Muchi v Mini Bakeries (Nairobi) Ltd (Appeal E014 of 2025)
[2026] KEELRC 227 (KLR) (29 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 227 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E014 OF 2025

JK GAKERI, J

JANUARY 29, 2026

BETWEEN

HILLARY MUCHI ..... APPELLANT

AND

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

JUDGMENT

1. Dissatisfied with the Judgment of Gloria Nasimiyu Barasah, S.R.M in Kisumu MCELRC No. E258 of 2021, Hillary Muchi v Mini Bakeries (Nairobi) Ltd delivered on 27th February 2025, the appellant filed this appeal on 6th March 2025 vide a Memorandum of Appeal dated 5th March 2025.

2. The appellant faulted the learned trial magistrate on several grounds relating to totality of the appellant's case and evidence in support and the appellant's entitlements and awards among others.

3. The brief facts of the case before the learned trial magistrate was that the respondent employed the appellant as a painter on causal basis in July 2015 at Kshs.703.00 which had risen to Kshs.960.00 as at the date of termination of employment.

4. The appellant's case was that his employment was terminated by Mr. Dickson Otieno Ndege, the respondent's foreman on painters, by word of mouth on 6th September 2021 but the respondent's case was that the appellant deserted the workplace on 6th September 2021 and never returned and was thus not terminated from employment and sought the dismissal of the suit with costs.

5. The appellant had prayed for numerous reliefs including underpayment, leave, travelling allowance, transfer and disturbance allowance, salary in lieu of notice, compensation for unlawful termination of employment, certificate of service and costs.

6. After considering the respective cases, evidence adduced and submissions by counsel, the trial court found that termination of the appellant's employment was unfair and award compensation, severance and service pay, long service award, costs of the suit and interest.

7. The appellant faulted the learned trial magistrate for having erred by:

    1. Finding that the appellant was not entitled to unpaid salary arrears and underpayment.

    2. Failing to find that the underpaid salary was part of the terminal dues.

    3. Failing to consider the appellant's evidence in its totality.

    4. Failing to allow the appellant's claim for house allowance, leave, travelling allowance, transfer and disturbance allowance, transport and pension.

    5. Failing to award salary in lieu of notice.

    6. Awarding lesser figure of service pay.

    7. Awarding a low figure of compensation for unlawful termination of employment and costs of Kshs.60,000.00.

Appellant's submissions

8. Counsel isolated no specific issues to address but submitted on the provision of Section 37 of the *Employment Act* on conversion of casual employment to term and entitlement to benefits, to submit that the appellant was a de facto permanent employee.

9. On underpayment, counsel cited the decisions in Matsyi v Solo [2025] KEELRC 862 (KLR) and Arisa v Kipkebe [2024] KEELRC 1232 (KLR), to submit that the appellant was entitled to the difference between the amount paid and the minimum wage payable to him including, housing allowance at 15% of the basic salary.

10. On leave travelling allowance, counsel cited the Collective Bargaining Agreement (CBA) between the union and the respondent to submit that the appellant was entitled to annual leave, citing the decisions in Kamtix Clearners v Odhiambo [2025] KEELRC 2475 (KLR), Transglobal Cargo Center t/a Africa Flights Services v Njeru [2025] KEELRC 3209 (KLR) and Sgs Security Guards Ltd v Chepkemoi [2025] KEELRC 1362 (KLR), to reinforce the submission on the duty of the employer to maintain employment records.

11. On transfer and disturbance allowance of Kshs.7,500.00, counsel relied on the CBA.

12. On provident fund, counsel relied on the provisions of the CBA and the decision in Kenyatta University v Maina [2022] eKLR and Halar Industries Ltd v Muia to urge that the appellant was entitled to Kshs.78,393.99.

13. Finally, counsel submitted that the appellant was entitled to notice pay and bar of soap.

14. Strangely, counsel cited the figure of Kshs.1,049,075.56 yet the Memorandum of Claim had no specific figure and a demand letter dated 2nd October 2021 had a different figure of Kshs.1,723,345.18.

Analysis and determination

15. 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.

16. 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, entitlements and assessment of costs at Kshs.60,000.00

17. As to whether the learned trial 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 23rd December 2021 whose contents in the court's view, fell below the threshold of a witness statement.

18. The statement, which the claimant adopted as his evidence in chief on 22nd January 2024 lacked essential particulrs of the appellant's employment by the respondent.

19. 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.

20. 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.

21. The appellant provided copies of legible and illegible payment records of the respondent's casuals for the month of September 2018.

22. 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.

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

24. As regards the date of employment, the appellant adduced no credible evidence of having been employed in July 2015. However, DWI Mr. Gabriel Odoyo testified that he had worked with the painter since 2014 which would suggest that the appellant may have been an employee in July 2015.

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

26. Significantly, the admission of RWI notwithstanding, it is discernible that the appellant had met the threshold of the provisions of Section 37 of the *Employment Act* and had transited from casual employment to term contract, and thus entitled to the terms and conditions of service under the *Employment Act*.

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

28. See in this regard, 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.

29. 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 was unclear as to how it took place.

30. In the court's view, the learned trial magistrate considered the evidence adduced by both parties sufficiently and captured a large portion of it in the judgment and cannot be faulted for having failed to consider the totality of the appellant's case and evidence on record.

31. 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 and inordinately low award for the unlawful termination of employment among other reliefs.

32. As regards termination of employment, 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.

33. Put in alternative terms, 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 were complied with as held in Naima Khamis v Oxford University Press (EA) Ltd [2017] KECA 480 (KLR) where the Court of Appeal stated:

> " ...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, procedurally 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".

34. See also Pius Machafu Isindu v Lavington Security and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.

35. 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.

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

37. The respondent on the other hand pleaded and testified that the appellant deserted the work place on 6th September 2021 and never returned, an allegation the appellant did not controvert.

38. 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 had failed to prove that it attempted to reach out to the appellant to resume duty.

39. 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".

40. 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).

41. It is trite law that whenever an employer relies on the defence of desertion or absconding of 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 or absconding employee if he or she does not show cause or respond at all.

42. 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".
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> See also Simon Mbithe Mbane v Inter Security Services Ltd [2018] eKLR and Joseph Nzioka v Smart Coatings Ltd [2017] eKLR.

43. 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.

44. 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"

45. In the instant case although RWIII testified that the appellant left on 6th September 2021 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.

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

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

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

49. 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.

50. In 2015, the appellant's daily wage was Kshs.703 compared to the minimum wage of Kshs.276 per day.

51. Assuming that the appellant was working on workdays only, his monthly salary was Kshs.17,575.00 per month which was higher than the consolidated salary of driver, or a day watchman who typically earn more than a painter.

52. Notably, the appellant availed a copy of his staff identify card dated 12/20 which analogous to the documents on record revealed that he was employed as a painter not as an artisan as alleged, a claim the appellant did not support by any credible evidence and had pleaded that he was indeed a painter.

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

54. The appellant adduced no evidence to prove that his monthly salary was less than the minimum wage payable to a Painter from May 2015 to 1st May 2017 or from 1st May 2017 to September 2021, when his wage was Kshs.960.00 per day.

55. The claim was patently unmerited.

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

57. The written witness statement dated 23rd December November 2021 made no reference to any of these allowance nor the requisite particulars.

58. 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.

59. In sum, the trial court did not err for having declined to award these allowances. They were not proved.

60. Significantly, the claiming of multiple reliefs is discouraged.

61. 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".

62. 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.

63. 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.

64. The appellant tendered no evidence to justify an ward of service pay and the trial court did not provide a justification for the ward. It was not proved and was not merited.

65. 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*.

66. The award of Kshs.97,920.00 was unmerited.

67. Concerning underpayment, the 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 as it was the basic salary of a car or van driver, shop assistant, printing machine operator, bakery machine operator, dough maker, machine tool operator and saw mill dresser among others.

68. Assuming that the appellant worked for 6 days a week from July 2015, his gross salary was Kshs.17,575.00 and when the wage rose to Kshs.960.00 per day, his salary was over Kshs.24,000.00, higher than the consolidated salary of a tractor driver or salesman.

69. It is trite law 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.

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

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

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

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

74. The appellant failed to demonstrate that the trial court erred in this instance.

75. 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*.

76. 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.

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

78. 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.

79. 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.

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

81. Significantly, having failed to show that the appellant deserted the workplace, the appellant was entitled to salary in lieu of notice Kshs.48,708.00 for termination of employment without notice.

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

83. 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.

84. Equally, the appellant was entitled to terminal benefits as per the CBA Kshs.88,978.00

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

86. 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..."

87. 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.

88. 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.

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

90. 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 would involve many parameters under the Advocates (Remuneration) Order.

91. 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.

92. The upshot of 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.

93. 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.

    d. Salary in lieu of notice Kshs.48,708.00.

    e. Terminal dues Kshs.88,978.00

    f. Long service award Kshs.9,600.00

    g. Bar soap Kshs.5,400.00

    h. Packet of milk Kshs.54,000.00

    i. Certificate of service.

94. 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 this 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

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