

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
AT NAIROBI**

**APPEAL NO. E138 OF 2025**

**KEVIN NYAMBANI ANGWENY.....**

**APPELLANT**

**VERSUS**

**ELITE POWER GROUP LIMITED.....  
RESPONDENT**

*(Being an appeal from the decision and judgement of Honourable Tom Mark Orlando, Principal Magistrate delivered on the 16<sup>th</sup> day of April 2025 in Matima, MCEP No. E213 of 2024).*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 10<sup>th</sup> May, 2025 the Appellant appeals against the whole of the judgment of Honourable Tom Mark Orlando delivered on 16<sup>th</sup> April, 2025.
2. The Appeal was based on the grounds that:
  - i. The Honourable Learned Trial Magistrate erred in law and fact by failing to consider the appellant's facts, oral, written submissions and documentary evidence adduced before the trial court in arriving at his conclusion.*
  - ii. The Learned Trial Magistrate erred in law and fact in finding that the Appellant failed to prove his case on a balance of probability on unlawful termination.*

*iii. The learned Trial Magistrate erred in law and fact in failing to consider that the Appellant's employment was terminated without a valid reason and in breach of the fair procedure provided under Sections 41, 44 and 45 of the Employment Act, 2007 thereby arriving at a wrong finding.*

*iv. The Honourable Learned Trial Magistrate erred in law and fact by failing to appreciate the Appellant's testimony during cross-examination thereby arriving at a wrong conclusion.*

*v. The Honourable Learned Trial Magistrate erred in law and fact in failing to appreciate that the Respondent failed to produce any documentary evidence in support of allegations laid by the Respondent thereby arriving at a wrong conclusion.*

*vi. The Learned Trial Magistrate erred in law and fact in failing to award the Appellant original dues resulting from the unfair termination.*

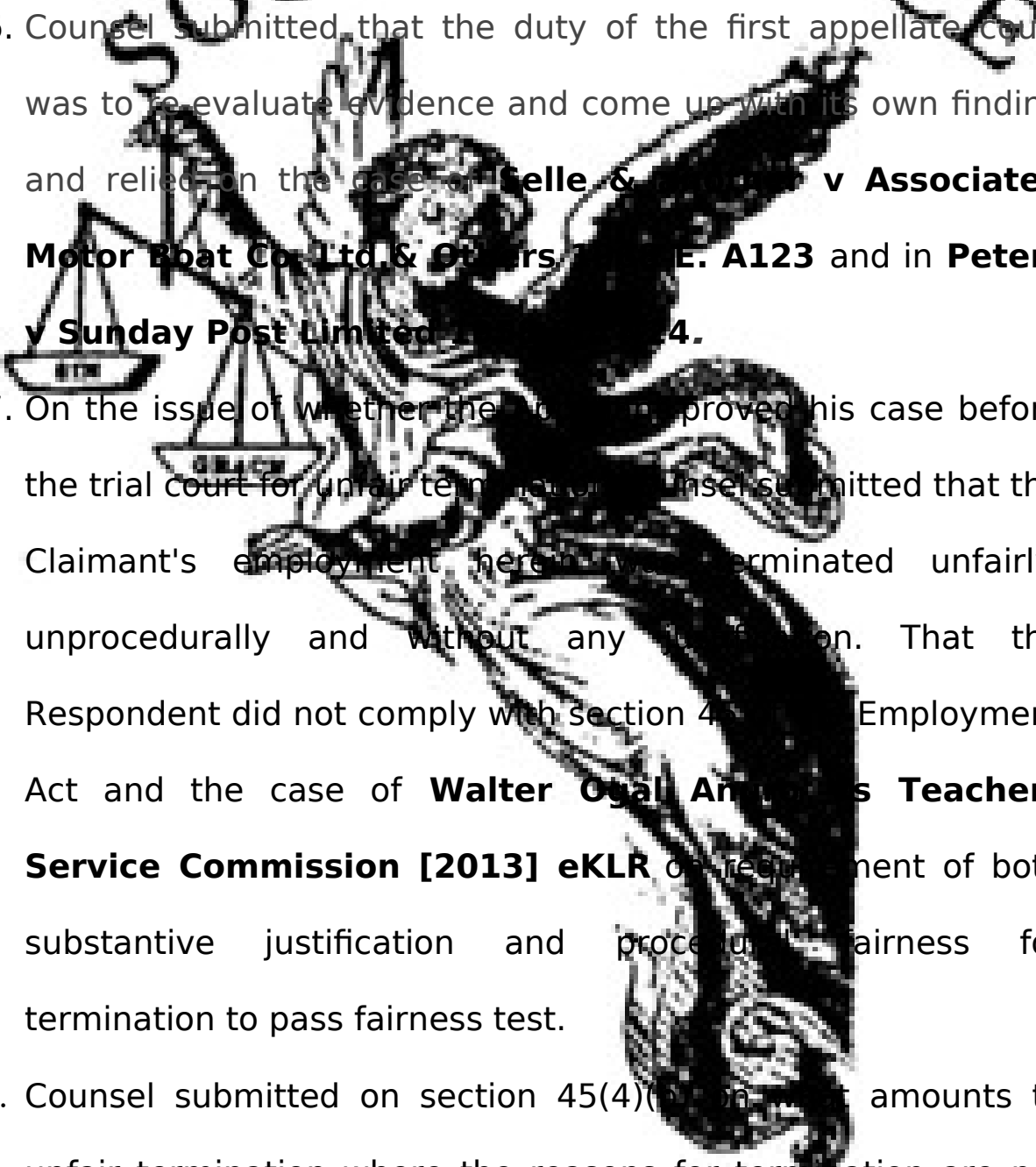
3. The Appellant prayed the Appeal be allowed with costs and the Honourable Trial Magistrate's judgment of 16<sup>th</sup> April 2025 delivered on the 16<sup>th</sup> day of April 2025 be set aside in its entirety.

4. The Appeal was disposed of by written submissions.

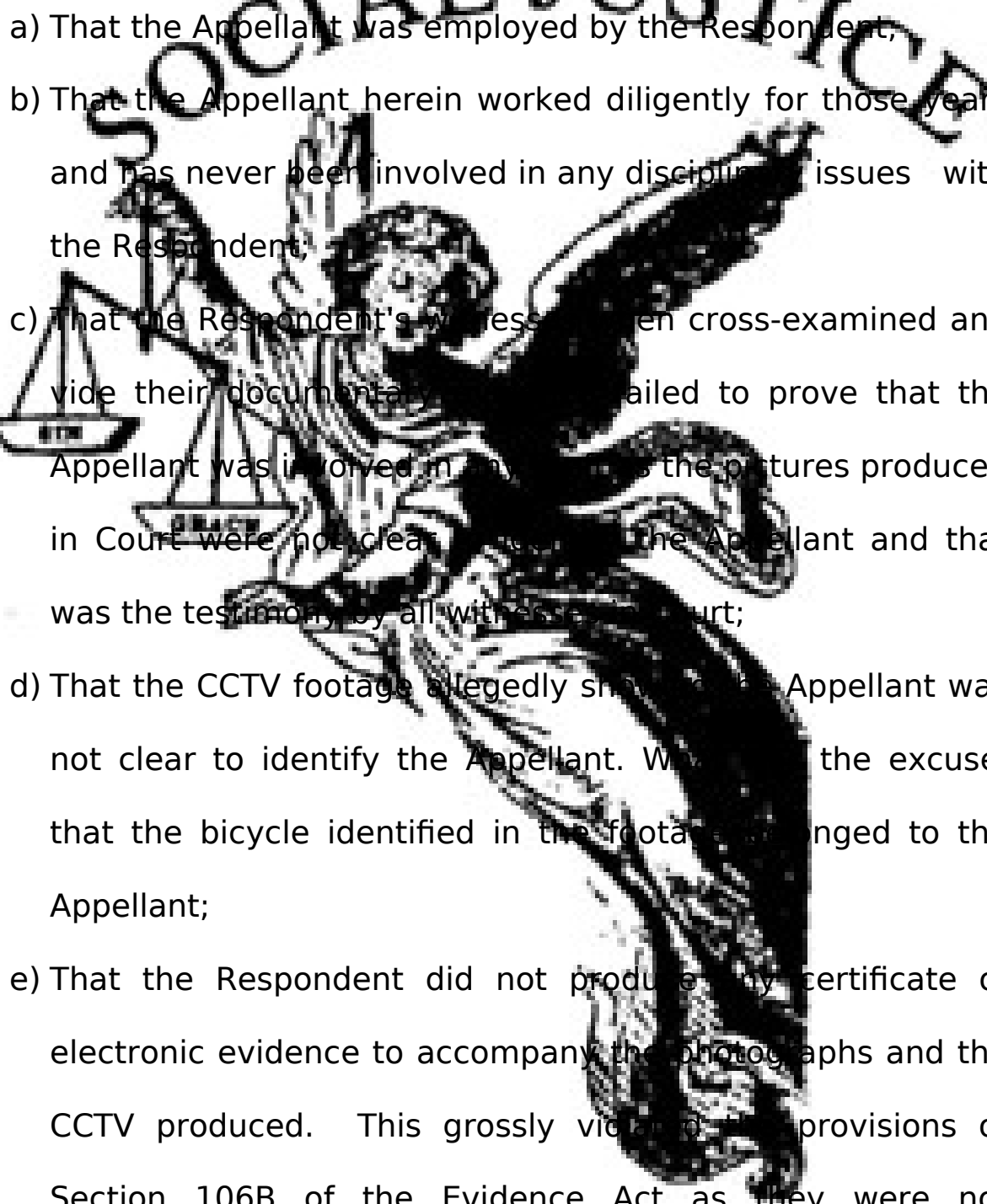
### **APPELLANT'S SUBMISSIONS**

5. The Appellant's Advocates Samuel Mwangi & Co. Advocates filed written submissions dated 6<sup>th</sup> October 2025 and on the issue of whether the appeal is merited counsel submitted that the Appeal is arguable and merited for the reason that the

learned Trial Magistrate erred in finding that the Appellant's employment was rightfully terminated as that decision was not supported by any evidence by the Respondent herein.

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6. Counsel submitted that the duty of the first appellate court was to re-evaluate evidence and come up with its own finding and relied on the case of **Selle & Others v Associated Motor Boat Co. Ltd. & Others** [1971] E. A123 and in **Peters v Sunday Post Limited** [1974] 1 W.L.R. 144.
7. On the issue of whether the Respondent approved his case before the trial court for unfair termination, Counsel submitted that the Claimant's employment here was terminated unfairly, unprocedurally and without any valid reason. That the Respondent did not comply with section 45(4) of the Employment Act and the case of **Walter Ogal Anyango vs Teachers Service Commission [2013] eKLR** of requirement of both substantive justification and procedural fairness for termination to pass fairness test.
8. Counsel submitted on section 45(4)(b) that it amounts to unfair termination where the reasons for termination are not valid and procedural fairness was not met. Counsel submitted

on the issues that the trial court failed to consider these parameters thus arriving at the wrong conclusion:-

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- a) That the Appellant was employed by the Respondent;
- b) That the Appellant herein worked diligently for those years and has never been involved in any disciplinary issues with the Respondent;
- c) That the Respondent's witnesses when cross-examined and vide their documentary evidence failed to prove that the Appellant was involved in any crime as the pictures produced in Court were not clear pictures of the Appellant and that was the testimony by all witnesses in Court;
- d) That the CCTV footage allegedly showing the Appellant was not clear to identify the Appellant. With the excuse, that the bicycle identified in the footage belonged to the Appellant;
- e) That the Respondent did not produce any certificate of electronic evidence to accompany the photographs and the CCTV produced. This grossly violated the provisions of Section 106B of the Evidence Act as they were not accompanied by a Certificate of Electronic Evidence and as

held in the case of **Selina Vukinu Ambe v Fernandez Sajero [2021] eKLR.**

9. Counsel also relied on the court of appeal case of **John Lokitare Lodinyo v I.E.B.C and 2 Others [2018] eKLR** which addressed the question of admissibility of electronic records under S106B of the Evidence Act. At the trial court in concluding that the Appellant discharged duty, stated that he believed the Respondent did not rely on what was produced as evidence. The Appellant herein complied with everything and proved that his employment was terminated unfairly. That the Respondent stated that the Appellant stole batteries yet no evidence was ever produced before court and the witnesses confirmed that he has not been charged in any court of law.

10. Counsel submitted that it was evident that there was no valid reason given at all over the termination of the Claimant from his employment. The Respondent failed to establish a valid reason for the termination of the Claimant's employment as required under Section 45(2) of the Employment Act as well

as procedural fairness was not adhered to as was confirmed by the Respondent's representatives during cross-examination.

11. Counsel relied on Section 41 of the Act on the conditions precedent to termination of employment on grounds of misconduct (including gross misconduct) poor performance or physical incapacity. Counsel relied on the case of **ALPHONCE MACHANG MWANGANYA VS OPERATION 680 LIMITED [2013] E.A.L.C. 107** adherence of the above section on procedural fairness.

12. Counsel further relied on the case of **KABINGI MUGO V SYNGENTA EAST AFRICA LIMITED INDUSTRIAL CAUSE NUMBER 1476 OF 2011** on at will employment where employer is not supposed to fire employees at will for any reason or no reason. That assuming the Appellant was involved in the alleged offence he was not accorded a fair hearing.

13. Counsel lastly relied on the case of **DONALD ODEKEV FIDELITY SECURITY LIMITED INDUSTRIAL CAUSE NUMBER 1998 OF 2011; [2011] LLR 177** that the employee being heard no matter the offence.

14. Counsel further relied on section 74 of the act on duty of the employer keeping employment records. That the Respondent herein did not produce any document to show that the Appellant ever went for leave. Whenever that topic came up, he was threatened with dismissal therefore the same should be awarded. House allowance was equally controverted by the Respondent herein and he was not worked in the month of October 2023. This should be awarded.

15. Counsel submitted that based on the above submissions, the Appellant proved its case on a balance of probability. The first issue was answered in the affirmative. The Appeal has merit and ought to be allowed.

16. On the issue of whether the Claimant was entitled to relief sought counsel submitted that having proved that the Claim was valid and the Appellant has proved that the Claim was wrongfully dismissed the reliefs sought should be allowed as per the Memorandum of Claim.

### **RESPONDENTS' SUBMISSION**

17. The Respondent's advocates GNK Associates LLP filed written submissions dated 7<sup>th</sup> November, 2025 and submitted

that it was evident that the Appellant deserted his duties following the theft incident. He did not produce any evidence such as letters, messages, or witnesses to substantiate his allegation that he was dismissed by the Respondent. The trial court therefore rightly held that there was no unlawful termination and that the Appellant had resorted to work of his own volition. The Appellant's conduct, including the subsequent complaint to the Data Commission, was a calculated attempt to deflect from his own misconduct and unjustly enrich himself through baseless claims.

18. Counsel relied on section 107 of the Evidence Act on the burden of proof which lies with the party who asserts a fact. That the Appellant bore the burden of proving that he was unfairly terminated and that he was entitled to the reliefs sought. He failed to discharge this burden.

19. Counsel further submitted that Section 44(4)(g) of the Employment Act, 2007 expressly provided that an employer was entitled to summarily dismiss an employee who committed, or was reasonably suspected of having committed, a criminal offence against or to the substantial detriment of his

employer. Theft of company property squarely falls within this provision. That the Appellant, having engaged in theft and thereafter deserted work, could turn around and claim that he was unfairly terminated. The trial court therefore properly applied both the law and the evidence in reaching its conclusion.

20. Counsel submitted that the Appellant failed to provide proof that he was actually terminated by the Respondent as alleged, his prayers in relation to salary in lieu of notice and compensation for unfair dismissal would fail. Reliance was based on section 107 and 109 of the Employment Act on he who alleges must prove while relying on the Employment and Labour Relations Court sitting in Nyeri in **Charles Kariuki Mwangi v Intersecurity Services Limited [2018] eKLR** where the court affirmed this burden.

21. Counsel submitted that the Respondent's testimony had been consistent throughout, establishing that the Appellant abandoned his workstation and failed to return. Counsel relied on Section 47(5) of the Employment Act on the respective burden of proof by the parties. That an employee must first

discharge the burden of proving that an unfair termination has indeed occurred, before the employer can be called upon to justify the reasons for such termination. That in the present case, the Respondent maintained that it did not terminate the Appellant's employment. Consequently, there were no grounds to justify a termination that never occurred. The Appellant failed to discharge his initial burden of proof as required under Section 47(5) of the Act. There was no credible evidence to demonstrate that his employment was terminated by the Respondent.

22. Counsel submitted that on the record, the evidence on record clearly shows that the Appellant abandoned his duties without notice and for reasons only known to him. He therefore cannot purport to claim salary for a period of notice, as was properly held by the learned Administrative Tribunal. The Respondent's evidence also confirmed that the Appellant's salary was consolidated, inclusive of house allowance.

23. On the issue of unfair dismissal counsel submitted that the Respondent did not terminate the Appellant's contract of service at any point in time. The Appellant is a deceitful

litigant who has failed to produce any proof of termination.

That as earlier submitted, Section 17(5) of the Employment Act squarely places the burden of proving unfair termination on the employee. Counsel relied on the Court of Appeal decision in **Pius Machafu Isindu v Lavinton Security Guards Limited** [2017] eKLR, where the court affirmed the principle that an employee who alleges unfair termination must first prove that such termination actually occurred.

24. Counsel submitted that from the Appellant's own cross-examination, it was evident that he made no immediate protest, either in writing or orally, to the Respondent, the Labour Officer, or any other authority. His conduct was inconsistent with that of a person whose employment was unlawfully terminated.

25. On the issue of the reliefs sought by the Appellant counsel submitted that the Appellant had failed to prove his entitlement to any of the reliefs sought under the Employment Act. Counsel urged this Honourable Court to uphold the well-reasoned decision of the learned trial magistrate and to be guided by established precedent.

## DETERMINATION

26. The court has considered the grounds of appeal, the record of appeal and submissions by counsel and observes that it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and to set up with its own findings and conclusions as was held in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, the Court of Appeal stated that: -

*“[A]n appeal to this Court from a trial by the High Court is by way of 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 witnesses and should make due allowances in this respect”*

27. In this case, the Judgment of the subordinate court was a declaration that the Claimant failed to discharge the burden of proof under section 107 of the Evidence Act and the claim was dismissed with costs to the Respondent. The Appellant being aggrieved by the judgement appeals on the whole of the Judgment raising 6 grounds. The will however reduce them into two grounds namely:

- i. Whether the trial court erred by finding that the Appellant did not discharge his burden of proof that he was unfairly terminated
- ii. Whether the trial court erred by not awarding the Appellant his reliefs sought

**Whether the trial court erred by finding that the Appellant did not discharge his burden of proof that he was unfairly terminated**

28. It is not in dispute that the Appellant was employed by the Respondent on or about September 2020 as a Technician and what was in dispute was on how the parties parted ways. The Claimant alleged that he was unfairly terminated by the Respondent on 12<sup>th</sup> October, 2023 without any valid reason. The Respondent on the other hand alleged that the Appellant absconded duties when he was called upon show cause on theft charges. That the Appellant was accused of stealing Respondent's property worthy Kshs. 588,000=.

That the matter was reported at Industrial Police station. That there were CCTV Footage showing the Appellant taking batteries from the Respondent and he begged for forgiveness through text messages.

29. The respective burden of proof for the parties is as governed by section 47(5) of the Employment Act where the Appellant ought to illustrate a termination which was unfair occurred and the Respondent to justify the grounds of the termination. The court of Appeal in **Pius Mafu Isindu v Lavington Security Guards** [2017] eKLR explained this burden as follows:

14. Section 47 (5) of the Act provides the procedure to be followed in matters of complaints of unfair termination as follows:

*"(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer."* [Emphasis added]

So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid, the employer be called upon under section 43 (1): "to prove the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under section 43.

30. It was upon the Appellant to demonstrate that unfair termination occurred before the Respondent could be called upon to justify the grounds of termination. From the evidence on record on 11<sup>th</sup> October, 2023 the Appellant begged for forgiveness from the Respondent regarding the issue of batteries. On 12<sup>th</sup> October, 2023 the day of termination the Appellant alleged he was unfairly terminated by a text message addressed to the respondent by the Respondent. He claimed he was chased from work by the Respondent.

31. The Respondent's allegations against the Appellant was facing disciplinary action when he absconded duties was not supported by the evidence such as a show cause letter or an invite to disciplinary hearing. Apart from the extract from Industrial Area Police station there were no other documents to prove that the Appellant was guilty of the offence. There was no investigation report showing that the Appellant was liable.

32. To this court therefore the trial court erred by finding that the Appellant never discharged his burden of proof that he was unfairly terminated. The Appellant was terminated on 12<sup>th</sup> October, 2023 from the evidence before this court. Absconding

of duties calls for dismissal as provided for under section 44(4) (a) of the Employment Act. Whenever an employer claims the defence of absconding of work the burden shifts to the employer to illustrate that the employee absconded duty and the efforts were made to reach such employee.

33. It was held in the case of **Richard Apolimo Koech vs Yuko Supermarket Ltd [2015] eKRR** that absconding duty was an act of misconduct on the part of the employee, in which case the requirements of section 41 of the Employment Act obtain.

34. The court also notes that the Respondent never produced any show cause letter either in the charges of theft and the subsequent absconding of duties by the Appellant if at all he absconded to avoid disciplinary action. The court has in a number of times pronounced itself on the issue of absconding duty by an employee. For instance, in the case of **Owudu v Digital Sanitation Services Limited (Appeal E109 of 2023) [2024] KEELRC 917 (eKRR) 13 April 2024 (Judgment)** the Court held as follows:

17. First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer.

18. Further, under Section 18(5) (b) of the Act, where the employer cannot trace the employee, notice must be issued to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken the legal duty to properly end employment.

12. In this particular case, notice was issued to the Appellant upon absconding, notice was also issued to the Labour office and his terminal dues deposited there. In addition, if the Appellant absconded duties during the alleged disciplinary action the Respondent did not demonstrate that it commenced any disciplinary action against the Respondent under Section 41 of the Employment Act as he allegedly failed to report on duty.

13. In **Joseph Nzioka v Smart Coatings Limited**

**[2017] eKLR** Nduma J. observed that

*“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause*

*why his services should not be terminated on account of absconding duties.”*

14. In this present case, the Respondent did not illustrate any efforts of contacting the Appellant to inform him that they were considering terminating his service due to absconding of duties. The court is not satisfied that the Respondent had on a balance of probabilities discharged its onus of establishing that the Appellant absconded/deserted duty. The Respondent did not issue any show cause letter to the Appellant, hence the appeal failed on the procedural fairness under section 41.

15. The court also notes that whenever the crime an employee is alleged to have committed, the requirement for a fair hearing was mandatory. In the case of **Pius Machafu Isindu vs Lavington Security Services Limited [2017] eKLR**, the Court of Appeal stated:

*“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) - prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”*

16. This court therefore disagrees with the trial court's finding that the Appellant did not discharge his burden of proof that he was unfairly terminated and find that the Appellant was unfairly terminated.

***Whether the trial court erred by not awarding the Appellant his reliefs sought.***

35. Having established that the Appellant's termination was unfair, the court must now determine whether the Appellant is entitled to any of the reliefs sought. The court has to ascertain the salary payable to the Appellant since the trial court could not believe the Appellant evidence that he was earning Kshs 20,000/=. From the pay slip of January 2019, the Appellant was earning a gross salary of Kshs 20,950/= and this court will take as his last salary.

36. On the prayer for compensation for unfair termination, this court relies on the provisions of Section 40(4)(b) of the Employment Act while considering the circumstances in which the termination took place, including the period of service which was 2 years and 10 months and the fact that the Appellant was unfairly terminated. This court awards the

Appellant three months salary as compensation for unfair termination.

37. On the prayer for one month's salary in lieu of notice, the court awards the Appellant one month's salary in lieu of notice pursuant to section 35 (1) (c) of the Act since no notice was given or payment in lieu of notice.

38. On the claims for leave pay and housing allowance this court appreciates that they are continuing injuries which the Claimant must file their suit within 12 months after cessation of employment as per section 90 of the Employment Act. This court notes that the employment relationship herein ended in October, 2023 and the claim was filed in May, 2024 which was within 12 months as required.

39. In among other cases the court of Appeal in **4S Security Services (K) Limited v Joseph Kabani & 468 others [2018] eKLR** the court held as follows:-

*Regarding 'a continuing injury', the proviso to Section 90 of the Employment Act requires that the claim be filed within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the*

*claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.*

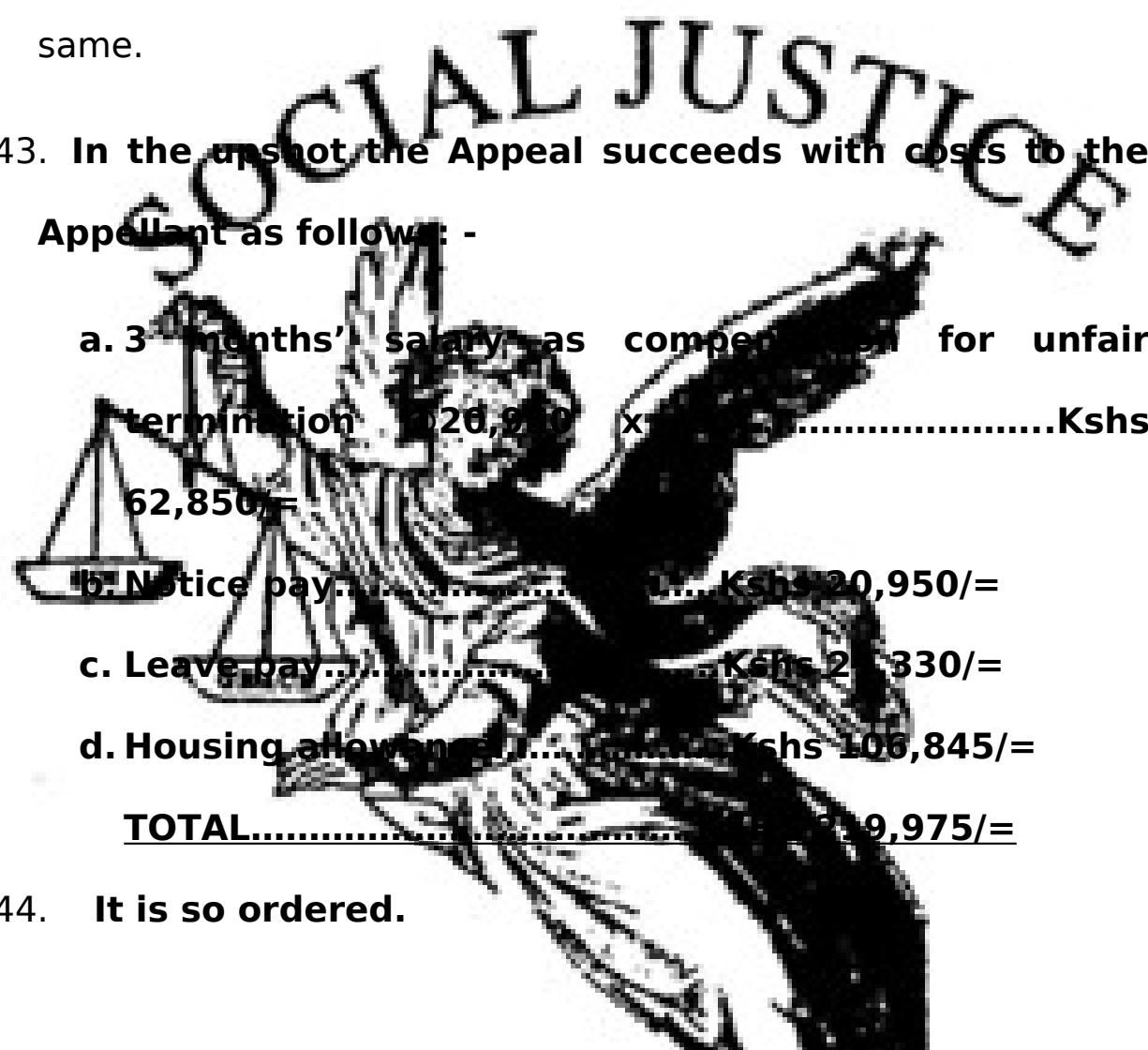
40. On the claim for leave pay this court appreciates that leave is an entitlement for an employee under section 28 of the Employment Act. The Respondent as the custodian of employment records under section 74 ought to have produced records showing the Appellant's period on leave. Failure to tender such evidence leads to the conclusion that the Appellant was entitled to the leave. This court therefore disagrees with the trial court's position and awards the Appellant the leave pay claimed of Kshs 29,330/=

41. On the claim for housing allowance, the court is of the view that the Appellant produced a payslip which showed the salary as gross without any housing allowance. The Respondent as the custodian of employment records should have produced the employment contract showing the pay was consolidated. This court therefore allows the prayer for housing allowance of Kshs 106,845/=

42. The court also awards the Appellant 42 days worked in October, 2023 since it was clear this was the date he was

terminated and there was no evidence that he was paid the same.

43. In the upshot the Appeal succeeds with costs to the Appellant as follows: -



- a. 3 months' salary, as compensation for unfair termination 20,950 x 3 .....Kshs 62,850/=
- b. Notice pay.....Kshs 20,950/=
- c. Leave pay.....Kshs 2,330/=
- d. Housing allowance.....Kshs 106,845/=
- TOTAL.....Kshs 193,975/=**

44. It is so ordered.

Dated at Nairobi this 30th day of January, 2026

Delivered virtually this 30th day of January, 2026

**Abuodha Nelson Jorum**

**Presiding Judge-Appeals Division**