REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E015 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

ALFRED OWINO ONYANGO.....APPELLANT

VERSUS

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

JUDGMENT

Aggrieved by the Judgment of Gloriah Nasimiyu Barasah, S.R.M in KISUMU MCELRC NO. E257 of 2021, in **Alfred Owino Onyango V Mini Bakeries (Nairobi) Ltd** delivered on 27th February 2025, the appellant instituted this appeal vide a Memorandum of Claim dated 5th March 2025 faulting the learned trial magistrate for having erred by failing to consider the totality of appellant's case and evidence and failing to award several prayers including underpayment, leave and house allowance or awarding less service pay or low compensation and awarding costs of Kshs.60,000.00

The brief facts of the case before the trial court was that the respondent employed the appellant as a Painter in

February 2013 on casual basis at Kshs.500 per day, which subsequently rose to kshs.960.00 per day.

The appellant rendered services at the respondent's branches in Kisumu, Eldoret, Kitale, Busia, Kisii, Migori and Kakamega among other places.

The appellant's case was that his employment was terminated by one Mr. Dickson Otieno Ndege, the respondent's Foreman in charge of Painters, by word of mouth on 6th September 2021.

The respondent denied the allegations and maintained that the appellant deserted the workplace on 6th September 2021 following a meeting at which the new duty rota was discussed.

Both parties adduced oral and documentary evidence and after considering the respective cases, evidence availed and submissions by counsel, the learned trial magistrate held that termination of the appellant's employment was unlawful and awarded three (3) month's salary as compensation, severance and service pay, long service award, costs at Kshs.60,000.00 and interest from date of filing the suit.

Appellant's submissions

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.

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.

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.

On transfer and disturbance allowance of Kshs.7,500 counsel relied on the CBA.

On provident fund contributions, 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.

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

Strangely, counsel cited the figure of Kshs.1,259,247.90 yet the Memorandum of Claim had no specific figure and a demand letter dated 2nd October 2021 had a different figure of Kshs.2,006,469.62

The respondent did not file submissions.

Analysis and determination

Before delving into the specific grounds of appeal, it is essential to underline the duty of the first appellate court, which is essentially to consider the evidence and re-evaluate it and arrive at its own conclusions bearing in

mind that it neither saw nor heard the witnesses and make due allowance in that respect.

See **Selle & another V Associated Motor Boat Co. Ltd (EA), Peters V Sunday Ltd** [1958] EA, **Gitobu Imanyara V Attorney General & others** [2016] eKLR.
As to whether the learned trial magistrate considered the totality of the appellant's case and the evidence in support, it is clear that both parties availed both oral and documentary evidence.

The appellant adopted his written witness statement dated 23rd November 2021, on 22nd January 2024 and was not cross-examined. The respondent on the other hand availed two (2) witnesses who were cross-examined.

Intriguingly, the appellant's witness statement on record, which was his evidence before the court made no reference to his employment, role, salary or wage, how and when it was paid, place of work or how his employment was terminated. It was silent on the reliefs sought.

In sum, the witness statement lacked all material particulars.

Be that as it may, the appellant provided documentary evidence in the form of two (2) demand letters and responses from the respondent, 30 pages of a document entitled “Attendance/payment voucher for casuals, most of which indicated as Busia branch but with unclear and illegible dates.

In addition, the appellant availed a copy of a letter by Mr. Thomas Mwaura, Head Legal Compliance & Administration, to all Painters, Western Region dated 3rd September 2021 on the new duty rota effective 1st September 2021, which was attached and minutes of a meeting held on 21st July 2021 at Kakamega which the appellant attended.

The appellant provided neither a copy of his national identity nor the employment card.

A copy of the Collective Bargaining Agreement between the respondent and the union for the period 1st May 2017 to 3rd April 2020 was also attached.

The foregoing was the entire gamut of the appellant’s evidence before the trial court.

The documentary evidence on record leaves no doubt that appellant was an employee of the respondent serving as a Painter.

Neither party availed credible or verifiable evidence of the date of employment or when and how salary was paid.

Concerning the 'Attendance/payment voucher for casuals' forms completed by hand, the dates on all the 30 pages are illegible or non-existent on most of the pages.

Similarly, the names are illegible in more than 20 of the pages and all legible pages revealed that the appellant's wage was Kshs.960.00 per day.

It is difficult to ascertain whether the appellant signed against his name in all the 30 forms he availed as evidence, much as the respondent did not provide controverting evidence.

From the minutes of the meeting held on 21st July 2021, it is discernible that the attendees discussed the issue of

transport allowance and the same was to await a response by management.

Equally, the Painters requested for soap and were advised to use their own means.

From the evidence on record, it is decipherable that the appellant served the respondent as a Painter for a long time and thus met the threshold of the provisions of Section 37 of the Employment Act and had transitioned from casual employment to term employment and thus entitled to the terms and conditions prescribed by the Employment Act.

The foregoing, however, did not *ipso facto* translate to entitlement to the reliefs prayed for which was an evidential issue, a mandatory requirement.

It is trite law that special damages must be specifically pleaded and strictly proved as articulated in several decisions such as **Hahn V Singh** [1985] KLR 716, **Nimo Ali V Sagoo Radiators Ltd** [2013] KECA 163 (KLR) and **Securicor (K) Ltd V Esther Oliech** [1996] KECA 89 (KLR).

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 is unclear as to how it took place.

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

As to whether termination of the appellant's employment was unfair, the trial court found that it was unfair but was faulted the trial court for failing to award salary in *lieu* of notice, unpaid salaries and inordinately low award for the unlawful termination of employment.

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.

Put in the 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".

See also **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR and **Pius Machafu Isindu V Lavington Security Guards Ltd** [2017] eKLR.

In the instant case, the appellant contended that his employment was unlawfully terminated by the respondents supervisor one Dickson Otieno Ndege on 6th September 2021.

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.

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.

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

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".

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).

It is trite law that whenever and employer relies on the defence of desertion or absconding duty, the employer is required to demonstrate 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.

The foregoing was reinforced 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".

See also **Simon Mbithe Mbane V Inter Security Services Ltd** [2018] eKLR and **Joseph Nzioka V Smart Coatings Ltd** [2017] eKLR.

Significantly, in circumstances in which an employee is alleged to have deserted his duty, the employer is still required to prove that the separation process was fair. 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"

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.

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.

In the court's view, 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 finding that termination of the appellant was unfair.

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

As regards housing allowance, the employer is bound to provide housing to the employee or pay a 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.

In 2013, the appellant's daily wage was Kshs.500 compared to the minimum wage of Kshs.203 per day.

Assuming that the appellant was working on workdays only his monthly salary was Kshs.12,500 which was higher than the consolidated salary of driver over day watchman who typically earn more than a painter.

Notably, the appellant did not avail a copy of his staff identify card but documents on record reveal that he was employed as a painter and not as an artisan as alleged, a claim the appellant did not support by any credible evidence had pleaded that he was employed as a Painter.

By the time his employment was terminated in September 2021 his wage was Kshs.960 per day which translated to about Kshs.24,000 per month.
The appellant adduced no evidence to prove that his monthly salary was less than the minimum wage payable to a Painter from May 2013 to 1st May 2015 or from 1st May 2015 to May 2017 to September 2021, when his wage was Kshs.960.00

The claim was patently unmerited.

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, and when and how much was unpaid.

The written witness statement dated 22nd November 2021 made no reference to any of these allowance nor the requisite particulars.

On leave, 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.

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

Significantly, the claiming of multiple reliefs is discouraged.

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".

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.

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.

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 unmerited as it ws not proved.

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.

The award of Kshs.97,920.00 was unmerited.

Concerning underpayment, 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.

Assuming that the appellant worked for 6 days a week from date of employment in 2013 his gross salary was Kshs.12,500.00. At the time the consolidated salary of the highest paid semi-skilled employee, a lorry or car driver was Kshs.7,113 and rose to Kshs.7,966.00 in May 2015 and when the wage rose to Kshs.960 per day, his salary was Kshs.24,000.00 higher than the consolidated salary of a tractor driver, salesman or Dryer.

It is trite 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.

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

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

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

The prayer for underpayment and unpaid salary arrears was not proved and was unmerited.

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

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.

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.

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

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.

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.

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

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.

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

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.

Equally, the appellant was entitled to terminal benefits as per the CBA, Kshs.118,637.30.

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

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..."

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.

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.

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

While the award of costs involved the exercise of discretion, the learned trial magistrate did note explain the circumstances the court took into consideration in determining the quantum of costs, which in ordinary circumstances involves many parameters under the Advocates (Remuneration) Order.

The court is thus satisfied that the appellant has demonstrated the need to disturb the award of costs by the learned trial magistrate by setting aside the sum of Kshs.60,000.00.

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 more 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.

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.118,637.30

(f) Bar soap Kshs.5,400.00

(g) Packet of milk Kshs.54,000.00

(h) Certificate of service.

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