

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS**

**APPEAL NUMBER E013 OF 2023**

NELSON MARARE KISAKA.....APPELLANT

VERSUS

TEXAS ALARMS (K) LIMITED.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. E.K. Suter (M) delivered on 28<sup>th</sup> September 2023 in Mavoko CMEL Suit No. E025 of 2022)*

**CORAM**

***Before Lady Justice J.W. Keli***

***C/A Otieno***

**JUDGMENT**

1. The Appellant herein, being dissatisfied with Judgment and Decree of the Hon. E.K. Suter (M) delivered on 28th September 2023 in Mavoko CMEL Suit No. E025 of 2022 between the parties filed a Memorandum of Appeal dated the 25<sup>th</sup> of October, 2023 seeking the following orders: -

**a) The Judgment delivered by Hon. E.R. Suter on the 28th September 2023 be set aside in its entirety.**

- b) **This Honourable Court be pleased to enter Judgment in favour of the Appellant as against the Respondent as prayed in the Statement of Claim dated 21" June 2022.**
- c) **The costs of this Appeal and the suit before the Magistrates Court be borne by the Respondent.**

**GROUNDS OF THE APPEAL**

2. The Honourable Magistrate erred in law and in fact in finding that there was no termination or dismissal of employment of the Appellant yet the Appellant is neither an employee nor did he resign from his employment thus arriving at a wrong determination on how the employment of the Appellant was terminated.
3. The Honourable Magistrate erred in law and in fact in finding that the issue of constructive dismissal could not arise and in so doing completely disregarded the evidence tendered by both parties and which formed part of the Court's record.
4. The Honourable Magistrate erred in law and in fact in assuming the Respondent's policies on salary retention pending a criminal trial yet the Respondent did not tender any evidence as to their policies or even any justification as to the retention of the Appellant's salary and in so doing arrived at a wrong conclusion that the Respondent did not beach the contract it had with the Appellant.
5. The Honourable Magistrate erred in law and in fact in her interpretation of what amounts to constructive dismissal and in finding that the fact that the Appellant did not tender a resignation

he could not have been constructively dismissed thus arriving at a wrong determination of the issue.

6. The Honourable Magistrate erred in law and in fact in completely ignoring the common ground evidence tendered by the parties that the Appellant was required to accept a warning letter as a term for his reinstatement back to work thereby arriving at a wrong conclusion that the termination of the Appellant was not unfair or unlawful.
7. The Honourable Magistrate erred in law and in fact in failing to award the Appellant compensation for termination without proper notice and unfair termination despite the overwhelming evidence led by both parties that demonstrated that the Appellant's employment did not end in a lawful manner.
8. The Honourable Magistrate erred in law and in fact in finding that the salary for December 2021 to March 2022 was not payable despite the Respondent's own evidence that the Claimant was still an employee at the time and thus entitled to a salary.
9. The Honourable Magistrate erred in law and in fact in failing to award the Appellant on the heads of house allowance, week off pay, accrued leave days, uniform deduction and paternity leave despite the Respondent failing to demonstrate as the employer that it indeed remunerated the Appellant as per the strict provisions of law and thus arrived at conclusions based on assumptions and not evidence tendered.
10. The Honourable Magistrate erred in law and in fact in completely disregarding the submissions filed on behalf of the Appellant and the Authorities filed in support thereto.

11. The Honourable Magistrate erred in law and in fact in arriving at a contradictory finding that the Appellant failed to prove its case in its entirety yet in the foregoing paragraph in the judgment the magistrate had found that the Appellant was entitled to a certificate of service as sought for in the statement of claim.

### **BACKGROUND TO THE APPEAL**

12. The Appellant filed a suit against the Respondent vide a plaint dated 10<sup>th</sup> May 2022 seeking the following orders: -

- a. Payment as prayed in paragraph 15 above of Kshs. 979,400/-.
- b. Paternity leave.
- c. Certificate of Service.
- d. Interest on (a) above from December 2021 until payment in full at court rates.
- e. Costs of the suit.
- f. Any other or further relief that the court may deem just and fit to grant.

(pages 7-10 of Appellant's ROA dated 25<sup>th</sup> September 2024).

14. The Appellant filed his verifying affidavit sworn on 10<sup>th</sup> May 2022, list of witnesses of even date, list of documents together with the bundle of documents attached of even date, and a witness statement of one Nelson Marare Kisaka dated 19<sup>th</sup> August 2022 (pages 11-18 of ROA). The Appellant also filed a supplementary list of documents dated 25<sup>th</sup> May 2023 (pages 79-134 of ROA).

15. The claim was opposed by the Respondent who entered appearance and filed a statement of defence dated 31<sup>st</sup> August 2022 (pages 24-25 of ROA). They also filed a list of witnesses, list

of documents with the bundle of documents attached, and witness statements of Jared Ogutu and George Onyango Otieno both dated 12<sup>th</sup> January 2023 (pages 26-34, and 37-40 of ROA). In addition to the foregoing, the Respondent filed a supplementary list of documents dated 11<sup>th</sup> May 2023 (pages 41-79 of ROA).

16. In response to the Respondent's statement of defence, the Appellant filed a Reply dated 14<sup>th</sup> September 2022 (pages 35-36 of ROA).

17. The Appellant's case was heard on the 27<sup>th</sup> of July 2023 with the Appellant testifying. He relied on his witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Respondent Mr. Odero (pages 201-203 of ROA).

18. The Respondent's case was heard on the same day when DW1 Jared Ouma Ogutu and DW2 George Onyango Otieno testified on behalf of the Respondent. They relied on their filed witness statements as their evidence in chief, and DW2 produced the Respondent's documents. They were cross-examined by counsel for the Appellant, Mr. Machuri (pages 203-204 of ROA).

19. The parties took directions on the filing of written submissions after the hearing. Both parties complied.

20. The Trial Magistrate Court delivered its judgment on the 28<sup>th</sup> of September 2023 dismissing the Claimant/Appellant's claim, with an order that each party bears their own costs (judgment at pages 192-199 of ROA).

## **DETERMINATION**

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

### **Issues for determination**

22. In their submissions dated 14th July 2025, the Appellant identified the following issues for determination, namely:-

- A. Whether the Claimant was an employee of the Respondent .
- B. Whether the Claimant was unfairly terminated and should be compensated.
- C. Whether the Claimant is entitled to the reliefs sought if any.

23. The Respondent identified the following issues for determination in their submissions dated 19<sup>th</sup> August 2025:

- i. Whether the Appellant was terminated by the Respondent and/or constructively dismissal.
- ii. Whether the Appellant's salary was retained as alleged and did the Respondent breach the employment contract.
- iii. Whether the warning letter was a term for reinstatement.
- iv. Whether the Appellant was entitled to compensation.
- v. Whether the salary for December 2021 to March 2022 is payable.
- vi. Whether the Appellant is entitled to house allowance, week off pay, accrued leave days, uniform deduction and paternity leave.
- vii. Whether the Appellant proved his case to the required standard.

24. The court upon consideration of the issues outlined by the parties for determination, was of the considered opinion that the issues for determination in the appeal were-

**a. Whether the trial court erred in fact and law in finding appellant's employment was not unfairly terminated.**

**b. Whether the appellant was entitled to the relief sought in the claim.**

Whether the trial court erred in fact and law in finding appellant's employment was not unfairly terminated.

The appellant's submission

25. The claimant faced grave hostilities upon being falsely accused of an offence that he had never committed and which thereafter resulted him to being imprisoned from 30th December 2021 to 7th March 2022, an occurrence that stabbed his family deeply. The Claimant diligently performed his duties to the satisfaction of the Respondent until 30th December 2021 when the Respondent caused the Claimant's illegal and unlawful arrest. The charges were dropped after the Respondent lacked any evidence to corroborate his case against the Claimant. During the cross examination, Claimant was puzzled when he saw the Respondent's letter dated 25th March 2022, titled warning letter. He had never seen the said letter hence the Respondent was premised on fabricating evidence with the goal of misleading the court. This is against the cardinal principles of equity; he who comes to equity must come with clean hands. The Claimant testified that after logging complaint with the Respondent's head Operation manager, he gave them Two (2) months to act upon the same but nothing happened. This was a clear indication that he had been constructively dismissed yet he had worked for the Respondent for six years. My lord, the Courts have on many occasions addressed the question as to what constitutes Constructive dismissal. In the Black's Law Dictionary, 10th Ed., Constructive

dismissal or discharge is defined as: "An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit." In the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, Lord Denning stated as follows: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is Constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract." My Lord, it is pertinent for this honourable court to note that for the six years that the claimant worked for the Respondent, he was only allowed to go on leave twice (emphasis mine). Perturbingly, and against the employment laws, when his wife delivered; he was never given paternity leave even after informing the authority of the same. Similarly, whenever he opted to take off days of which he was never paid for the same till his unfair constructive dismissal. My Lord, the Court of Appeal in addressing itself to the issue of Constructive dismissal, in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR stated as follows: "The key element in the definition of Constructive dismissal is that the employee must have been entitled to or have the right to leave

without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test." My lord, we do submit that the Claimant's case aligns with the principles enumerated in the above case in relation to Constructive Dismissal. We submit that the Claimant was unfairly terminated. Your Lordship, it is our humble submission that the Honourable Court exceeded its mandate when it issued the said orders despite uncontested evidence to the contrary being adduced in Court. My lord, the Claimant seeks a declaration that the treatment meted upon him by the Respondent amounts to unfair Labour practice and a violation of his rights under the Constitution, more so the provisions of Articles 27(1), 41 and 47. My lord, the Court in the case of Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023) [2023] KESC 112 (KLR) (Civ) (28 December 2023) (Judgment) inter alia stated as follows: "...The Constitution provided for labour relations under article 41. Unfair Labour practice encompassed all conduct prior to, in the course of employment, during and after termination of employment. The provisions of article 41 encompassed the full spectrum of Labour practices. The provisions of article 41 were borne from the realization that employment and/or right to work was a human right. The right was also linked to other rights in the bill of rights more so the protection of life and the dignity of a person. The right was therefore a principle with legal obligations. 20. The Claimant's termination was unlawful and unfair, contrary to Section 43 of the Employment Act, 2007. The Respondent failed to prove any valid reason for the termination, as required under Section 43(1), which provides that where an employer fails to justify the grounds for termination, the termination shall be deemed unfair.

Further, Section 43(2) mandates that the employer must demonstrate that the reason for termination was genuinely held at the time of dismissal. No such justification was provided by the Respondent, and the trial court erred in failing to apply this clear legal standard. This position of law was well-articulated in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, where the court held that for a termination to pass the test of fairness, it must be shown that there was not only substantive justification but also procedural fairness. The court emphasized that the burden of proof lies with the employer to demonstrate valid reasons for termination and compliance with fair procedure, failing which the termination is rendered unfair. Similarly, in *Kenya Revenue Authority v Reuel Waithaka Gitahi & 2 others* [2019] KECA 300 (KLR), the Court of Appeal affirmed that an employer must comply with both substantive and procedural fairness in terminating an employee's contract. The court held that failure to provide reasons and follow due process in terminating employment contravenes the law and renders the termination unfair. In the present case, the Claimant, a confirmed permanent employee, was neither subjected to any disciplinary hearing nor paid his dues upon release. The Respondent's conduct amounted to constructive dismissal and a violation of both statutory and constitutional rights, thus rendering the termination unlawful. My lord, Article 48 of the Constitution embodies the principle of fair hearing. The Constitution in no uncertain terms prohibits all forms of discrimination as propounded by article 27. In the case of *Peter K Waweru v Republic* [2006] eKLR the Court stated as follows: "Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to

treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured." My lord, the Claimant also seeks general damages and aggravated damages for breach of the Claimant's rights under the constitution; We submit that the Respondent infringed the Claimant's constitutional right guaranteed under Article 41 of the Constitution. In addition, the Respondent has discriminated the Claimant in sheer disregard of the provisions of Article 27 of the Constitution hence should be compensated for the same.

### **The respondent's submission**

26. In Josephine M. Ndungu & Others V Plan International Inc (2019) eKLR where the Court observed: '68. Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements....' In KENYA REVENUE AUTHORITY V MENGINYA SALIM MURGANI [2010] eKLR, the Court of Appeal held that: ,It is axiomatic that contracts of service have a mutuality of rights and obligations for both parties because a contract of service is not a Yoke of slavery or a contract of servitude. This is the reason why either party is allowed to terminate the contract by giving the stipulated notice or reasonable notice if not specifically stipulated in the contract or alternatively, tender equivalent salary in lieu of notice. This applies whether or not the contract is permanent or pensionable and this right vest in both the employee and the employer... Indeed a contracting party does not need to rely on misconduct in order to terminate a contract of service and a party can terminate such

contract without giving any reason.’ In the case of *Coca Cola East Africa & Central Africa V. Maria Kagal Ligaga* [2015] KLR the concept of constructive dismissal was discussed in the case of wherein the Court of Appeal found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. That although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The Court proceeded to outline and summarize the following legal principles relevant in determining constructive dismissal (a) What are the fundamental or essential terms of the contract of employment? (b) Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? (c) The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract (d) An objective test is to be applied in evaluating the employer's conduct (e) There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved. (f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination (g) The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach, the employee must within a reasonable time terminate the employment relationship pursuant to the breach (h) The burden to prove repudiatory breach or constructive dismissal is on the employee (i) Facts giving rise to repudiatory breach or constructive dismissal are varied. "Further in *Leena Apparels (EPZ) Limited V Nyevu Juma Ndokolani* [2018] KLR the Court of Appeal re-affirmed the key issue in an allegation of constructive dismissal was the employer's conduct. The Court observed thus; "However, it is worth remembering that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or

acquiescence is in issue. In other words, an employer is required not to behave in a way that amounts to a repudiatory breach of contract." The Appellant herein was employed by the Respondent on the 4th day of March 2016 as a guard earning a daily wage of Kshs. 390/- and was subsequently promoted to permanent and pensionable on the 13th day of May 2019 earning a daily wage of Kshs. 520/-. It is not therefore in dispute as to whether or not the Appellant was indeed an employee of the Respondent. It is the Respondent's contention that the Appellant was never dismissed either constructively or unfairly as alleged and that in order to frustrate the disciplinary process declined to receive and/or sign the warning letter only for the Respondent to receive a Statement of Claim and Summons to Enter Appearance. Whether the Appellant's salary retained as alleged and did the Respondent breach the employment contract? In the case of *MATESESHO V. NEWTON (CAUSE 9 OF 2019) KEELRC 1554 KLR (29 JULY 2022) JUDGEMENT* ...the Court stated that as regards salary for August 2014, it is clear from the evidence that the Claimant left employment on August 1, 2014 allegedly to go and fetch the money that he had failed to account for. He was subsequently terminated on August 8, 2014 without having reported back on duty. Therefore, he did not work during the month of August and is not entitled to claim salary for this period. The Appellant seeks his salary from the date of arrest until his release yet he did not work on the said days. I agree with the lower court's finding that the Claimant was not entitled to his salary the period he was in prison. Further, the Court stated that each company has its policies on salary payment while undergoing a criminal trial thus the Respondent did not breach the employment contract. Whether the warning letter was a term for reinstatement? The fact that the Appellant and his Colleague allowed a suspect to pass through the main gate carrying a big box at around 0515hours that morning was misconduct on their part hence the Respondent gave the Appellant and his colleague warning letters which the Appellant declined. The said letter

could not for all intents and purposes be a condition for reinstatement since their services had not been terminated. Whether the appellant entitled to compensation, salary for December 2021 to March 2022, House Allowance, Week off Pay, Accrued Leave Days, Uniform Deduction and Paternity Leave? In *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd And Another* (2002) EA 503 112 at p. 118 the Court of Appeal stated that: “.... A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.” Further, in the case of *Joseph Njoroge Kiama V Summer Ltd* [2014] eKLR the court stated that concerning house allowance, no evidence was tendered or led by the Respondent to show the claimant was either being paid house allowance or the consolidated salary inclusive of house allowance. Payment of house allowance is a matter of law as provided under section 31(1) of the Employment Act. The Claimant was employed on on a three (3) month renewable contract which commenced on the 4th day of March 2016 under employment number 1362 and later employed on a permanent and pensionable basis under employee number 6092 on the 1st day of June 2019. Upon employment, the claimant duly signed a Letter of employment which stipulated the terms of the said employment which he duly signed and acknowledged during cross examination that he was not forced or coerced into signing. Paragraph 10 of the said letter stipulated the hours of work and clearly stated that the said allowance included overtime and house allowance. From the case of *National Bank Of Kenya Ltd V Pipeplastic Samkolit (K) Ltd and Another supra*, the Claimant is bound by the terms of the said contract and the duty of the court is to enforce it thus cannot re-write it. Further, the Claimant’s pay slips provided by the Respondent show house allowance paid to the Claimant thus he cannot claim that the same was not paid. In the case of *Co-Operative Bank of Kenya V Banking Insurance & Finance*

Union (2015) eKLR where the Court held that ,...the award of reliefs for unfair termination was discretionary and based on the circumstances of the case as catalogued in subsection (4). The services of the Claimant were not terminated as alleged. The Claimant by his conduct of going to seek legal advice from his lawyer before accepting the warning letter, which was a form of disciplinary action as stipulated in the Letter of employment, and thereafter taking the Respondent to court before exhausting the internal dispute resolution mechanisms of appealing the decision of issuing him with warning letter was not only premature but an intimation of his desire not to continue in the Respondent's employ. Whether the Appellant proved his case to the required standard? In Masaba V The Teachers Service Commission & Another (EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2023) [2024] KEELRC 2232 (KLR) (20 SEPTEMBER 2024) (JUDGMENT) the Court stated that:- "...employment claims are civil in nature and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b of the Employment Act, to extent that the termination is unfair if '(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee...' In Josephine M. Ndungu & Others V Plan International INC supra, the court observed:- ,Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements....' The Appellant herein after the incident leading to their arrest together with his colleague, were arrested by the DCI Officers on the

30th December 2021 for further investigations and reported back to the Office on the 8th day of March 2022. They were asked to produce copies of their bond as well as record statements. The Appellant became very violent and aggressive towards the Assistant Operations Manager one Jared Ogutu thus was handed to the Head of Operations Mr. George Otieno who dealt with him. They were to report the next day 9th March 2022 but did not return until the 25th day of March when they were served with warning letters. The Appellant declined to sign his and asked for time to seek legal advice. Section 47(5) of the employment act stipulates it is the duty of the employee to prove unfair termination. In the present case, the Appellant alleges his services were terminated yet they reported to the Respondent's offices on 8th March and asked to return on 9th but failed to do so. They returned on 25th March and were served with Warning letters which the Appellant as earlier stated declined to accept and/or sign and sought time to seek legal counsel only to return with Court papers. The Respondent on the other hand never terminated the Appellant's services as alleged but was merely exercising its obligations under the discipline procedure which entailed issuing a warning letter to the Appellant and his colleague. From the foregoing, the Appellant failed to prove his case on a balance of probabilities since frustrated the disciplinary process hence his suit was premature.

### **Decision**

27. The grounds of appeal under the issue were –
- a) The Honourable Magistrate erred in law and in fact in finding that there was no termination or dismissal of employment of the Appellant yet the Appellant is neither an employee nor did he resign from his employment thus arriving at a wrong determination on how the employment of the Appellant was terminated.

- b) The Honourable Magistrate erred in law and in fact in finding that the issue of constructive dismissal could not arise and in so doing completely disregarded the evidence tendered by both parties and which formed part of the Court's record.
- c) The Honourable Magistrate erred in law and in fact in assuming the Respondent's policies on salary retention pending a criminal trial yet the Respondent did not tender any evidence as to their policies or even any justification as to the retention of the Appellant's salary and in so doing arrived at a wrong conclusion that the Respondent did not breach the contract it had with the Appellant.
- d) The Honourable Magistrate erred in law and in fact in her interpretation of what amounts to constructive dismissal and in finding that the fact that the Appellant did not tender a resignation he could not have been constructively dismissed thus arriving at a wrong determination of the issue.
- e) The Honourable Magistrate erred in law and in fact in completely ignoring the common ground evidence tendered by the parties that the Appellant was required to accept a warning letter as a term for his reinstatement back to work thereby arriving at a wrong conclusion that the termination of the Appellant was not unfair or unlawful.
- f) The Honourable Magistrate erred in law and in fact in failing to award the Appellant compensation for termination without proper notice and unfair termination despite the overwhelming evidence led by both parties that demonstrated that the Appellant's employment did not end in a lawful manner.

g) The Honourable Magistrate erred in law and in fact in finding that the salary for December 2021 to March 2022 was not payable despite the Respondent's own evidence that the Claimant was still an employee at the time and thus entitled to a salary.

28. The trial court held there was no constructive dismissal as the appellant never resigned and refused to sign a warning letter, refused to work to be paid salary and opted to institute legal proceedings. The court found, after re-evaluation of the evidence before that trial court, that:- There was no termination by the employer. The employer imposed disciplinary sanctions of a warning letter, which the appellant did not sign, but started legal proceedings. The appellant never resigned to allege constructive dismissal. On salary not paid during the arrest period, the court agreed with the trial court that the salary was not payable according to section 18(6) of the Employment Act to wit- "No wages shall be payable to an employee in respect of a period during which the employee is detained in custody or is serving a sentence of imprisonment imposed under any law." The non-payment of the salary for the period of arrest was thus not a valid basis of claiming constructive dismissal. The court found no basis to interfere with the decision of the trial court on the allegation of unfair termination (Mbogo v Shah).

**Whether the appellant was entitled to the relief sought in the claim.**

29. Prayer for underpayment- the trial court found the appellant was not paid below minimum wages as he was working within Mavoko municipality. The appellant's payslip before the court indicated he received a monthly wage of Kshs. 15,400(page 46 of ROA). The trial court found that he was in Mavoko Zone as of 2018, and that the wages order was applicable, which this

court finds indicates the monthly salary was 12522.70 (Mavoko municipality). The court upheld the trial court's finding that the appellant was not paid below the applicable minimum wage.

30. Claim for house allowance - the house allowance is payable at rate of 15% of 12522.70 (applicable minimum wage) thus due housing was Kshs, 1878.40. The salary paid of Kshs, 15400 and thus above the minimum salary plus the housing at 15% . The court found no basis to interfere with the decision of the trial court on housing.

31. Claim for unpaid salary December 2021-march 2022 - the court upheld the trial court position that salary was not payable during the arrest period under section 18(6) of the Employment Act. The respondent admitted the appellant was working until end month in December 2021. It was established the appellant was only paid advance sum of Ksh. 2,000. The court finds the appellant was entitled to wages for the month of December 2021, having worked, and the same is awarded at appeal, less the advance, thus Kshs. 13,400.

32. Claim for Week off- I found the no basis to interfere with the finding of the trial court that the salary included weekly off days. The appellant told the trial court he took 2 days off and was not paid. On perusal of the payslip, the same stated wages for 30 days, and the same were found to be above minimum wages.

33. Claim for Leave – the trial court explained the basis of its finding that the claim of leave was not proved, being that the claimant, on oath, admitted he went on leave and had signed the forms. I find no basis to interfere with the decision on leave.

34. Claim for Overtime- the appellant sought for 3 hours of overtime for period worked. The trial court held the 3 days were not justified. The respondent pleaded that the court ought not to rewrite contracts. The court holds that, in employment claims, an employer cannot draw up a contract in violation of the working hours regulations. Regulation 5 Regulation of Wages And Conditions of Employment Act (The Regulation of Wages (General) Order, 1982 provides for work hours as follows-‘Hours of work –

1. The normal working week shall consist of not more than fifty-two hours of work spread over six days of the week.

(2) Notwithstanding subparagraph (1) the normal working week of a person employed on night work shall consist of not more than sixty hours of work per week.....’ Regulation 6 provides for overtime where an employee works beyond the above prescribed hours of work as follows: ‘6. Overtime shall be payable at the following rates—

(a) for time worked in excess of the normal number of hours per week at one and one-half times

the normal hourly rate;

(b) for time worked on the employee's normal rest day or public holiday at twice the normal hourly rate.’ In the instant case, the appellant’s contract of employment was produced by both parties (pages 14 and 29 of ROA). The contract clause on hours of work stated- ‘Due to the nature of business, you will work in a 12-hour shift either day or night. Your wages are inclusive of overtime payment and housing allowance.’ The court finds the above

contract clause was a prima facie evidence that the claimant worked overtime. The court finds that the wages paid were not inclusive of all due overtime, as the amount above

minimum wage was Ksh. 1000 per month. The court awards overtime less amount of Kshs. 1000 per month. The court awards the overtime sought less Kshs. 70000 (1000 for each month worked, thus 70 months). Thus, Kshs. 474,000-70,000, thus Kshs. 404000/- .

35. Claim for Uniform dues- I found no basis to interfere with the trial court position that the basis of the claim was not justified.

### **CONCLUSION**

36. In conclusion, the appeal is allowed with respect to salary for December 2021 and overtime. The Judgment and Decree of the Hon. E.K. Suter (M) delivered on 28<sup>th</sup> September 2023 in Mavoko CMEL Suit No. E025 of 2022 is set aside and substituted as follows-

Judgment is entered for the claimant against the respondent as follows –

- a. December salary – Kshs. 15400 less salary advance of Ksh. 2000 thus award of Kshs, 13400
- b. Overtime – Kshs. 404,000/-
- c. Cost of the suit and interest at court rate from the judgment date.

37. The appellant is awarded costs of the appeal.

38. 30 days stay granted.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup>  
DAY OF DECEMBER, 2025.**

**J.W. KELI,**

**JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – Sundwa h/b Okulu

Respondent – Ms Odero

ORIGINAL