REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E016 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

SAMUEL MASOSO.....APPELLANT

VERSUS

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

JUDGMENT

This is an appeal against the Judgment of Hon. G. N. Barasa, S.R.M delivered on 27th February 2025 in KISUMU MCELRC NO. E0262 of 2021 **Samuel Masoso V Mini Bakeries (Nairobi) Ltd**.

The brief facts of the case before the trial court were that the claimant was initially employed by the respondent as a casual painter in 2011 at Kshs.400 per day which later rose to Kshs.960.00

The claimant alleged that he used to work at the respondent's branches at Kisumu, Webuye, Eldoret, Kitale, Kakamega, Kisii, Busia and Migori and worked continuously.

The claimant's case was that his employment was verbally terminated by one Mr. Dickson Otieno Ndege on 6th September 2021 and prayed for underpayment, leave, travelling allowance, transfer disturbance allowance, provident scheme contributions, soap, milk, terminal benefits, notice pay, long service award, compensation, interest, certificate of service and costs of the claim.

The respondent's case was that the claimant and his colleagues were invited for a meeting on 6th September 2021 following a change in the duty rota to streamline their work in view of the COVI-19 pandemic but they walked out of the meeting and never returned to the workplace.

According to the respondent, the claimant absconded or deserted the workplace on 6th September 2021.

After considering the respective cases, evidence on record and submissions by counsel, the learned trial magistrate found that termination of the claimant's employment by the respondent was unfair and awarded three (3) month's salary in *lieu* of notice, long service award, service pay, severance pay, costs of the suit at

Kshs.60,000.00 and interest from the date of filing the suit.

Aggrieved by the decision, the appellant filed the instant appeal.

The learned trial magistrate was faulted on eight (8) grounds, that the court erred in law by:

1. *Failing to award underpayment and underpaid salary arrears.*
2. *Failing to appreciate that the appellant's case related to termination of employment and unpaid and underpaid salaries was part of terminal dues.*
3. *Failing to consider the totality of the appellant's case and evidence thereof.*
4. *Failing to award house allowance, leave pay, leave travelling allowance, transfer and disturbance allowance, cost of transport and provident fund contributions.*
5. *Failing to award salary in lieu of notice.*
6. *Awarding less service pay.*
7. *Awarding inordinately low compensation.*
8. *Awarding costs of Kshs.60,000.00*

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 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

Similarly, counsel submitted that the appellant was entitled to transfer and disturbance allowance as per the CBA, Kshs.242,000.00 and Kshs.118,208.38 as provident fund contributions, notice pay at Kshs.54,957.00 and bar soap, Kshs.18,150.00
The respondent did not file submissions.

Analysis and determination
The eight (8) grounds of appeal as itemised by the appellant's counsel may be condensed into three (3) or four (4) grounds namely; failure to consider the appellant's case in totality and evidence, appellant's entitlements in the circumstances of this case and awards made or not made and assessment of costs.

Before delving into the grounds of appeal, it is essential to restate the role of the first appellate court as enunciated in previous decisions such as **Selle and another V Associated Motor Boat Co. Ltd & Others**

[1968] EA 123 **Williamson Diamonds Ltd V Brown** [1970] EAI.

In **Gitobu Imanyara & 2 others V Attorney General** [2016] KECA 557 (KLR), the Court of Appeal held:
"This being a first appeal, it is trite law that this court is not bound necessary to accept the findings of fact by the court below and that an appeal to this court from a trial... is by way of a 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 allowance in this respect..."

The principal ground of appeal, in the court's view is that trial court erred by failing to consider the totality of the appellant's case and the evidence in support thereof. This is because evidence is the cornerstone of any case and without it, the case fails.

Regrettably, the appellant's witness statement dated 20th December 2021 and adopted as evidence in chief on 22nd January 2024 lacked virtually all relevant particulars in

support of the appellant's case before the trial court, and made no reference to any documentary evidence.

The appellant's case was grounded on several documents, namely; employment card dated 12/20 showing that the appellant was employed as a painter, demand letter and responses, and several barely legible payment vouchers for causals with illegible dates save for those dated September 2021, painters duty rota dated September 2021, minutes of a meeting held at Kakamega branch on 21st July 2021 which the appellant attended at which the issue of soap and travelling allowance was discussed and while the former was determined, the latter was left pending advice from the management.
The last piece of evidence was copy of the collective agreement (CBA) between the respondent and the Bakery Confectionery, Food Manufacturing and Allied Workers Union (Kenya) for the period 1st May 2017 to 30th April 2020.

Strangely, none of the parties availed verifiable evidence of the date of employment or payment of wages or salary to the appellant or evidence of any employment relationship between the parties before 2018.

Be that as it may, the parties were in agreement that the separation took place on 6th September 2021. The only dispute was how the separation took place and puzzlingly, none of the parties availed credible evidence of the separation.

The appellant's claim that one Mr. Disckson Otieno Ndege the respondent's supervisor terminated his employment verbally on 6th September 2021 lacked supportive evidence as to where the alleged words were echoed or the circumstances in which the termination was effected, including what the appellant did thereafter and subsequent days.

In sum, the appellant failed to show how the separation took place.

It is trite law that he who alleges must prove the allegations by adducing credible evidence by dint of the provisions of Section 107, 108 and 109 of the Evidence Act. (See **CMC Aviation Ltd V Crusair** [1987] KLR 103, **Karugi & another V Kabiya & 3 others** [1987] KLR 347, **James Muniu Mucheru V National Bank of Kenya Ltd** [2019] KECA 1058 (KLR).

Under, Section 45 of the Employment Act:

(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 the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Similarly, in **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR Ndolo J stated;

"...However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness..."

Simply put, the employer must have had a reason or reasons to terminate the employee's employment and

must have conducted the termination in accordance with a fair procedure.

An in-depth examination of the evidence provided by the respondent leaves little doubt that none the provisions of Section 41, 43, 44, 45 or 40 of the Employment Act was complied with.

Both **RWI** and **RWII** maintained in court that the appellant deserted the workplace and were not terminated form employment.

To buttress its case, the respondent provided a copy of a letter written by Mr. Dickson Otieno Ndege to the effect that the appellant deserted the workplace on 6th September 2021. However, the letter had neither an addressee nor acknowledgement by recipient if any.

In addition, the respondent provided a copy of minutes of the disciplinary meeting held on 14th September 2021 which the appellant did not attend. RWII confirmed as much on cross-examination.

Similarly, the respondent adduced no shred of evidence to demonstrate that it made any attempts to contact the

appellant or issued a notice to show cause or invited the appellant for the disciplinary hearing.

Put in the alternative terms, it behooved the respondent to demonstrate that the appellant absconded or deserted the workplace.

Evidence of a notice to show cause to the appellant, would have shown that the respondent had made reasonable attempts to contact the appellant to resume duty or face disciplinary action for his absence.

In **Felistas Acheha Ikatw V Charles Peter Otieno** [2018] eKLR Maureen Onyango J held;
"The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate 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 **Stanley Omwoyo Oncheri V Board of Management Nakuru YMCA Secondary School** [2015] eKLR, **Dickson Matingi V Db Schenker Ltd**

[2016] eKLR, **Nzioka V Smart Coatings Ltd** [2017] eKLR and **Boniface Francis Mwnagi V BOM Iyego Secondary School** [2019] eKLR.

The foregoing propositions of law apply on all fours to the facts of the instant case, and as adverted to elsewhere in this judgment, the respondent adduced no evidence to prove that the appellant absconded or deserted the workplace.

Neither RWI nor RWII availed evidence on the efforts or attempts made by the respondent to find out where the appellant was and why he was not reporting to work.

In court's view, the trial court captured the evidence adduced by the appellant and the respondent in detail and cannot be faulted on the ground of having failed to consider the totality of the appellant's case and supportive evidence.

Consequently, this court is in agreement with the learned trial magistrate that the termination of the appellant's employment by the respondent was unfair for want of a substantive justification and procedural fairness and the

award of three (3) month's salary compensation was consistent with the finding.

Appropriate reliefs

As regards the appellant's entitlements and awards reliance was placed on the Regulatory of Wages (General) (Amendment) Orders since 2013 to 2018 and the provisions of the Collective Bargaining Agreement.

Intriguingly, the appellant's counsel assumed that the appellant was an ungraded artisan yet he was employed as a painter, a fact he pleaded in the memorandum of claim and which was supported by the documentary evidence on record he provided.

For purpose of salary and allowances, a painter without any formal training on paintwork and any other skill formally learnt and recognized , is equated to an unskilled or semi skilled employee whose minimum consolidated wage was Kshs.3,756 or Kshs.6,792 per month in 2011 and Kshs.5,436.90 or Kshs.9,808.10 in 2015 and had risen to Kshs.16,857.68, inclusive of housing allowance in 2018.

Assuming that the appellant worked for 25 days every month from 2011 to 2021 his monthly salary was

Kshs.10,400 in 2011 and had risen to more than Kshs.24,000, beyond the consolidated minimum wage of Kshs.16,857.68.

Significantly, the appellant's written witness statement made no reference to the allegation that he was underpaid or demonstrated how the underpayment was perpetuated by the respondent either under the provisions of the CBA effective May 2017 or under the relevant Regulation of Wages (General) (Amendment) Order.

Needless to underscore, the concept of minimum wage is a prescription of law and binds all employers and non-compliance attracts criminal sanctions. Terms of a CBA on the other hand are contractual terms enforceable by the parties, principally by the union on behalf of its members.

The court found it intriguing that the union did not raise the issue of the alleged non-compliance with terms of the CBA from May 2017 to September 2021, having negotiated the CBA.

In sum, the appellant failed to demonstrate that he was underpaid during his employment, and the court was unable to discern evidentiary that the appellant was underpaid.
The court is in agreement with the trial court on this issue.

As regards house allowance, having found that the appellant's gross salary rose from Kshs.10,400 in 2011 to more than Kshs.24,000 from 2018, which exceeded the minimum wage by a wide margin, the claim for housing allowance was unsustainable.

Concerning leave pay, the appellant made no allegation of any outstanding leave pay or when it accrued. The claim lacked particulars, was unproven and was unsustainable as the trial court found.

The claim for transfer disturbance allowance suffers the same fate for want of proof.

Neither the appellant's written witness statement nor the oral evidence in court provided particulars of the claim. The appellant adduced no evidence as to he was transferred from Kisumu to Kakamega or from Kisumu to

Busia or Kisii or Webuye and was not paid the allowance. Without credible evidence in support of the claim, the same remained a mere allegation for dismissal.

Similarly, the claim for leave travelling allowance lacked particulars and was unmerited as the trial court found. Minutes of the meeting at the Kakamega Branch which the appellant attended on 21st July 2021 discussed the issue of provision of soap, but the respondent refused to shoulder the burden leaving it to the appellant.

The court is however satisfied that the request was reasonable having regard to the nature of work the appellant was involved in and the employer did not provide protective clothing as per Clause 22 of the CBA.

Similarly, the claim for a packet of milk per day was not unreasonable bearing in mind that the appellant's daily duties were manual. The prayers were merited.

As regards the claim for contributions to a provident fund, the appellant made no allegation or proved that the respondent was not deducting or remitting NSSF deductions to the NSSF as by law required. A provisional

NSSF statement would have effortlessly proved the true state of affairs.

The claim was unproved.

Regarding terminal dues, contrary to the respondent's argument that the appellant was not entitled to terminal dues, he was, as the respondent tendered no evidence on how it separated from the appellant financially, as per the CBA.

This claim encompasses unpaid salary or wage up to 6th September 2021, if any, prorata leave or leave travelling allowance, and acting allowance among others.

The respondent adduced no evidence on how it computed and paid or proposed to pay to the appellant after clearance.

The appellant is accordingly awarded Kshs.148,240.00 for the duration served.

The claim for long service award was uncontested Kshs.9,600.00.

On pay in *lieu* of notice, having found that termination of the appellant's employment was unfair, the appellant qualified for salary in *lieu* of notice by dint of Section 49(1)(a) of the Employment Act, the equivalent of three months salary Kshs.73,062.00 by dint of Clause 3 of the CBA.

Finally, in considering the quantum of compensation, the learned trial magistrate considered the notice pay, basic salary and length of service among other factors and although some of the factors considered were irrelevant the eventual award was, in the court's view, fair and it is upheld.

From the foregoing, it is discernible that the trial court fell into error on the entitlements and awards of severance pay, which was not supported by any evidence and neither of the parties pleaded or proved redundancy.

The award is set aside.

Finally, on the award of costs at kshs.60,000.00, the trial court was faulted for not having considered all the items, in respect of which costs were incurred.

Although courts have statutory power and discretion to award costs, and do so routinely, they seldom assess the actual amount and typically leave it to the parties.

In order to promote fairness, the amount payable by the respondent as cost ought to be left to the parties.

In the premises, the award of Kshs.60,000.00 as costs is set aside.

The foregoing shows that there is need to interfere with the exercise of discretion by the trial court in consonance with the principles in **United India Insurance Co. Ltd & another V East African Underwriters Co. Ltd**.

In the end, the judgment of the trial court is interfered with to the extent that:

(a) The award of Kshs.60,000.00 as costs of the suit is set aside.

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

(c) The award of Kshs.97,920.00 as severance pay is set aside.

(d) Award of Kshs.148,240.00 as terminal dues.

(e) Notice pay Kshs.48,708.00

(f) Bar soap Kshs.5,400.00

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

(h) *Certificate of service.*

(i) *Other awards by the trial court are affirmed save that interest shall run from the date of Judgment.*

Owing to the partial success of the appeal, 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 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