REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E012 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

IBRAHIM WASONGA ARWA.....APPELLANT

VERSUS

MINI BAKERIES (NAIROBI) LTD.....RESPONDENT

JUDGMENT

Aggrieved by the Judgment of Gloria Nasimiyu Barasah, S.R.M. in Kisumu CMELRC No. E263 of 2021, **Ibrahim Wasonga Arwa V Mini Bakeries (Nairobi) Ltd** delivered on 27th February 2025, the appellant lodged the instant appeal on 6th March 2025 vide a Memorandum of Appeal dated 5th March 2025.

The brief facts of the appellant's case before the trial court were that the appellant was employed by the respondent as a Painter in October 2017 on causal basis at Kshs.960 per day and worked until 6th September 2021, when his employment was terminated by one Mr. Dickson Otieno Ndege, by word of mouth.

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The appellant prayed for various reliefs including underpayment, leave, travelling allowance, transfer disturbance allowance, notice pay, bar soap, one packet of milk per day, compensation for unfair termination of employment, certificate of service, costs and interest.

The respondent admitted that the appellant was its employee but maintained that he and his colleagues deserted on 6th September 2021 following a meeting on the new duty rota introduced by the respondent and the appellant did not report to work on 7th September 2021.

After considering the respective cases, evidence on record and submissions by counsel, the trail court entered judgment in favour of the appellant and awarded 3 months salary compensation, severance pay, service pay, long service award, costs at Kshs.60,000.00 and interest from date of filing the suit.

This is the Judgment appealed against.

According to the appellant, the learned trial magistrate erred by failing to:

1. *Find that the appellant was entitled to underpayment and unpaid salary arrears.*

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2. *Appreciate that the appellant's claim arose out of termination of employment and underpayment and unpaid salary arrears were part of terminal dues.*
3. *Consider the totality of the appellant's case and the evidence in support.*
4. *Award unpaid house allowance, leave pay, leave travelling allowance, transfer and disturbance allowance, transport and monthly contributions to the pension fund.*
5. *Award salary in lieu of notice.*

The trial court was also faulted for awarding a lesser figure as service pay, awarding an inordinately low amount as compensation and awarding costs of Kshs.60,000 without regard to the costs incurred by the appellant.

Appellant's submissions

The appellant's counsel abandoned the seventh ground of appeal with respect to the quantum of award made by the trial court.

As regards the transition from casual employment to term contract by dint of Section 37 of the Employment Act, counsel submitted that the appellant's employment

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had transitioned to permanent employment by virtue of the length of service and was entitled to full statutory benefits including annual leave, leave travelling allowance, house allowance and statutory deductions and payment of salary on monthly basis.

Concerning underpayment, reliance was placed on the decisions in **Matsyi V Solo** [2025] KEELRC 862 (KLR), **Arisa V Kipkebe Ltd** [2024] KEELRC 1232 (KLR) on the essence of minimum wage as were the decisions in **LTI Kisii Inns Ltd & 2 others V Deutche Investitions – Und En Wicklungsgellschaft (Deg') & others** [2011] eKLR on constitutional protection of parties to a contract of employment, to urge that the trial court failed to consider minimum wage as a continuing injury or damage and the appellant was entitled to the unpaid difference of Kshs.226,713.90.

On leave travelling allowance reliance was placed on the decisions in **Kamtix Cleaners Ltd V Odhiambo** [2025] KEELRC (2475) KLR and **Sgs Security Guards Ltd V Chepkemoi** [2025] KEELRC 1362 (KLR), to urge that the appellant was entitled to Kshs.36,000.00

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Similarly, counsel submitted that the appellant was entitled to transfer and disturbance allowance as per the CBA, Kshs.242,000.00 and Kss.118,208.38 as provident fund contribution, notice pay at Kshs.54,957.00 and bar soap Kshs.18,150.00

Analysis and determination

This being a first appeal, the mandate of the court is as was enunciated in **Selle and another V Associated Motor Boat Co. Ltd & others** [1968] EA 123, **Peters V Sunday Post Ltd** [1958] EA 424 and **Gitobu Imanyara V Attorney General & Others** [2016] eKLR among others, which is to reconsider the evidence and evaluate it and make its own conclusions bearing in mind that it has neither seen nor heard the witness and thus make due allowance in that respect.

Although the learned trial magistrate was faulted on eight (8) grounds the same may be condensed into three (3) namely; failure to consider the totality of the appellant's evidence, awards made and entitlements and assessment of costs at Kshs.60,000.00

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As to whether the learned trail magistrate failed to consider the totality of the appellant's evidence in support of his case, the first port of call for this court is the appellant's witness statement dated 20th December 2021, whose contents in the court's view, fell below the threshold of a typical witness statement.

The statement, which the claimant adopted as his evidence in chief on 22nd January 2024 lacked essential details of the appellant's employment by the respondent. It had no date of employment, position held, nature of work, place of work, wage or salary and how it was paid, terms of engagement or circumstances in which employment was terminated and the resultant claims.

However, the absence of specific evidence was somewhat ameliorated by the respondent's admission of some of the allegations including the separation in September 2021 and transporting the appellant to the site from 1st May 2017 to 30th April 2020 and throughout his employment and the scanty documentary evidence.

The appellant provided copies of both illegible and legible payment records of the respondent's casuals for the month of September only.

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He also filed the contentious duty rota for painters dated September 2021, minutes of a meeting between painters and the respondent's Foreman, Shop Steward and Union Secretary at which some resolutions on reporting time, respect, and cleanliness among others were made.

Finally, he provided a copy of the CBA for the period 2017 to 2020.

As regards the date of employment, the appellant adduced no credible evidence of having been employed in October 2017. However, DWI Mr. Gabriel Odoyo testified that he had worked with the Painters since 2014 which would suggest that the appellant may have been an employee in October 2017.

Concerning the employment status of the appellant, although he was originally engaged on casual basis, RWI confirmed on cross-examination that the appellant was appointed on permanent and pensionable terms.

Significantly, the admission of RWI notwithstanding, it is discernible that the appellant had met the threshold of Section 37 of the Employment Act and transited from

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casual employment to a term contract and thus entitled to the terms and conditions of service under the Employment Act.

This, however, did not translate to entitlement to the reliefs prayed for which required proof, a mandatory requirement for special damages.

See **Hahn V Singh** [1985] KLR 716, **Nimo Ali V Sagoo Radiators Ltd** [2013] KECA 163 (KLR), **Securicor Ltd V Esther Oliech** [1996] KECA 89 (KLR). These decisions were emphatic that special damages must be specifically pleaded and strictly proved.

During the hearing, it emerged that a disagreement appear to have arisen after the respondent changed the duty rota in September 2021 and the although the separation took place on 6th September 2021, it is unclear as to how it took place.

The learned trial magistrate considered the evidence adduced by both parties sufficiently and captured a large portion of it in the judgment.

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In the court's view, the learned trial magistrate cannot be faulted for having failed to consider the totality of the appellant's case and evidence on record.

As to whether termination of the appellant's employment was unfair, the trial court found that it was unfair but was faulted for failure to award salary in *lieu* of notice, unpaid salaries, underpayment and inordinately low award for the unlawful termination of employment among others.

Concerning termination, it is trite law that for a termination of employment to pass the fairness test it must be proved that the employer had a substantive justification to terminate the employee's employment and conducted the termination in accordance with a fair procedure.

Put in the alternative, it must be demonstrated that the provisions of Section 41, 43, 44, 45 and 47(5) of the Employment Act, as regards there having been a valid and fair reason for the termination and procedural fairness had been complied with as held **in Naima Khamis V Oxford University Press** (EA) Ltd [2017] KECA 480 (KLR) where the Court of Appeal stated.

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"…From the foregoing termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per the contract, or fails to accord the employee an opportunity to be heard as by law required".

See also **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR and **Pius Machafu Isindu V Lavington Security Guards Ltd** [2017] eKLR.

In the instant case, the appellant contended that his employment was unlawfully terminated by the respondent's supervisor, one Dickson Otieno Ndege on 6th September 2021.

Regrettably, the appellant tendered no scintilla of evidence as to how the termination took place and what followed thereafter including following up on dues with the employer because the supervisor was not.

The respondent on the other hand pleaded and testified that the appellant deserted the work place on 6th

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September 2021 and never returned, an allegation the appellant did not controvert.

The learned trial magistrate relied on the decisions in **Nzioka V Smart Coatings Ltd** [2017] eKLR and **Bonface Francis Mwangi BOM Iyego Secondary School** [2019] eKLR to hold that the respondent failed to prove that it attempted to reach out to the appellant to resume duty.

Having alleged that the appellant deserted duty it was incumbent upon the respondent to prove desertion.

Black's Law Dictionary 10th Edition defines desertion as: "Wilful and unjustified abandonment of a person's duties or obligations".

It is a serious administrative offence and if it is proved to have occurred could lead to disciplinary action, including dismissal from employment.

See also **Seabolo V Belgravia Hotel** [1997] 6 BLLR 829 (CCMA).

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It is trite law that whenever and employer relies on the defence of desertion or absconding duty, the employer is required to show the reasonable steps it took to contact the employee to resume duty or notify him or her that disciplinary action was being contemplated for their absence and may thereafter proceed to terminate the deserting employee if he or she does not show cause or respond at all.

The foregoing is fortified by the decision in **Felistas Acheha Ikatw V Charles Peter Otieno** [2018] eKLR where Maureen 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 ground of desertion is being considered".

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

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Significantly, even in circumstances in which an employee is alleged to have deserted duty, the employer is still required to prove that the separation process was fair.

In **Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd** 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 issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant fair hearing prior to her termination"

In the instant case, although RWIII testified that the appellant left on 6th September and did not report on 7th September 2021, he availed no evidence of the steps the respondent took to ensure that the appellant resumed duty or notify him that disciplinary action was being considered on account of desertion of duty.

Similarly, although RWI testified that he attended a disciplinary meeting on 14th September 2021, he adduced no evidence to demonstrate that the appellant had been

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invited for the meeting and was aware of the charges against him and a copy of minutes of the alleged meeting were not filed.

In the court's view, the respondent failed to prove that the provisions of Section 41 of the Employment Act were complied with. The trial court cannot be faulted for having found that termination of the appellant's employment was unfair.

The trial court was also faulted for failing to award house allowance, leave pay, leave travelling allowance and transfer and disturbance allowance.

As regards housing allowance, the employer is bound to provide housing to the employee or pay house allowance to enable the employee procure reasonable accommodation. However, where wages are paid on a daily basis, the amount paid is inclusive of house allowance.

In 2017, the appellant's daily wage was Kshs.960 compared to the minimum wage of Kshs.837.70 per day for skilled and semi-skilled employees.

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Assuming that the appellant was working on workdays only his monthly salary was Kshs.24,000.00 which was higher than the consolidated salary pattern designer or trailer driver who typically earn more than a Painter.

Notably, the appellant availed a copy of his staff identify card dated 12/2020, which, analogous to the documents on record revealed that he was employed as a painter and not as an artisan as alleged, a claim the appellant did not support by any credible evidence and had pleaded that he was employed as a Painter.

By the time his employment was terminated in September 2021 his wage was Kshs.960 per day which translated to about Kshs.24,000 per month.

The appellant adduced no evidence to show that his monthly salary was less than the minimum wage payable to a Painter from 1st May 2017 to September 2021, when his wage was Kshs.960.00

The claim was patently unmerited.

As regards leave pay, leave travelling allowance and transfer and disturbance allowance, the appellant adduced no shred of evidence to show that any of these

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allowances was not paid, when and how much was unpaid.

The written witness statement dated 20th December 2021 made no reference to any of these allowance nor the requisite particulars.

The appellant tendered no evidence of when he did not proceed on leave or was not paid leave allowance or was transferred and was not paid transfer disturbance allowance.

In the court's view, the trial court did not err for having declined to award the allowances. They were not proved.

Significantly, the claiming of multiple reliefs is discouraged.

In **Pandya Memorial Hospital V Geela Joshi** [2020] eKLR, the Court of Appeal cited the sentiments of Rika J. in **GMV V Bank of Africa Ltd** (supra) that:

"This court does not encourage employees to claim multiple remedies arising from the same wrong doing on the part of the employer, whether these violations are claimed to infringe the constitution, the statute or the contract".

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As regards service pay, the appellant tendered no evidence to show that he was not a member of the National Social Security Fund (NSSF) or that deductions were neither being made nor remitted to the NSSF.

It is trite law that service pay is only awarded to employees who are not members of the NSSF or any other pension scheme or provident fund.

The appellant tendered no evidence to justify an ward of service pay and the trial court did not provide any justification for the ward. It was unmerited as it was not proved.

On severance pay, it is common ground that the appellant neither alleged nor evidentiary proved that he was declared redundant. His case was and remained that of unfair termination of employment by the respondent.

Severance pay is only payable, in cases of redundancy under Section 40(1)(g) of the Employment Act.

The award of Kshs.97,920.00 was unmerited.

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Concerning underpayment, appellant alleged that his monthly salary was Kshs.14,785.70 under the 2015 Regulation of Wages (Amendment) Order yet that was not the salary of a Painter was the basic salary of a printing machine operator, bakery machine operator, dough maker machine tool operator and saw mill dresser among others.

Assuming that the appellant worked for 6 days a week from August 2017, his gross salary was Kshs.24,000.00 and his salary remained the same and was higher than the consolidated salary of a tailor, driver or pattern designer effective 1st May 2018.

It is trite that minimum wage is a prescription of the law and all employers are bound to observe the minimum wage as decreed by the Cabinet Secretary for Labour failing which they commit an offence.

The appellant's witness statement made no reference to his salary per month nor allege that there was any underpayment and by how much?

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The meticulous computations in the Memorandum of Claim were averments that required supportive evidence but none was provided.

The appellant did not explain how he was being paid and when.

In sum, the prayer for underpayment and unpaid salary arrears was not proved and was unmerited.

The appellant failed to demonstrate that the trial court erred on this aspect.

On compensation, having found that termination of the appellant's employment by the respondent was unfair, the appellant qualified for compensation under Section 49(1)(c) of the Employment Act.

In determining the quantum of compensation, the learned trial magistrate considered the length of service, age, likelihood of securing alternative employment and mitigation of loss. Other than age, the other factors the court considered were relevant as were his wishes, which were never expressed and his contributions to the termination of employment, if any.

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The equivalent of three (3) month's gross salary was fair.

Having considered some of the relevant factors under Section 49(4) of the Employment Act, the trial court cannot be faulted for having exercised its judicial discretion in the manner it did and as explained in **D. K. Njagi Marete V Teachers Service Commission** [2020] KECA 840 (KLR), the purpose of an award of compensation to the wronged party is to offset the final loss occasioned by the wrongful act.

In other words, the purpose of compensation is to make good the wronged party's loss and not to punish the employer.

See **Hema Hospital V Wilson Makongo Marwa** [2015] eKLR.

In the end, the court is not persuaded that the appellant has made any case for disturbing the award made by the trial court.

Having failed to show that the appellant deserted the workplace, the appellant was entitled to salary in *lieu* of

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notice Kshs.24,354.00 for termination of employment without notice.

The appellant was also entitled to the long service award as per the terms of clause 40 of the CBA Kshs.9,600.00

The appellant was entitled to bar of soap and a packet of milk per day as provided by the CBA for 3 years only, Kshs.5,400.00 and Kshs.54,000.00 respectively.
Equally, the appellant was entitled to terminal benefits as per the CBA Kshs.59,319.00

Finally, the award of costs is discretionary and the court is enjoined to do so judicially.

In **Rai & 3 others V Rai & 4 others** [2014] KESC 31 (KLR), the Supreme Court of Kenya stated:
"Although there is eminent good sense in the basic rule of costs that costs follow the event it is not an invariable rule and, indeed the ultimate factor on award or non-award of costs is the judicial discretion. It follows therefore, that costs, do not in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this court in other cases…"

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Under Section 12(4) of the Employment and Labour Relations Court Act,

(4) In Proceedings under this Act, the court may subject to the Rules, make such Orders as to costs as the court considers just.

Similarly, under Rule 70 of the Employment and Labour Relations Court (Procedure) Rules 2024.

(1) The Court shall be guided by Section 12(4) of the Act and the Advocates (Remuneration) Order in awarding costs.

It requires no belabouring that the trial court had unfettered discretion to award or not to award costs but assessed awarded costs at Kshs.60,000.00

While the award of costs involved the exercise of discretion, the learned trial magistrate did not explain the circumstances the court took into consideration in determining the quantum of costs, which in ordinary circumstances involves many parameters under the Advocates (Remuneration) Order.

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The court, is thus satisfied that the appellant has demonstrated the need to interfere with the award of costs by the learned trial magistrate by setting aside the sum of Kshs.60,000.00.

The foregoing analysis leaves no doubt that the appellant has demonstrated that the court may justifiably interfere with the exercise of discretion by the trial court in accordance with the principles enunciated in **Price and another V Hilder** [1986] KLR and elaborately captured by Madan JA (as he then was) in his rendition in **United Insurance Co. Ltd and another V East African Underwriters (Kenya) Ltd** [1985] eKLR.

See also **Mbogo & another V Shah** [1968] EA 93 and **Mrao Ltd First American Bank of Kenya Ltd & 2 others** [2003] KLR 125.

In conclusion, the appellant's appeal nominally succeeds and the Judgment of the of the trial court is interfered with to the extent that:

(a) The assessment costs at Kshs.60,000.00 is set aside.

(b) The award of service pay is set aside.

(c) The award of severance pay is set aside.

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(d) *Salary in lieu of notice Kshs.24,354.00*

(e) *Terminal dues Kshs.59,319.00*

(f) *Bar soap Kshs.5,400.00*

(g) *Packet of milk Kshs.54,000.00*

(h) *Certificate of service.*

Other awards by the trial court are affirmed save that interest shall run from date of judgment as opposed to date of filing the suit.

Parties shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF JANUARY 2026.

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

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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

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