

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

APPEAL NO. E009 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

CHARLES OLUOCH
MUTHOR.....APPELLANT

VERSUS

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

JUDGMENT

This is an appeal against the Judgment of Hon. G. N. Barasa, S.R.M in KISUMU MCELRC NO. E261 of 2021
Charles Oluoch Muthor V Mini Bakeries (Nairobi) Ltd.

The appellant's case before the trial court was that he was employed by the respondent as a Painter in March 2012 at Kshs.400.00 per day and worked continuously until 6th September 2021 when his employment was terminated by Mr. Dickson Otieno Ndege, by word of mouth by which time his daily wage had risen to Khss.960.00

That he used to work at the respondent's branches in Kisumu, Webuye, Eldoret, Kakamega, Kisii, Busia and Migori.

The appellant prayed for underpayment, leave travelling allowance, transfer disturbance allowance, provident scheme contribution, soap, milk per day, terminal benefits, notice pay compensation, certificate of service, cost of the claim and interest.

The Memorandum of claim was amended on 18th July 2024 to introduce Rose Auma Onyango and Joyce Atieno Oluoch as administrators of the Estate of Charles Oluoch Muthor.

The respondent's case was that the appellant together with his colleagues were invited for a meeting on 6th September 2021 after consolidation of the duty rota but they stormed out of the meeting and did not return to their place of work.

The respondent denied having underpaid the appellant and prayed for dismissal of the suit with costs.

After considering the respective cases, evidence placed before the court and submissions on record, the learned trial magistrate found that termination of the claimant's employment was unfair and awarded 3 months gross salary compensation, severance pay for each year of service, long service award, service 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 faulting the trial magistrate on eight (8) grounds:

- 1. Failing to award underpayment.*
- 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 Deutsche 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 Kss.118,208.38 as provident fund contribution, 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 and **Williamson Diamonds Ltd V Brown** [1970] EAI among others.

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 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 were discussed and while the former was determined, the latter was left in abeyance 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.

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).

Having alleged that Mr. Dickson Otieno Ndege dismissed him from employment on 6th September 2021, it behooved the respondent to show that the separation was fair.

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 from 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 any other person.

In a similar vein, 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.

Notably, if the appellant deserted as alleged, the respondent adduced no shred of evidence to demonstrate that it made any attempt 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 him to resume duty or face disciplinary action for his absence.

In **Felistas Acheha Ikatwa 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 of the efforts or attempts made by the respondent to for the appellant to resume duty or issue a notice to show cause to him.

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.

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

The award of three (3) month's gross salary as compensation was fair.

Appropriate reliefs

As regards the appellant's entitlements and awards, reliance was placed on the Regulation 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 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 in 2018 inclusive of housing allowance.

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 the appellant 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.

Notably, the prescribed minimum daily wage is inclusive of house allowance.

Concerning leave pay, the appellant made no allegation of any outstanding leave pay or when it accrued, or he did not proceed on leave.

The claim lacked particulars, was unproven and was unsustainable as the trial court found.

The claim for transfer disturbance allowance suffers the same fate. It was unproved.

Neither the appellant's written witness statement nor the oral evidence in court provided particulars to substantiate the claim. For instance, when the appellant transferred from Kisumu to Kakamega or from Kisumu to Busia or Kisii or Webuye without credible evidence in support of the claim, it remained a mere allegation for dismissal.

Similarly, the claim for leave travelling allowance lacked particulars and was unmerited as the trial court found.

Although the appellant availed no evidence that he was entitled to bar soap or one packet of milk per day including or the days on which they were not given, minutes of the meeting held at Kakamega revealed that the issue was outstanding and the CBA provided for it as was the one packet of milk. Both claims were merited.

As regards the claim for contributions to a provident fund, the appellant made no allegation or prove that the respondent was not deducting and 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.

On 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 prepared to pay to the appellant at the separation.

The appellant is accordingly awarded Kshs.133,416.00 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 two months salary Kshs.48,708.00 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 and service pay, the entitlement to which was not evidentiary demonstrated.

The awards 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 was unmerited and it is set aside.

The foregoing shows that a case has been made for 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 upshot, the decision 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 Kshs.43,985 as service pay is set aside.*
- (c) The award of Kshs.97,920.00 as severance pay is set aside.*
- (d) Award of Kshs.133,416.00 as terminal dues.*
- (e) Two months notice pay Kshs.48,708.00*
- (f) Bar soap Kshs.5,400.00*
- (g) Packet of milk Kshs.54,000.00*
- (h) Long service award, Kshs.9,600.00*
- (i) Certificate of service.*
- (j) Other awards by the trial court are affirmed save that costs shall run from the date of Judgment as opposed to date of filing the suit.*

Owing to the partial success of the appeal, 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

ORIGINAL