

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

APPEAL NO. E008 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

BENSON

OTIENO

WASONGA.....APPELLANT

VERSUS

MINI

BAKERIES

(NAIROBI)

LTD.....RESPONDENT

JUDGMENT

This appeal arose from the judgment of Hon. G. N. Barasa, Senior Resident Magistrate delivered on 27th February 2025 in Kisumu CMELRC NO. E260 of 2021 **Benson Otieno Wasongo V Mini Bakeries (Nairobi) Ltd.**

The appellant's case before the trial court was that he joined the respondent as a casual Painter in July 2015 at Kshs.703.00 per day and worked continuously until 6th September 2021 when the respondents' supervisor terminated his employment by word of mouth and his wage had risen to Kshs.960 per day. The appellant prayed for underpayment, leave travelling allowance, transfer and disturbance allowance, provident fund

contribution, bar soap, milk, terminal benefits, long service award, compensation, leave pay, house allowance, notice pay, certificate of service, costs and interest.

The respondent's case was that it employed the appellant as a casual Painter from July 2015 to September 2021 when it changed the duty rota for Painters restricting them to a single locality but the appellant and his colleagues rejected the rota stormed out of the premises on 6th September 2021 and did not return and the disciplinary committee found that they were entitled to terminal dues of Kshs.10,726.00 for every completed year of service.

The respondent's case was that the appellant absconded duty and was not entitled to the reliefs prayed for.

After considering the evidence placed before the court and submissions by counsel, learned trial magistrate found that termination of the appellant's employment was unfair and awarded 3 months gross salary as compensation, severance pay, long service award, service pay, costs assessed at Kshs.60,000.0 costs and interest.

This is the judgment appealed against.

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

- 1. Finding that the appellant was not entitled to underpayment and unpaid salary arrears.*
- 2. Failing to appreciate that the appellant's cause of action arose from termination of employment.*
- 3. Failing to consider the totality of the appellant's evidence.*
- 4. Failing to award salary in lieu of notice.*
- 5. Awarding less service pay than provided by the CBA.*
- 6. Awarding inordinately low compensation.*
- 7. Assessing costs at Kshs.60,000.00*
- 8. Finding that the appellant was unfairly treated as casual employee but failed to award the prayers made.*

Appellant's submissions

As regards the status of the appellant's employment, counsel submitted that by virtue of Section 37 of the Employment Act and having served for about 6 years, he had transitioned to term contract and thus entitled to full statutory benefits and monthly payment of salary and

was thus entitled to underpaid salaries as minimum wage was a legal requirement.

Reliance was placed on the decisions in **Matsyi V Solo** [2015] KEELRC 862 (KLR) and **Arisa V Kipkebe Ltd** [2024] KEELRC 1232 (KLR) to urge that the appellant was entitled to the minimum wage which was considered a continuing injury and the appellant was entitled to the difference between the minimum wage and the amount paid including housing allowance.

On leave travelling allowance, reliance was placed on the decisions in **Kamtix Cleaners Ltd V Odhiambo** [2025] KEELRC 2475 (KLR), **Transglobal Cargo Centre Ltd t/a Africa Flights Services V Njeru** [2025] KEELERC 3209 (KLR) and **Sgs Security Guard Services Ltd V Chepkemoi** [2025] KEELREC (KLR) on the right to leave.

Concerning transfer and disturbance allowance, reliance was placed on Clause 30 of the CBA to urge that the appellant was not accorded free transport in the performance of his duties. That the appellant was required to move from place to place, to urge the court to award the sum of Kshs.7,500.00 as disturbance allowance and Kshs.142,000.00 as transport.

On Provident Fund Scheme, counsel submitted that the trial court erred by failing to comment or make an award despite relevant evidence and employer admission.

Finally, counsel submitted that the appellant was claiming the sum of Kshs.1,112,120.72. Yet the Memorandum of Claim had no figure.

The respondent did not file submissions.

Analysis and determination

The eight (8) grounds cited by the appellant may be condensed into three (3) namely; appellant's entitlements and awards, evidence before the trial court and assessment of costs at Kshs.60,000.00.

Before delving into these grounds, it is essential to restate the role of the first appellate court as enunciated in previous decisions such as **Kenya Ports Authority V Kutsons (Kenya) Ltd, Selle & another V Associated Motor Boat Co. Ltd** [1968] EA 123, **Peters V Sunday Post** [1958] EA and **Gitobu Imanyara V Attorney Genral** [2016] eKLR which is to reconsider the evidence and evaluate it so as to arrive at its own conclusions

bearing in mind that it has neither seen nor heard, the witnesses and make allowance in that respect.

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 November 2021, whose contents in the court's view fell below the threshold of a witness statement.

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

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.

However, the absence of detailed witness statement was somewhat ameliorated by the respondent's admission of some of the allegations such as date of separation on 6th September 2021 and transport to places of work from 2017 and the scanty and incoherent documentation.

The appellant availed photo copies of barely legible documents with unclear dates save for the casual payment vouchers for September 2018 when the appellant's daily wage was Kshs.932.00

Significantly, the appellant availed a copy of the respondent's letter dated 3rd September 2021, on the duty rota which culminated in the separation three (3) days later, as well as a copy of minutes of a meeting held on 21st July 2021 between Painters and the Foreman, including the Shop Steward and the union Secretary. A Copy of Collective Bargaining Agreement for the period 1st May 2017 to 30th April 2020 was also filed.

Concerning employment, the appellant adduced no credible evidence of having been employed in July 2015 and none of the copies of the payment vouchers for casuals on record bore the date of 2015 or 2016. The copy of the staff card produced was dated December 2020.

However, RWI Mr. Gabriel Oduor Juma admitted having worked with the Painters since 2014, which would appear

to suggest that the appellant may have been an employee in 2015.

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.

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.

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

See **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 are emphatic that special damages must be specifically pleaded and strictly proved.

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.

Finally, the learned trial magistrate considered the evidence adduced by both parties sufficiently and captured a large portion of it in the judgment.

Disconcertingly, the appellant attached copies of inelegantly photocopied Memorandum of Claim, Verifying Affidavit, List of witnesses and witness statement, including letters and other documents and worryingly, some were completed by hand while others were left blank and thus unusable for any purpose.

In the court's view, the learned trial magistrate cannot be faulted for having failed to consider the totality of the appellant's evidence on record.

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.

Concerning termination, 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, 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, procedural 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.

In this case, the appellant contended that his employment was unlawfully terminated by the respondent's supervisor one Dickson Otieno Ndego on 6th September 2021.

Regrettably, the appellant tendered no scintilla of evidence as to how the termination 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.

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 could lead to disciplinary action, including dismissal from employment, if it is proved to have occurred.

See also **Seabolo V Belgravia Hotel** [1997] 6 BLLR 829 (CCMA).

It is trite law that whenever an 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 thereafter may proceed to terminate the deserting employee if he or she does not show cause or does not 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.

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.

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.

In a similar vein, although RWI testified that he attended a disciplinary meeting on 14th September 2021, he adduced no evidence to demonstrate that the appellant was invited for the meeting and was aware of the charges against him and a copy of minutes of the alleged meetings were not filed.

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 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, it is trite law that 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.

It is important to state that the appellant was a painter not an artisan. He adduced no evidence to show that he was an artisan.

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

Assuming that the appellant was working on workdays only, his monthly salary was Kshs.19,838 which was higher than the consolidated salary of driver or 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 and 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 2015 to 1st May 2017 or from 1st 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, 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.

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 these 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 award of service pay and the trial court tendered no justification for the award. It was unmerited as it was 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, 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 and 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 August 2015, his gross salary was Kshs.19,075 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 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.

The appellant's witness statement made no reference to his 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.

In sum, 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 respect.

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 was his wishes, which were never expressed and his contribution if any, to the termination of employment.

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 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.

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.74,148.33.

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 awarded costs and assessed it at Kshs.60,000.00

While the award of costs involved the exercise of discretion, the learned trial magistrate did not explain the circumstances taken 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.74,148.33.*
- (f) *Certificate of service.*
- (g) *Bar soap Kshs.5,400.00*
- (h) *Packet of milk Kshs.54,000.00*

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 the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 29TH DAY OF JANUARY 2026.**

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty

of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

ORIGINAL