annual leave.
34. When tabulating leave pay, the basic wage serves as the threshold. In this case, Ksh. 15,201.65 for 33 days is Ksh. 16,721.80 in leave pay.
35. In employment disputes, costs are not automatic. These are regulated under section 12(4) of the *Employment and Labour Relations Court Act*. Costs are discretionary, and reasons for the award of costs must be stated. In this case, no reasons are given. Each party should meet its costs.
36. Accordingly, the appeal is partially successful and the judgment in Mombasa CMLECR No. E034 of 2024 is reviewed in the following terms;
 - a. Notice pay Ksh. 17,481.85.
 - b. Compensation for two months Ksh. 34,963.70
 - c. Service pay Ksh. 8,740.50
 - d. Leave pay Ksh. 16,721.80
 - e. Underpayments inclusive of house allowance Ksh. 114,250.77
 - f. Certificate of service.
 - g. Each party bears its costs for the appeal and the trial court proceedings.

DELIVERED IN OPEN COURT AT NAIROBI, THIS 18TH DAY OF DECEMBER 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Marion

..... and

