Chandaria v Mungai (Appeal E086 of 2025)
[2026] KEELRC 120 (KLR) (23 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 120 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E086 OF 2025

JW KELI, J

JANUARY 23, 2026

BETWEEN

MINESH KESHAULAL CHANDARIA ..... APPELLANT

AND

PETER KIMINGI MUNGAI ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. B. M. Cheloti (PM) delivered on 28th February 2025 in Nairobi MCELRC No. E470 of 2022)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. B. M. Cheloti (PM) delivered on 28th February 2025 in Nairobi MCELRC No. E470 of 2022 filed a Memorandum of Appeal dated the 25th of March 2025 seeking the following orders: -

    a. The appellant's appeal be allowed

    b. The Judgement delivered on 28th February 2025 and the subsequent decree emanating therefrom be set aside in its entirety.

Grounds Of The Appeal

2. The Honourable Magistrate erred in law and fact by finding that the Respondent was employed in 2018 without any credible evidence to substantiate this claim.

3. The Honourable Magistrate failed to adhere to the mandatory provisions of Section 47(5) of the *Employment Act*, 2007, which unequivocally places the burden of proof on an employee alleging unfair termination or wrongful dismissal to demonstrate that such termination or dismissal indeed occurred.

4. The Honourable Magistrate erred in law and fact by finding that the Appellant had terminated the Respondent's employment, whereas the evidence clearly demonstrated that the Respondent had absconded duty, resurfaced after a prolonged absence, and later initiated the claim.

5. The Honourable Magistrate erred in law and fact by finding that the Respondent was underpaid and applying incorrect salary calculations disregarding the Respondent's own admissions that he received a monthly salary of Kshs. 17,000/=.

6. The Honourable Magistrate erred in separately awarding a sum of Kshs. 98,925/= as house allowance under the Regulation of Wages (General) (Amendment) Order 2018 without considering that the figures provided in the said Order are already inclusive of house allowance.

7. The Honourable Magistrate erred in law and fact by awarding excessive compensation equivalent to 12 months' salary, without due consideration of:

    i. The Respondent's own conduct and prolonged abscondment without any communication whatsoever, which contributed to the termination.

    ii. The Respondent's length of service, which was relatively short.

    iii. The statutory guidance under Sections 49(4) and 50 of the *Employment Act*, which require proportionality in compensatory awards.

8. The Honourable Magistrate erred in law and fact by focusing solely on the Appellant's alleged failure to track the Respondent after abscondment, while disregarding the Respondent's legal obligation to notify the employer of any inability to report to work. In so doing, the Magistrate applied double standards by requiring the Appellant to prove communication with the Respondent regarding abscondment yet failing to impose the same burden on the Respondent to prove prior notification of their intended absence.

9. The Honourable Magistrate misapplied the decision in Joseph Nzioka v Smart Coatings Limited [2017] eKLR by interpreting it as imposing an obligation on the employer to trace the whereabouts of an absent employee. However, the cited case explicitly states that "dismissal on account of absconding must be preceded by evidence showing that a reasonable attempt was made to contact the employer concerned" thereby placing the burden on the employee to demonstrate such efforts.

10. The Honourable Magistrate erred in law and fact by concluding that the Appellant had failed to remit the Respondent's NSSF contributions, despite documentary evidence (NSSF statements) proving compliance for the months actually worked.

11. The Honourable Magistrate failed to appreciate that a prior relationship existed between the parties before any formal employment commenced, and therefore, MPESA transactions were insufficient evidence of an employment relationship.

12. The Honourable Magistrate erroneously placed the burden of proof on the Appellant throughout the proceedings, despite the same not being shifted through the production of evidence by the Respondent.

Background To The Appeal

13. The Respondent filed a suit against the Appellant vide a memorandum of claim dated 10th March 2022 seeking the following orders: -

a. A declaration that the dismissal of the Claimant by the Respondent was unlawful, malicious, and contrary to legal procedure.

b. A declaration that the Claimant right to fair labour practices have been breached.

c. Maximum compensation for wrongful dismissal.

d. Special damages

i. One month pay in lieu of Notice Ksh.21,067.43

ii. Unpaid salary (September 2021) Ksh.21,067.43

iii. Underpayments Ksh.398,427.48

iv. Damages for wrongful dismissal Ksh.252,809.16

v. Severance Ksh.36,462.86

vi. Unpaid amount for leave not taken Ksh.42,945.15

vii. Leave Travelling allowance Ksh.1,700.00

viii. Housing allowance Ksh.98,925.30

e. Interest on the total.

f. Costs of the Cause.

g. Any further relief this Honourable Court may deem fit and just to award under the circumstances.

(pages 4-9 of Appellant's ROA dated 17th July 2025).

14. In support of his claim, the Respondent filed the list of witness 10th March 2022; witness statement of even date; and list of documents with the bundle of documents attached of even date (pages 12-18 of ROA). The Respondent later filed a supplementary list of documents dated 13th January 2023 and a further list of documents dated 27th October 2023, both with the bundles of documents attached (pages 19-34 of ROA).

15. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 10th June 2022 (pages 35-37 of ROA). The Appellant also filed a witness statement dated 2nd August 2023; and a list of documents of even date with the bundle of documents attached (pages 38-42 of ROA).

16. In reply to the response by the Appellant, the Respondent filed a further statement dated 27th October 2023 (pages 43-46 of ROA).

17. The Claimants/Respondents' case was heard on the 22nd of November 2023 with the Respondent testifying. He relied on his filed witness statement as his evidence in chief and produced the documents attached to all the Claimants/Respondents lists of documents as his exhibits. He was cross-examined by counsel for the Appellant, Mr. Munene (pages 187-188 of ROA).

18. The Appellant's case was heard on 11th September 2024 with the Appellant relying on his filed witness stamen and producing his documents before the court. He was cross-examined by counsel for the Claimant/Respondent, Mr. Magonda (pages 189-190 of ROA).

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

20. The Trial Magistrate Court delivered its judgment on the 10th of March 2025 partially allowing the Claimants/Respondents' claims in respect of one month's salary in lieu of notice; unpaid salary for September 2021; salary underpayment; house allowance; unpaid leave for the 18 months prior to termination; and 12 months' salary as compensation for unfair termination, and costs of the suit plus interest. The court also made an order that the Appellant remits the Claimant/Respondent's unpaid NSSF contributions, and issues him with a Certificate of Service (Judgment at pages 178-179 of ROA).

Determination

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

Issues for determination

22. The Appellants identified the following issues for determination in their submission dated 22nd October 2025:-

    i. Whether the learned Magistrate erred in finding that the Respondent had proved unfair termination and in doing so misapplied the law on the burden of proof under Section 47 (5) of the Act.

    ii. Whether the learned Magistrate erred in finding that the Respondent's employment commenced in 2018.

    iii. Whether the awards for compensation and allowances were legally and factually sustainable.

23. On their part, the Respondents identified the following issues for determination in their submissions dated 31st October 2025:

    i. Was the Respondent a casual employee.

    ii. Whether the Respondent's termination was unfair.

    iii. Whether the Respondent was entitled to the reliefs sought.

    iv. Who will bear the costs of this appeal.

24. On perusal of the grounds of appeal and taking into consideration the issues outlined by the parties, the court determined the following as the relevant issues for determination in the appeal-

    a. The nature of the employer-employee relationship

    b. Whether the learned Magistrate erred in finding that the Respondent had proved unfair termination and in doing so misapplied the law on the burden of proof under Section 47 (5) of the Act.

    c. Whether the trial court erred in reliefs granted.

The nature of the employer-employee relationship

25. The relevant grounds of appeal under the issue for determination by the court were stated as –

    a. The Honourable Magistrate erred in law and fact by finding that the Respondent was employed in 2018 without any credible evidence to substantiate this claim.

b. The Honourable Magistrate failed to appreciate that a prior relationship existed between the parties before any formal employment commenced, and therefore, MPESA transactions were insufficient evidence of an employment relationship.

26. In the memorandum of claim at paragraph 4, the respondent pleaded that he worked as from 1st April 2018 diligently upto his dismissal on the 30th September 2021(page 4 of the ROA). In a witness statement paragraph 2, the respondent averred that he was employed by the appellant as a van driver from 1st April 2018 to 30th September 2021, when he was dismissed. (page 13 of ROA). The claimant produced his MPESA statement before the trial court, which had an entry of payment on the 5th August 2018 from the appellant. (page 30 of ROA).

27. Conversely, the appellant in his witness statement stated that he employed the respondent sometime in March 2021 as a driver of a saloon car through an oral contract. The respondent produced the claimant's NSSF statement, which indicated remittances for only 3 months in July 2021 (page 42 of the ROA). The respondent filed a further statement dated 27th October 2023 in which he reiterated he was employed on 1st April 2018 and denied the allegation of the appellant of having been employed in March 2021(page 43 of ROA).

28. On perusal of the record, the court found the claimant adopted his witness statement at the trial and that the issue of date of employment was not raised in cross-examination. That was the same issue raised in the appellant's cross-examination. In the re-examination, the appellant reiterated that the respondent was employed in March 2021. The trial court did not appear to have determined the issue of date of employment. The employer only filed NSSF statement which had entries for only three months starting in July 2021 and having pleaded to have employed the respondent in March 2021, the NSSF statement was inconclusive evidence of the employment. Conversely, the respondent filed his MPESA statement with entries of payments from 5th August 2018. The appellant did not dispute the statement or explain the relationship he had with the respondent to justify the payment. In a contest over the employment period, the burden shifts to the employer, as custodian of records, to produce documents related to the employment. The appellant having failed to do so, the court finds that the respondent proved on the balance of probabilities that he was employed on 1st April 2018 by the appellant.

Whether the learned Magistrate erred in finding that the Respondent had proved unfair termination and in doing so misapplied the law on the burden of proof under Section 47 (5) of the Act.

Appellant's submissions

29. The learned Magistrate's finding that the Respondent had proved unfair termination was not only unsupported by evidence but also founded on a fundamental misapprehension of the law governing the burden of proof under Section 47(5) of the *Employment Act*, 2007 which provides that:

> " For any complaint of unfair termination...the burden of proving that an unfair termination or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination shall rest on the employer."

30. The said provision establishes a dual and sequential evidential burden: the employee must first demonstrate, on a balance of probabilities, that termination indeed occurred. Only thereafter does the evidential burden shift to the employer to justify the reasons and procedure for such termination. The legal import of this provision is clear: the employee must not only prove that termination occurred but must also establish some element of unfairness before the evidential burden shifts to the employer. It is not sufficient to merely allege termination; the law requires credible proof of both fact and

unfairness. This position was reaffirmed in Josephine M. Ndungu & Others v Plan International Inc [2019] KEELRC 663 (KLR), where Makau J held that the employee's burden is discharged only upon establishing a prima facie case that the termination fell short of the legal threshold set under Section 45 of the Act. The finding that the Respondent had proved unfair termination was therefore a grave error in both law and fact. The learned Magistrate inverted the statutory order of proof by placing upon the Appellant the initial burden to prove the non- existence of termination-an evidentiary burden wholly foreign to law and precedent.

31. In the impugned judgment, the trial court ignored the clear sequence of the burden of proof and wrongly required the Appellant to prove instead. This inversion was an error of law that effectively shielded the Respondent from his primary statutory duty to establish the factual basis of his claim.13. When parliament drafted the *Employment Act*, the rationale behind the drafters' decision to require the employee to bear the initial burden of proof is to prevent frivolous and speculative claims by disgruntled employees, and to ensure that only bona fide disputes reach the bench for adjudication. The Respondent's claim in this case fell short of that standard and ought to have been summarily dismissed for want of prima facie proof of unfair termination. Shockingly, the learned Magistrate imposed upon the Appellant the entire evidential burden, despite the Respondent's contradictory and unsubstantiated testimony-evidence barely sufficient to sustain a hearing, let alone a finding of liability.

32. The Respondent adduced no termination letter, no written communication, and no witness testimony to corroborate his claim. His sole allegation was that he "was informed that his services were no longer required"-a self-serving assertion unsupported by documentary or independent proof. The Appellant, however, consistently maintained that the Respondent had absconded duty - a fact the Respondent himself admitted during trial, stating that he had been away on a prolonged medical break following a non-work-related injury.

33. The evidence, including the Respondent's own statements, showed that he had deserted his job rather than been dismissed. He stayed away from work for a long time without any explanation and later reappeared only to file this case. Finding that he was terminated was therefore based on speculation, not proof. The learned Magistrate erred in law by assuming that unfair termination could be inferred simply because there was no termination letter. The absence of such a letter is not proof of unfair termination and does not relieve the employee of the burden imposed by Section 47(5) of the *Employment Act*.

34. By requiring the Appellant to prove that termination did not occur, without first placing the initial burden on the Respondent to establish a prima facie case of unfair termination, the court applied a standard unknown to law. Such reasoning would permit any disgruntled employee to allege unfair termination without proof, contrary to both logic and the clear intent of Section 47(5) of the *Employment Act*. Thus, by shifting the evidential burden to the Appellant ab initio, the trial court replaced legal proof with presumption. It effectively punished the employer for an approach condemned by the supreme Court which not proving a negative has emphasized the need for parties to meet their respective burdens of proof. In Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) [2022] KESC 56 (KLR) the Apex bench held that: "The law of evidence complements the existing civil and criminal substantive and procedural laws in this country. The outcome of a case depends on the strength, accuracy and reliability of evidence. In an adversarial court system like ours, the courts and judges are 'blind", in the sense that they do not carry out any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what parties present. Consequently, cases are won or lost on the evidence placed before the court."

35. Recently, the ELC has restated this position where the learned Justice Yani in Ngetich & 9 others v Nyamongo & 14 others [2025] KEELC 7072 (KLR) held that: "This being an adversarial system, the Court is an impartial adjudicator. The court cannot for any reason abandon its position as a neutral arbiter and turn itself into an investigator. Since it is the parties that are responsible for presenting their cases and evidence, there is no room for this court to intervene or help either party to supplement and/or better its case. The role of the court as a neutral arbiter is limited to determining the dispute based on the evidence and arguments presented by each party. A court must not descend into the arena of disputes or assist one party over another by gathering evidence for them, or helping them to do so. We submit that although these authorities do not arise from employment disputes, they restate fundamental principles of evidence law applicable across all civil proceedings. In this case, the Respondent approached the court without any proof of unfair termination, yet the trial court effectively carried him over the threshold of proof to the prejudice of the Appellant and in clear departure from the rule of law that governs our adversarial system.

36. The trial court's finding that termination was unfair was thus bereft of evidential foundation and unsupported by law. The conclusion was based on conjecture, not proof, and cannot stand under appellate scrutiny. The essence of Section 47(5) is EQUALITY BEFORE THE LAW-that both employer and employee bear defined, sequential obligations. To exempt one party from compliance distorts justice and undermines the statutory balance. Without the Respondent first discharging his evidential burden to establish a prima facie unfair termination, the Appellant was under no legal duty to justify anything. See Josephine M. Ndungu & others v Plan International Inc (supra)

37. In Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] KECA 300 (KLR) the Court of Appeal authoritatively held that: "Much as courts are right to be solicitous of the interests of the employee, they must remain fora where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway."-----See Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLRAs stated above, the first duty is for the respondents (employees) to lay a foundation that their services were terminated and that they were terminated wrongly."

38. The law must apply equally to both parties. Just as employers are required to prove their case when called upon, employees too must meet the standard set for them under Section 47(5). The law was never meant to favour one side over the other, but to ensure fairness for both. Unless the employee first proves that termination actually occurred and was unfair, the employer cannot be expected to defend a claim that has not been established. In the end, justice cannot rest on sympathy or assumption. The Respondent bore the duty to prove his case and failed to do so. To uphold such a finding would be to reward allegation over evidence a path the law wisely forbids. The same must be overturned for being per-incuriam.

The Respondent's submissions

39. The Respondent testified that after getting out of hospital, he went to the Appellant to request back his work. He was orally told that there was no work available for him as the Appellant had already employed a new driver. The Respondent was terminated without being issued any notice. The law stipulates a 28 days' notice to an employee who falls under a monthly wage which the Appellant adamantly failed to abide by. 33. The Appellant never issued any termination notice or letter. He knew the Respondent had been involved in an accident. He also confirmed that he employed a new driver the moment the Respondent failed to show up. No reliever driver records were filed. He never notified the labour officer that the Respondent never showed up to work. Reference on record of Appeal, Typed proceeding, page 190, lines 4-6.

40. The Respondent was entitled to being issued with a notice or payment in lieu of notice prior to being terminated. The Appellant never filed any documents to controvert the position that no notice was ever issued to the Respondent. It was the Appellant admission that the Respondent was never issued with a termination notice or letter. The Appellants actions was a clear violation of sections 35(1) (c) of the *Employment Act*. We also rely on the following provisions of the law;- Section 43 of the *Employment Act* provides for Proof of reason for termination. It states;- 43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or 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. Section 45 of the *Employment Act* discusses Unfair termination as follows: 45. Unfair termination (1)No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove- (a) that the reason for the termination is valid; (b) that the reason for termination is a fair reason- (i) related to the employees conduct, capacity or compatibility; or (ii)based on the operational requirement of the employer, and (c) that the employment was terminated in accordance with fair procedure. (4) A termination of employment shall be unfair for purpose of this part where- (a) The termination is for one of the reasons specified in section 46; or (b) It is found out that in all the circumstance of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purpose of this section, a labour officer, or the industrial court shall consider- (a)the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;(b) the conduct and capability of the employee up to the date of termination; (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d)the previous practice of the employer in dealing with the type of circumstance which led to the termination, (e)the existence of any previous warning letters issued to the employee. In the case of James Ondima Kabesa -vs- Trojan International Limited [2017] eKLR Onyango J. observed as follows; “In considering if termination is fair, the Court must consider two limbs; whether fair procedure as provided in section 41 of the *Employment Act* was complied with; and, if there was valid reason for termination as provided under section 43. Section 45 provides that if either of the two was not complied with then the termination is unfair.”

41. On the question of desertion of duty, the Appellant failed to demonstrate how he tried reaching out to the Respondent. He admitted having knowledge that the Respondent had been involved in an accident. He blocked the Respondent phone and offered no assistance towards medication. No report of desertion of duty was made to the labour officer. Any claim of desertion of duty must be proved by the employer as it won’t be enough to simply state that an employee deserted duty. The Respondent invites the Court to consider the case of Evans Ochieng Oluoch -Vs- Njimia Pharmaceutical Limited [2016] eKLR, where the court held as follows; The Claimant states that he was verbally terminated on the 17th December 2010 after making a request to go on leave. The Respondent on the other hand states that the Claimant deserted duty after being summoned to a meeting to discuss under performance of his duties. Desertion amounts to gross misconduct, it must be proved.it is not enough for an employer to simply state that an employee has deserted duty. 38. The Appellant is supposed to show efforts were made towards getting in touch with the Respondent when any allegation of desertion of duty is raised. The Appellant never made any follow up to know the extent of the injuries sustained by the Respondent. The Appellant never sent any email, SMS or Wassup message to the Respondent inviting him back to work. We invite court to consider the supra case where court continued to state; ” According to this letter, some effort was made to reach the Claimant. However,

the Claimants manager who is said to have made these efforts was not called as a witness and the court was therefore unable to assess the efficacy of these efforts. An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserted employee. At the very least, the employer must issue reasonable notice to the employee that the termination of employment is being considered. 40. From the foregoing, we humbly submit that the Appellant failed to prove his allegation of desertion. He never produced any attendance records to prove his allegation of desertion of duty. He never showed any effort made towards reaching the Respondent. He never produced any records of a reliever driver. The law provides that in instances of desertion a report needs to be made to the labour office before any termination of an employee can be done. The Respondent was never issued with a warning letter or a show cause letter or summoned to any disciplinary hearing or issued with a termination letter or notice. We pray that this Honourable Court holds that the learned Magistrate rightly held that the Respondent termination was unprocedural and therefore unlawful.

Decision on issue No. 2

42. The relevant grounds for determination were as follows-

    a. The Honourable Magistrate failed to adhere to the mandatory provisions of Section 47(5) of the *Employment Act*, 2007, which unequivocally places the burden of proof on an employee alleging unfair termination or wrongful dismissal to demonstrate that such termination or dismissal indeed occurred.

    b. The Honourable Magistrate erred in law and fact by finding that the Appellant had terminated the Respondent's employment, whereas the evidence clearly demonstrated that the Respondent had absconded duty, resurfaced after a prolonged absence, and later initiated the claim.

43. The prove of employment claims is according to section 47 (5) of the *Employment Act* which states as follows- ''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 for the termination of employment or wrongful dismissal shall rest on the employer.'' In the instant case, on the occurrence of the termination, the claimant stated in a witness statement that he was involved in a road accident and hospitalized at Kiambu Level Five hospital for one and a half months, and upon discharge and return to work, was informed that his services were no longer required. The Respondent stated that his services were terminated on the 30th September 2021. (see page 13 of ROA the claimant's witness statement). In proof of his claim of hospitalization, the claimant filed medical records at the said hospital. A copy of the discharge note indicated he was admitted at the Ministry of Medical Services, Kiambu District hospital on the 28th September 2021 and discharged on 13th November 2021. The documents he indicated he stumbled and fell while walking on a rough road(page 21 of ROA). I will return to the discharge report later in the judgment.

44. Conversely, the appellant filed a witness statement dated 2nd August 2023, where he stated the claimant absented himself without explanation in September 2021. He was not aware of any accident, and none was brought to his attention(page 39 of ROA). The claimant filed a reply to the response and stated that he worked up to 28th September 2021, and when heading to work, he fell and dislocated his right hand and was hospitalized for 2 weeks. During cross-examination, the respondent told the court he was involved in an accident and was going to the hospital.

45. During the cross-examination, the appellant told the court that the respondent got into an accident and they got a reliever. The claimant worked from March 2021 to September 2021. The trial court recorded that the appellant told the court that he came to learn of the claimant's injury towards the end of November 2021 when the claimant resumed work. This being first appellate court in Selle & Another -v-Associated Motor Boat Co. Ltd & Others [1968] EA 123, the role of the court was enunciated thus: "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

46. In the instant appeal, the court, on review of the discharge summary and the medical report, found in consistency on date of admission to the hospital with the discharge indicating 28th September and the interim invoice at the hospital 31st October 2021(page 22). The documents indicated the respondent was discharged on 12th November 2021 consistent with the testimony of the respondent that he returned at the end of November. The appellant, while stating the claimant absconded in September 2021 during the hearing, said the claimant worked up to September 2021 and was involved in an accident. The appellant, having stated he replaced the respondent for absconding, that was tantamount to termination. The trial rightly observed that the appellant had a duty to issue notice to show cause on the said absenteeism and comply with section 41 of the *Employment Act* as stated in the cited decision in Joseph Nzioka v Smart Coatings Limited (2017)e KLR. I find the decision of the trial court sound in law and uphold the finding of unfair termination for lack of compliance with section 41 of the *Employment Act*.

Whether the trial court erred in reliefs awarded

47. Compensation- court awarded maximum compensation on the basis that the termination was unprocedural, thus unlawful. The trial court awarded maximum compensation of 12 months without any justification, contrary to the provision of section 49(4) of the *Employment Act*. In Kenya Broadcasting Corporation v Geoffrey Wakio where the Court stated "This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR the court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical." The award of maximum compensation in the instant case was arbitrary. The court upheld the finding of employment in 2018. The court was satisfied that the claimant was absent without permission of the employer or any notification for approximately 1 and ½ months, a valid reason for summary dismissal subject to procedural fairness. He contributed to the termination, and thus the maximum award was disproportionate to the period of service and failed to consider the contribution to the termination. The court set aside the maximum award and substituted it with 2 months' salary. Notice pay awarded is provided for under section 35 of the *Employment Act* thus upheld.

48. The claims for underpayment for entire period of employment April 2018- September 2021 are upheld as they took into account the salary of Kshs. 17000 which was pleaded and it was not in dispute the minimum wage was Kshs. 18319.50. The award unpaid salary of September 2021 is upheld as during the hearing the appellant told the court the respondent worked up to September 2021 consistent with the claim.

49. On housing the appellant submitted the minimum wage was inclusive of housing. the relevant wage order was of 2018. The same stated as follows-THE REGULATION OF WAGES (GENERAL) (AMENDMENT) ORDER, 2018 1. This Order may be cited as the Regulation of Wages (General)

(Amendment) Order, 2018 and shall come into force on the 1st May, 2018. 2. The Regulation of Wages (General) Order, is amended by deleting the Schedule and substituting therefor the following new Schedule— Schedule 1 Basic Minimum Monthly Wages (Exclusive Of Housing Allowance)2. Minimum Daily and Hourly Rates (Inclusive Of Housing Allowance). What was invoked was a monthly wage, which was exclusive of the housing allowance. The award of housing is thus upheld.

50. On leave – the appellant submitted that the claimant, having worked for 6 months, the award of 18 months was speculative and not supported. The court upheld the employment in 2018, thus the submissions are not relevant. The appellant did not produce any record to demonstrate the claimant had taken annual leave in 2020 and 2021, and the court finds no basis to interfere with the trial court's findings.

Conclusion

51. In conclusion the appeal is allowed and the Judgment and Decree of the Hon. B. M. Cheloti (PM) delivered on 28th February 2025 in Nairobi MCELRC No. E470 of 2022 is set aside and substituted as follows-

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

    a. Notice pay of 1 months salary Kshs. 18,319.50

    b. Compensations for unfair termination equivalent of 2 months salary Kshs. 36,639.

    c. unpaid salary September 18,319.50

    d. salary underpayment Kshs. 47,502.00

    e. house allowance Kshs. 98,925.48

    f. Untaken leave of 18 months Kshs. 27,479.25

    Total amount awarded Kshs.247,184 .73 with interest from date of filing suit till payment in full.

    Costs of the suit.

52. On appeal, the principle of litigation is that costs follow the event thus costs of the appeal are awarded to the appellant.

53. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF JANUARY, 2026.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Munene

Respondent – Magonda