



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Tonobo v PG Security Limited (Appeal E171 of 2025)  
[2026] KEELRC 93 (KLR) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 93 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E171 OF 2025  
JW KELI, J  
JANUARY 23, 2026**

**BETWEEN**

**PATRICK OCHIENG TONOBO ..... APPELLANT**

**AND**

**PG SECURITY LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Hon. E. Riany  
(PM) delivered on 29th April 2025 in Nairobi CMEL No. E1928 of 2022)*

**JUDGMENT**

1. The Appellant herein, dissatisfied with the Judgment and Decree of the Hon. E. Riany (PM) delivered on 29th April 2025 in Nairobi CMEL No. E1928 of 2022 between the parties filed a Memorandum of Appeal dated the 27<sup>th</sup> May 2025 seeking the following orders: -
  - a. The appeal herein be and is hereby allowed.
  - b. The judgment of the trial court delivered on 19th March, 2025 in C.M.E.L NO. E1928 OF 2022 be set aside.
  - c. The Honourable Court be pleased to award the Appellant the terminal dues and compensation as prayed in the Appellant's statement of claim filed in the lower court amounting to Kshs. 3,894,078.21 or such amount as the Honourable Court may deem fit and just to meet the ends of Justice.
  - d. The costs of the appeal and the lower court be awarded to the Appellant.
  - e. The Honourable Court do issue such orders and relief as it may deem fit and just to grant.



## Grounds Of The Appeal

2. The Honourable Magistrate erred in law and fact by dismissing the entire claim by the Appellant with costs to the Respondent against the weighty evidence on record and the law applicable in respect to employees' terminal benefits.
3. The Honourable Magistrate erred in law and fact in failing to analyse and make findings on each of the reliefs sought by the Appellant and hence leading to miscarriage of justice.
4. The Honourable Magistrate erred in law and fact by failing to award the Appellant house allowance as required by the mandatory provisions of Section 31 of the *Employment Act*, 2007.
5. The Honourable Magistrate erred in law and fact by failing to award the Appellant unpaid public holidays that he worked.
6. The Honourable Magistrate erred in law and fact by failing to award the Appellant his claim for leave days for the years worked as required by the provisions of section 28 of the *Employment Act*, 2007 as read with regulation 17 of the Protection of Security Services Order, 1998 which provides for 26 days leave for persons employed as security guards.
7. The Honourable Magistrate erred in law and fact by failing to award the Appellant his claim for overtime despite there being no evidence of such payments.
8. The Honourable Magistrate erred in law and fact by failing to award the Appellant service gratuity as required by the provisions of rule 17 of the Regulation of wages (Protective Security Services) order, 1998.
9. The Honourable Magistrate erred in law and fact by failing to award the Appellant his claim for salary underpayments despite the fact that the Appellant was underpaid during the course of his employment.
10. The Honourable Magistrate erred in law and fact by failing to order the Respondent to release the wrongfully withheld Claimant's Certificate.
11. The Honourable Magistrate erred in law and fact in failing to make a finding that the termination of the Appellant was unlawful and unfair.
12. The Honourable Magistrate erred in law and fact by failing to consider and have due regard to the Appellant's case and to the facts and evidence presented in support thereof.

## Background To The Appeal

13. The Claimant/Appellant filed a claim against the Respondent vide a statement of claim dated the 9<sup>th</sup> of November 2022 seeking the following orders: -
  - a. A declaration that the Respondent's refusal/neglect or failure to pay the Claimant's salaries and benefits is unfair and unlawful.
  - b. The Claimant be paid his full terminal his salary arrears and benefits accruals as set out in paragraph 12 hereinabove totaling to Kshs.3,894,078.21
  - c. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
  - d. The Respondent to pay the costs of this claim.



- e. Interest on the above at Court rates.
  - f. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act, 2007.  
(pages 8-11 of Appellant's ROA dated 24<sup>th</sup> July 2025).
14. The Claimant filed his list of witnesses dated 9<sup>th</sup> November 2022; list and bundle of documents of even date with the bundle of documents attached; and witness statement of even date (pages 13-35 of ROA). The Claimant later filed a further witness statement dated 10<sup>th</sup> March 2025 (220-221 of ROA).
  15. The Respondent entered appearance and filed a statement of defence dated 22<sup>nd</sup> August 2023 (pages 36-40 of ROA). The Respondent also filed a witness statement of CATHERINE WANJIRU dated 8<sup>th</sup> September 2023, and list of documents of even date with the bundle of documents attached (pages 41-216 of ROA).
  16. To counter the defence, the Claimant filed a reply dated 10<sup>th</sup> March 2025 (page 217-219 of ROA).
  17. The Claimant/Appellant's case was heard on the 12<sup>th</sup> of March 2025 where the claimant testified in the case, relied on his filed witness statement as his evidence in chief, and produced his documents as exhibits. The Claimant was cross-examined by counsel for the Respondent, Ms. Macharia (pages 249-251 of ROA).
  18. The Respondent's case was heard on the same day with CATHERINE WANJIRU testifying on behalf of the Respondent as RW1. She relied on her filed witness statement as her evidence in chief, and produced the Respondent's documents as exhibits. The witness was cross-examined by counsel for the Claimant, Mr. Nyabena (pages 252-253 of ROA).
  19. The court gave directions on filing of written submissions after the hearing, and both parties complied.
  14. The Trial Magistrate Court delivered its judgment on the 29<sup>th</sup> of April 2025, dismissing the Claimant/Appellant's claim in its entirety, with costs (judgment at pages 235-241 of ROA).

### **Determination**

20. The appeal was canvassed through written submissions. Both parties filed.

### **Issues for determination**

21. In his submissions dated 27<sup>th</sup> October 2025, the Appellant compressed the grounds of Appeal into the following issues for determination:
  - i. The Learned Magistrate erred in law and fact by failing to make a finding that the termination of the Appellant was unfair and that the Respondent had no valid reason to terminate the Appellant.
  - ii. The Learned Magistrate erred in law and fact by failing to consider the reliefs sought by the Appellant and award him terminal dues and compensation sought.
  - iii. Who should bear the costs of the suit?
22. The Respondent submitted generally on the grounds of appeal in their submissions dated 24<sup>th</sup> November 2025.
23. The court on perusal of the record of appeal was of the considered opinion that the issues raised by the appellant were specific, relevant and adopted them in the determination of the appeal.



The Learned Magistrate erred in law and fact by failing to make a finding that the termination of the Appellant was unfair and that the Respondent had no valid reason to terminate the employment of the Appellant.

24. The grounds of appeal were-
- a. The Honourable Magistrate erred in law and fact in failing to make a finding that the termination of the Appellant was unlawful and unfair.
  - b. The Honourable Magistrate erred in law and fact by failing to consider and have due regard to the Appellant's case and to the facts and evidence presented in support thereof.

### **The appellant's submissions**

25. The Appellant was unfairly terminated of his employment without any valid reason. The during the trial the Respondent's witness in the trial court claimed that the Appellant absconded and deserted his duties as shown in page 252 of the Record of appeal. It is our case that the Appellant did not desert his duties but was in fact dismissed by the Respondent. The evidence on record which is largely unchallenged show that the Appellant's conditions of employment leading to the separation were uncondusive. The Respondent imposed unfair labour practices upon the Appellant. On 15t August, 2022 the Respondent introduced a very unilateral contract whose terms and conditions were not agreeable to the Appellant as it infringed on his constitutional rights. The said contract sought to completely disregard the Appellant's previous services to the Respondent as it did not reveal the dates of his previous employment with the Respondent. Further, this contract did not disclose the rightful dues or benefits accrued during the Appellant's employment with the Respondent. This contract only acknowledges that the commencement date of the Appellant's services with the Respondent shall be the date effective after signing of the said contract. The contract further in clause 1 stated that :- "The terms and conditions of this contract shall commence on and supersedes other terms of other previous contract..." In clause 24 of the proposed contract it provided as follows:- "The terms and conditions of this contract supersedes all other contracts signed therefore..." This is shown in page 16 and 18 of the Record of appeal.
26. The Appellant was being asked to sign a fresh contract he had worked for the Respondent for over 13 years of continuous service. He was being asked to sign a new contract which meant that he was starting employment afresh. The commencement date will be the date of signing the new contract. During the pendency of the Appellant's employment, he was not paid a number of allowances and entitlements under the new law like house allowance, public holidays, overtime and 26 days accrual leave days as required by the previous provisions of the law. It is our persuasion that the Respondent aimed to change the unilateral contract so as to deny the Appellant's so deserved dues for the 14 years he worked for them as he was due to retire later the year on October thus imposing us to send a demand letter to the Respondent as shown in page 22 of the Record of Appeal. The Respondent in the trial court testified that they knew that the Appellant was approaching retirement as shown in page 253 of the Record of Appeal. This clearly brings out a picture of a ploy orchestrated by the Respondent to deny the Respondent of his dues and upon refusing to sign the unilateral contract, constructively dismissed the Appellant with the veil of desertion without following due procedure. My Lady, we thus implore for you to uphold justice unto the Appellant in light of the evidence brought to this court.
27. The Appellant was constructively dismissed as the Respondent aimed to do away with him through threats of signing the unilateral contract whilst imposing unfavourable working conditions and without according him the rights he ought to enjoy as an employee. The Respondent contends that the Appellant absconded from duty. The Respondent did not attach any letter to the Claimant asking him



to report for duty, there was no email written to him or message or WhatsApp message. The witness who testified did not indicate that he contacted the Appellant. The only document produced by the Respondent was a desertion letter allegedly written to the County Labour Officer and desertion follow up schedule. Neither the letter shows that the Appellant received it nor did the Respondent bring the proof of calling the Appellant or any witness to ascertain the above. We are of the view that the purported letter to the County Labour Officer and this schedule are part of the Respondent's scheme to manufacture documents for purposes of trying to answer the Appellant's claim and legitimize their breach of the Appellant's rights. The same have no legs to stand. There was no evidence produced by the Respondent to show that the Appellant was ever called for a disciplinary hearing to show cause why he should not be dismissed for absconding duty.

28. In the case of Joseph Nzioka vs Smart Coatings Limited; ELRC Cause No. 899/2014; [2017] eKLR Honourable Abuodha J. at paragraph 10 of the said judgment held that:- "Dismissal on account of absconding must be preceded by evidence showing that reasonable attempts were made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties. The Respondent failed to prove that they indeed followed up the necessary procedure outlined by the law since issuance of the unilateral contracts aimed to harm the Appellant. The Respondent was obligated to ensure that the Appellant was told the consequence of signing new contracts, and the fate of his existing contract with the Respondent. There was no evidence produced by the Respondent that there was any sensitization of the Appellant on the consequences of their signing new contracts when he raised concerns instead threats of termination were issued in case of failure to sign the new contract. The reason for the termination was failing to sign. A new contract without being given an explanation, there was no evidence that the Respondent gave the Appellant an explanation of why new contract was to be but simply that it nullified any existing or previous contract. As per page 240 of the Record of appeal the trial Magistrate erred in law and fact in his judgement by claiming that the Appellant deserted work without considering how the Appellant was being forced and threatened termination of his employment if he failed to sign the contract. The failure to provide the Appellant with the reasons for the change of contracts was unfair. This is further augmented in the case of Elizabeth Kwamboka Khaemba versus BOG Cardinal Otunga High School Mosochi & 2 Others [2014] eKLR where Wasilwa, J. observed as follows; "The key position is that the employer cannot alter employee's employment contract without consulting the employee. The working of the section is couched in mandatory terms, an indication that the employer cannot unilaterally revise the contract unless there is consultation. In the current case, there was no consultation, and the decision to change the duties and position of the claimant was made in shrouded malice as an extension of the "disciplinary" process instigated against the claimant. The end result of changing the Claimant's contract without consultation with her is tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination;" The Learned trial Magistrate state that the Respondent had issued the Appellant with a retirement notice in the pretext that the Appellant had reached the mandatory retirement age. It should be noted that the Claimant had reached the 60 years but continued to work for the Respondent and had worked close to two years post retirement age. This clearly evidenced during trial by the Appellant and shown in page 250 of the Record of Appeal. The said evidence is corroborated with the Respondent's witness who states in page 253 of the Record of Appeal that the Appellant was 61 years old, and thus brings to question why the Respondent were Issuing a new unilateral contract to an employee who is post retirement. From the foregoing the Appellant was unfairly and unjustifiably terminated of his employment due to not signing a contract that violated his rights which is not a valid reason for termination. While under the veil of desertion, the Respondent on this part failed to follow the proper procedure in desertion of an employee and as such the termination was unfair. The evidence on record which is uncontroverted shows and demonstrates that there was no



valid reason. There is no doubt on the evidence on record that the Respondent did not comply with the provisions of Section 41 of the *Employment Act*, 2007.

### **The Respondent's submissions**

29. It is our submission that the lower Court analyzed the evidence that was availed in Court. The Appellant adopted his witness statement dated 9th November 2022 and produced his list and bundle of documents dated even date. It was the Appellant's claim that on or about 1st August 2022, the Respondent introduced a very unilateral contract whose terms and conditions were not agreeable to the Appellant. He claimed that the contract did not disclose the rightful dues and benefits accrued during the Appellant's employment. He consequently decided to desert his job and a desertion letter dated 24th October 2022 was sent to him. It is clear from this onset that it is actually the Appellant who deserted his duties. The Respondent filed a Statement of Defence dated 22nd August 2023. The Respondent's witness adopted her witness statement dated 8th September 2023. She also produced her list and bundle of document dated 8th September 2023 which were marked as exhibits 1 to 21. The witness stated that indeed, the Appellant was once an employee of the Respondent. She indicated that the Appellant's complaint that he would lose his accrued benefits were addressed in a letter dated 14th September 2022. (Page 169 record of appeal). The letter read in part; (paragraph 5) "In addition do note that the contract does not in any way interfere with the years served and they will not loose any benefits whatsoever and this development have been explained to them clearly." Further, a the Appellant was presented with a reviewed contract whereby clause 1 and 24 of the reviewed contract read respectively; (Page 171-173 record of appeal) 1. "The terms and conditions of this contract shall commence on.....and supersedes other terms of previous contract without loss of benefits. That the terms and conditions of this contract supersedes all other contracts signed there before without loss of benefits." (sic) Indeed, the Appellant's concerns were addressed and assured in writing. The reviewed contract was sent to the Appellant's Advocates through Whatsapp forum and he responded by saying "okay"(page 174 record of appeal). The Appellant's witness in a Whatsapp conversation notified the new Appellant's Advocates that the Respondent intended to pay those individuals who didn't want to work and those who had resigned. Be that as it may, the Respondent's witness stated that they discovered that the Appellant had reached retirement age as he was born in 1961. He was already aged 61 years as at the year 2022 and he ought to have retired in the years 2021. Indeed, the Appellant confirmed during hearing that he had already attained retirement age (page 250 line 13 of the proceedings). The witness testified that as such, the Appellant was served with a retirement notice. It was her testimony that the Appellant however did not serve the notice and instead he decided to desert his work. The Appellant confirmed during hearing that he was served with a retirement notice by the Respondent (page 250 line 15 of the proceedings). The Appellant indeed confirmed during cross examination that he was the one who deserted his duties even after being assured that he would not loose his benefits because of the new contract. He stated as follows: "I stopped working for the company after I refused to sign new contract that did not cater for the 14 years I had worked there. The contract reveals at paragraph 1 that it will not interfere with years served and they will not loose any years served." (Page 250 lines 7-10 of the proceedings) The Appellant's claim that he had been retired without notice could not therefore hold water. Further, the Appellant's claim that his termination was unlawful and unfair cannot be justified as he clearly confirmed in Court that he is actually the one who deserted his duties. The Appellant claimed for one month salary in lieu of notice. The Appellant having attained the statutory retirement requirement, he was served with a retirement notice dated 14th September 2022. The notice ran for one month the last working date being 13th October 2022. However, the Appellant refused to serve the notice and instead deserted his duties. He was served with a desertion letter 24th October 2022. The appellant was therefore not entitled to a claim for one month salary in lieu of notice. 12 months gross salary



compensation for unfair termination and loss of employment. The Appellant admitted during cross examination that he had already attained retirement age as at the year 2022 as he was born in 1961. He therefore cannot turn around and claim for compensation for alleged unfair termination and loss of employment yet he was not expected to continue being an employee after retirement age. Section 45 of the *Employment Act* 2007. Section 45(1) for the Act provides that: (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 employee’s 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. In this case, the termination of the Claimant’s services was as a result of having reached the retirement age. The termination was fair as it was based on operational requirements of the employer. The Respondent hence did not breach the provisions of Section 45(ii) of the *Employment Act*. The Appellant failed to prove that his termination was unfair especially after admitting that he was served with a retirement notice. Section 47(5) of *Employment Act*, 2007 thus provides:- “For any complaint of unfair termination of employment or wrongful dismissal the burden of providing 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 of wrongful dismissal shall rest on the employer.”

## Decision

30. The trial court held the appellant had failed to prove his claim of unfair termination on a balance of probabilities (page 240 of the ROA). The manner of prove of employment employments is according to section 47 (5) of the *Employment Act* to wit- ‘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.’”
31. By opting not to defend the suit the respondent forgo the opportunity to justify the reason for the termination and demonstrate it was as per fair procedure. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- ‘45(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.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR).
32. This being a First appellate court I am guided by decision in *Selle & Another Vs Associated Motor Boat Co. Limited & Others* (1968) EA 123, where the Honourable Court expressed itself 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, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance to this aspect ... " Further, in the case of Kenya Revenue Authority & 2 Others Vs Darosa Investments Limited(2018) e KLR, it was held with respect to this Court's jurisdiction on appeal, that- " the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result, arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice" In the instant appeal, the trial court found that the appellant was issued with a contract which he refused to sign and stopped working as admitted during the hearing. Further, at the time of being issued with the contract, he was 61 years old, and the retirement age was 60 years. The employer opted to issue a retirement notice dated 14th September 2022(page 176 of ROA), but the appellant did not sign the same, and it was so indicated. The last working day as per the notice was 13<sup>th</sup> October 2022. A desertion letter was produced dated 24<sup>th</sup> October 2022 copied to County Labour Office. The court found that the letter was issued post the retirement date. The court then finds that while it was true the appellant absconded from work, the employer did not comply with section 41 of the Employment Act to bring the employment relationship to an end procedurally. The desertion letter was written beyond the date indicated as last of work.

33. The court found that the reason for termination on account of retirement age was valid, but there was no compliance with the procedural process, the appellant having absconded work. The court finds the appellant was entitled to compensation for unfair termination for procedural unfairness, which is awarded for the equivalent of 1 month's notice, as sought, Kshs. 15,201.65 (minimum wages plus 15% house allowance thus Kshs. 17,481.90.

The Learned Magistrate erred in law and fact by failing to consider the reliefs sought by the Appellant and award him terminal dues and compensation sought.

34. The grounds of appeal were-

- i. The Honourable Magistrate erred in law and fact by failing to award the Appellant house allowance as required by the mandatory provisions of Section 31 of the Employment Act, 2007.
- ii. The Honourable Magistrate erred in law and fact by failing to award the Appellant unpaid public holidays that he worked.
- iii. The Honourable Magistrate erred in law and fact by failing to award the Appellant his claim for leave days for the years worked as required by the provisions of section 28 of the Employment Act, 2007 as read with regulation 17 of the Protection of Security Services Order, 1998 which provides for 26 days leave for persons employed as security guards.
- iv. The Honourable Magistrate erred in law and fact by failing to award the Appellant his claim for overtime despite there being no evidence of such payments.
- v. The Honourable Magistrate erred in law and fact by failing to award the Appellant service gratuity as required by the provisions of rule 17 of the Regulation of wages (Protective Security Services) order, 1998.
- vi. The Honourable Magistrate erred in law and fact by failing to award the Appellant his claim for salary underpayments despite the fact that the Appellant was underpaid during the course of his employment.



- vii. The Honourable Magistrate erred in law and fact by failing to order the Respondent to release the wrongfully withheld Claimant's Certificate.
35. The trial court held the appellant was not entitled to any of relief sought. The court proceeds to re-evaluate the evidence before the trial court to reach own conclusion (Selle).
36. On claim for uniform refund – the respondent in witness statement of Catherine Wanjiru stated that the claimant is not entitled to Kshs. 20000 worth of uniform as he has never cleared nor returned the uniforms and equipment to the respondent which it alleged poses a risk to the respondent in case the uniform are used as decoy to commit crime. The claimant, during the hearing, admitted he never returned the uniform. The deposit was money belonging to the appellant. Since it was deposited in accordance with the uniform policy, the employee ought to return the uniform. The amount is due to the appellant on return of the uniform awarded for KSh. 20, 000.
37. Claim for house allowance – the respondent stated that the appellant was paid 15% of wages and relied on payslips filed in court( pages 53-63 of ROA). The appellant filed reply and denied having been issued with payslip during employment. During the hearing, the claimant denied having been issued with payslips. He stated that initially he was paid cash, and later through Equity bank and the Co-operative bank. He stated that he handed the bank statements to his advocates. The documents produced by the claimant did not include the bank slips. The payslip indicated a component of housing. The appellant ought to have produced his bank statements to controvert the evidence of the payslip placed before the court. On a balance of probabilities, the court finds that the claim for housing was not proved.
38. Public holidays- the payslips filed in court indicated the public holidays pay ( pages 53-63 of ROA).
39. Pending leave- the claimant sought leave for 26 days per year, citing that the law gave him 26 days and not 21 days given by the employer. Section 28 of the Employment Act requires employees to have a minimum of 21 days of annual leave per year. During the hearing the claimant told the court he was seeking leave for 2022. He had no issue of leave for other years taken for 21 days per year. The respondent at the cross-examination agreed the claimant was entitled to 1 year leave and indeed in witness statement stated claimant was entitled to 21 days. The witness was the a human resource officer of the respondent hence custodian of leave documents. The claimant is granted leave for 21 days as pleaded by the respondent thus 21/30 x Kshs. 17,481.90 thus KShs. 12,237.33.
40. Service gratuity- the basis of the claim for gratuity was not proved. The appellant was under NSSF. Section 35(6) of the Employment Act applied.
41. claim for salary for 14 days- the respondent stated in witness statement that the claimant was entitled to salary of 22 days worked in September which it stated translated to Kshs. 12819/- This having been admitted, the trial court erred by not awarding the undisputed salary arrears.
42. Salary underpayment – having upheld the evidence of the payslips and for lack of evidence to prove the amount in the payslip was not remitted, the court found that the payslips were in compliance with the relevant minimum wages order produced before the trial court.
43. Overtime claim -I upheld the decision Rogoli ole Manadiegi v General Cargo services 2016(e KLR). The claimant stated he worked as a security guard from 6 am to 6 pm. The draft contract indicated 8am to 5 pm, but he did not sign the same. the burden of proof of overtime which was claimed for the entire period of work, 14 years, lay with the claimant. The claimant produced slips which indicated a handover for the months of June 2022 and July 2022, which indicated the time of handover as 6.00hrs and 18.00 (pages 25-29 of ROA). The court noted among the exhibits produced by the appellant some indicated the appellant was on off duty. The claimant admitted he took 21 days leave each year and



indeed the court established the leave was only due for the last week of service 2022. How then can the claim of overtime for the entire 6 days a week of 14 years of service be sustained? The court found that while there was an indication that the claimant worked some days overtime, the claim was watered down by exaggeration and an obviously untrue position on overtime. This position was consistent with the decision in *Ndungu v Segeera Limited* (Cause E008 of 2022) [2024] KEELRC 66 (KLR) (26 January 2024) (Ruling) Justice Onesmus N. Makau thus held;

“20. Section 27 (2) of the *Employment Act* states that:“(1)An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.(2)Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.”2. The burden of proof is upon the claimant to prove by evidence that he worked extra time and that he is entitled to compensation for the same. To begin with the claimant pleaded in paragraph 27 of his Claim that he worked 3.5 hours extra hours per day, 24 days a month for 45 months. He calculated his overtime compensation at Kshs.4,347,000 using an hourly rate at Kshs. 1,150. The question that arises is whether the claimant has produced any prove of authorisation to work extra time as required under clause 5 of his Letter Appointment. The answer is in the negative. 23. My curiosity was drawn to the fact that the claimant claims overtime for almost four years worked from October 2017, yet in an email dated 11th March 2021, the complaint of workload raised was only in relation to the period from the year 2020. It follows that from 2017 to 2019 there was no such complaint. 24. Another observation is that the claim as pleaded assumes that the claimant never took any leave during the 45 months of service. If that was the case, he would have prayed for accrued leave. He has not done so, because obviously he took leave as and when it fell due. 25. The above observations lead me to a finding of fact that the claim for overtime lacks material particulars and it is exaggerated. It includes days when he was away on leave. A claim for overtime work is a special-damages claim which must specifically pleaded and proved. Whereas the respondent did not adduce evidence to disprove the claim for overtime, it is obvious that the claimant cannot benefit from that default. The burden is upon him to prove his case on a balance of probabilities.” This was the same position as in the insistent case where the claim for overtime included 21 days of leave each year, off duty days, sick off days etc hence exaggerated and lacking in specificity. The claim for overtime fails for the foregoing reasons.

## Conclusion

44. The appeal is allowed partially. The Judgment and Decree of the Hon. E. Riany (PM) delivered on 29<sup>th</sup> April 2025 in Nairobi CMEL No. E1928 of 2022 is set aside and substituted as follows-
- a. The termination is held unfair for lack of procedural fairness and notice pay awarded equivalent to 1 month notice, thus Kshs. 17,481.90
  - b. Uniform refund of Kshs. 20,000 on condition that the claimant returns the uniform within 30 days of the judgment.
  - c. Outstanding leave- Kshs. 12,237.33
  - d. Unpaid salary Kshs. 12,819



- e. The above monies are payable with interest at the court rate from the date of filing the suit to the date of full payment save for the refund which interest to accrue on the date of return of the uniform.
- f. Stay of 30 days to enable the appellant return the uniform, failing which the payment be less the uniform pay.
- g. The claimant is awarded costs of the suit.

45. Cost of the appeal awarded to the appellant against the respondent.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY, 2026.**

**J. W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant – Ms. Kimani h/b for Nyabena

Respondent- Ms. Macheru

