Wainaina v Jacridge School Limited (Appeal E095 of 2025)
[2026] KEELRC 107 (KLR) (23 January 2026) (Judgment)

Neutral citation: [2026] KEELRC 107 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E095 OF 2025

JW KELI, J

JANUARY 23, 2026

BETWEEN

STEPHEN KINYANJUI WAINAINA ..... APPELLANT

AND

JACRIDGE SCHOOL LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. C. Mwaniki (PM) delivered on 13th March 2025 in Ruiru MCELRC E063 of 2024)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. C. Mwaniki (PM) delivered on 13th March 2025 in Ruiru MCELRC E063 of 2024 between the parties, filed a Memorandum of Appeal dated the 30th March 2025 seeking the following orders: -

    a. This appeal be allowed and the judgment of the trial court be set aside.

    b. The appellant be awarded costs.

Grounds Of The Appeal

2. The Honourable Magistrate erred in law and in fact in finding that the Respondent proved his case against the appellant to the required standards despite the express admission made by the respondent that proper procedure was not followed.

3. The Honourable Magistrate erred in law and in fact by failing to pronounce and give a determination on the issue of the overtime worked despite the admission made by the respondent on the hours worked.

4. The Honourable Magistrate erred in law and in fact by finding that the Appellant was housed in the school up to 2019 as per the Respondent's admission and failing to provide for housing allowance from the time the appellant left the respondent's house until his termination.

5. The Honourable Magistrate erred in law and in fact by holding that the underpayment was for a period of 15 months and another 47 months (which period the learned trial Magistrate calculated the underpayment without the production of pay slips for the 47 months period) and not the entire 154 months worked and giving different values for the underpayment creating an ambiguity in the judgment.

6. The Honourable Magistrate erred in law and in fact by appreciating that there is a set calendar of operations for schools as employers and in the same breath failing to appreciate that there are set standard procedures in the same calendar on matters leave.

Background To The Appeal

7. The Claimant/Appellant filed a claim against the Respondent vide a memorandum of claim dated the 8th of May 2024 seeking the following orders: -

    a. A declaration that the termination of the claimant's employment by the respondent was unlawful, unfair and unprocedural.

    b. An order for the payment of the claimant's terminal dues in the sum of Kshs. 5,631,075.00.

    c. An order that a certificate of service do issue to the claimant with respect to his service to the respondent

    d. An order as to costs of this claim and interests thereon.

    e. Any other relief that the court may deem fit.

    (pages 3-7 of Appellant's ROA dated 18th June 2025).

8. The Claimant filed his list of witnesses dated 8th May 2024; witness statement of even date; and list of documents of even date with the bundle of documents attached (pages 9-23 of ROA).

9. In response to the claim, the Respondent entered appearance on 28th May 2025 and filed a response to memorandum of claim dated 28th June 2024 (pages 34-38 of ROA). They also filed the Respondent's list of witnesses dated 28th June 2024; witness statements of Michael Nderitu and Dennis Nyanji dated 28th June 2024 and 22nd August 2024 respectively; and a list of documents with the bundle of documents attached dated 28th June 2024 (pages 39-49 of ROA).

10. The Claimant/Appellant's case was heard on the 18th of September 2024 where the claimant testified in the case, relied on his filed witness statement as his evidence in chief, and produced his documents as exhibits. He was cross-examined by counsel for the Respondent, Ms. Thuo (pages 59-63 of ROA).

11. The Respondent's case was heard on 4th November 2024 with the Respondent's witnesses testifying in the case on their behalf, namely Michael Ngugi Nderitu as DW1; and Dennis Nyenji as DW2. They both relied on their filed witness statements as their respective evidence in chief, and DW1 produced the Respondent's documents as exhibits. They were both cross-examined by counsel for the Claimant/Appellant, Ms. Mwenda (pages 63-67 of ROA).

12. The court gave directions on filing of written submissions after the hearing, and both parties complied.

13. The Trial Magistrate Court delivered its judgment on the 13th of March 2025, partially allowing the Claimant/Appellant's claim to the tune of Kshs. 102,845.25/- being salary underpayment, and costs of the suit.

Determination

14. The appeal was canvassed by way of written submissions. Both parties ccomplied.

Issues for determination

15. In his submissions dated 23rd October 2025, the Appellant identified the following issues for determination:

    i. Whether the appellant's termination was procedural, fair and lawful.

    ii. Whether the appellant is entitled to the award of overtime pay.

    iii. Whether the appellant is entitled to payment of house allowance.

    iv. Whether the appellant is entitled to underpayment.

16. The Respondent adopted the Appellant's issues for determination in their submissions dated 24th November 2025, save for including a fifth issue for determination, namely:

    i. Whether the appellant is entitled to annual leave.

17. The court adopted the issues outlined by the parties in the determination as follows-

    i. Whether the appellant's termination was procedural, fair and lawful.

    ii. Whether the appellant is entitled to the award of overtime pay.

    iii. Whether the appellant is entitled to payment of house allowance.

    iv. Whether the appellant is entitled to underpayment.

    v. Whether the appellant is entitled to annual leave.

Whether the appellant's termination was procedural, fair and lawful

Appellant's submissions

18. PROCEDURE- it is trite law that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason rerating to the conduct of the employee, capacity or compatibility or based on the operational requirements of the employer and the termination of employment was conducted in accordance with a fair procedure. The upshot is that there must have been a substantive justification and procedural fairness. Section 41 of the *Employment Act* requires an employer to notify and explain to an employee in a language the employee understands the reasons it is considering for terminating the services of the employee. ln the trial court, DW1 admitted at cross examination that no termination letter was issued and therefore no reason was given for termination, there was no invitation sent to the claimant to a disciplinary hearing, no notice to show cause why the Appellant should not be terminated or dismissed was issued, made a confession that the employer did not plan to have a disciplinary process and claimed that the employer was not duty bound to give any reasons contrary to section 41 of the *Employment Act*. ln Anthony Mkata Chitavi v. Malindi Water & Sewerage Company Ltd [20131 eKLR the Court had this to sav on fair process: The ingredients of

procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence, state his case in person, writing, or through a representative or shop floor union representative if possible. Thirdly, if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction." Further in Naima Khamis v Oxford University Press (EA) Ltd (2017) eKLR, the Court of Appeal expressed itself as follows:... From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantially 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 is per contract or fails to accord the employee an opportunity to be heard as by law required. My Lord, the Respondent admitted to not having given reasons for the termination, not issuing a notice to show cause, not conducting a hearing, and blatantly confessing that they did not have a plan to have a disciplinary process. This was unprocedural, unfair and unlawful termination.

Respondent's submissions

19. Whether the Appellant's employment was terminated - Before determining whether the "termination" was lawful or not, it is incumbent upon this Court to first establish whether the Appellant's employment was really terminated. The Appellant contends that he was unfairly terminated, while the Respondent maintains the firm position that the Appellant absconded from work and voluntarily left employment. To this end, we are guided by Section 47(5) of the *Employment Act*, which provides that; "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." It therefore follows that the burden of proof was on the Claimant to establish that he was unfairly terminated by the Respondent, which, as correctly held by the trial court, he failed to do so. At the trial stage, the Claimant admitted that he failed to report to work after he was released from custody on 13th July 2023. Under cross-examination, he confirmed that he did not report until 24th July 2023, but he did not give any explanation why he failed to report to work, whereas he was well aware that the school was still in progress.. When he later resurfaced on 24th July 2023, he requested a recommendation letter, to which the Respondent obliged. The letter described him in good terms and did not harbour any ill will towards the Claimant. This is not the conduct of an employee who was terminated. To borrow the words of the Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR); "This is hardly the conduct of an employee whose services were summarily and rudely terminated. On a balance of probability, he was not pushed. He jumped. Having voluntarily left employment, the Appellant did not wait for any disciplinary procedures to follow, hence cannot complain later on that the termination was unlawful. Indeed, after the trial court heard the testimonies and analyzed the evidence on both sides, it rightfully found that there was no termination or indeed any unfair termination. The trial court had the benefit of hearing and seeing the witnesses firsthand and it is a well settled principle that an appellate Court should not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was held in by the Court of Appeal in Mwanasokoni v kenya Bus Services Ltd [1985] eKLR as follows, "As was said by the House of Lords in Sotiros Shipping v Sauviet Sohold, The Times, March 16, 1983: "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in

the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said..... It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

Decision

20. The ground of appeal under the issue was- The Honourable Magistrate erred in law and in fact in finding that the Respondent proved his case against the appellant to the required standards despite the express admission made by the respondent that proper procedure was not followed. This being a first appeal, the principles guiding the duty of this Court as was stated by Sir Clement De Lestang, V.P., in Selle -vs- Associated Motor Boat Co. [1968] EA 123 (cited in China Zhongxing Construction Company Ltd v Ann Akuru Sophia [2020] eKLR: "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such 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 that respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

21. The claimant contended that following arrest on 12th July 2023 and holding in police cells for 3 days he was released and required to report to the police station every day pending investigations. On the 24th July 2023, the police officer informed him that he had been cleared, as the complainant/ the respondent was not ready to proceed with the matter. That he reported to work on same date and was informed he had been replaced and was issued with a recommendation letter(appellant's witness statement at page 10-11 of ROA). Covers very vivid witness statements of Michael Nderitu , he stated that he facilitated the release of the claimant from custody, which was on the 13th July 2023, but the claimant absconded for a long time and returned on the 24th July 2023, and said he had found another job and asked for a recommendation letter, which the respondent issued. (page 40 of RoA).

22. During cross-examination, the claimant admitted that he was arrested on 12th July 2023 and released from the police cells on 13th July 2023, but never reported back to duty till 24th July 2023, when he got the recommendation letter(page 62 of the RoA). Conversely, during the cross-examination of the witness for the respondent, Michael Nderitu, he told the court that they did not terminate the appellant's services. He admitted that no notice to show cause was issued to the claimant and that there were no minutes of any meeting.

23. The trial Court held there was no evidence of termination and the appellant absconded duty. The court finds that the trial court erred in finding, for lack of any protest on termination, that the appellant had not proved unfair termination. It was undisputed that the appellant, on release from custody of police on 13th July 2023, did not resume duty until 24th July 2023, when he told the court he was informed the position had been filled and he was issued with a recommendation letter on the same date.

24. Absconding of work is a valid reason or termination of employment. The employer is required by law to comply with procedural fairness under section 41 of the *Employment Act* before terminating an employee for absenteeism. The employer just issued a recommendation letter without prove of resignation. On a balance of probabilities, the court found it was more probable than not that the appellant told the truth, as having absonded, he was never issued with a show cause, most probably because the employer had replaced him as a driver, as stated. The employer was under an obligation

in the case of absconding to comply with section 41 of the *Employment Act* as held in Simon Mbithi Mbane Vs Inter Security Services Limited (2018) eKLR the Court stated that an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. Further taking into account the period of work and the court awarded 10 months gross salary as compensation for the unfairness.(see Wilson Kibande Abai v Kenya Tents Limited [2019] eKLR and Obonyo v Kibos Sugar & Allied Industries [2024] KEELRC 1392 (KLR)) The reason of absconding was valid thus the appellant was not entitled to compensation. The appellant was only entitled to Notice pay, which he claimed for 1 month, for lack of procedural fairness, and the same is awarded at the minimum wages established by the trial court of Kshs. 32,280.75 per month.

Whether the appellant is entitled to the award of overtime pay

Submissions by the appellant

25. The appellant averred during trial that he worked an overtime of 3.5 hours for 20 days a month for 154 months. He would report for duty at 6:00am, pick up the pupils and would close at 6:30pm after driving the pupils back home and delivering the bus back to school. At midday he would drive the younger children home and come back to pick the rest in the evening, hence closing work at 6:30pm. ln between the school trips, he would carry out other tasks as assigned, such as cleaning the buses, breaking firewood, driving to the market, making chapatis and other tasks. The Respondent admitted that the claimant reported to work at 6:00am and left work at 5:30p.m., amounting to 8 hours less an hour Lunch break so on the minimum, the Appellant was at work for 10 and 1/2 hours as per the Respondent's admission, clearly 2 hours beyond the normal hours of work. My Lord, Section 7 of the Regulations of Wages General Order on the same provides as follows: - " An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked to the following rate: a) One and half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and b) Twice the normal rate of wages per hour in respect of any time worked on a rest doy..In Kenyan national private security workers union v G4S Kenya limited &2 others,; Central Organization of Trade Unions COTU (K) & 4 others (lnterested parties) [20211eKLR, the Court held that; - " the foregoing notwithstanding, the Court wishes to clarify that when tabulating hours worked per week, afry hours worked overtime must be converted using the formula in the Protective Security Services (Order) 1998 so that any hours worked beyond working hours on o normal working day are deemed to be 1.5 hours, white any hours worked on a public holiday or rest day are converted at 2 hours for every hour worked... the formula for calculation is thot Overtime Formula x 1.5 x Overtime hours above 52 per week" My Lord, the Respondent admitted that the Appellant worked extra hours and the only discrepancy between the hours declared by the appellant and those declared by the Respondent is half an hour, the respondent did not lead any evidence to disprove the appellant's claim for overtime payment. We therefore hold the view that the appellant proved their claim for overtime pay to the required standard of proof on a balance of probabilities.

The Respondent's submissions

26. Whether the Appellant is entitled to the award of overtime pay. On this issue, the Claimant alleged that on a typical day, he would work between 6:00 am and 6:30 pm, hence worked more than 12 hours and was entitled to overtime. This is far from the truth, and this Honourable Court should appreciate that, based on the nature of the work of the Claimant, it was necessary for the Claimant to pick the learners early in the morning and drop them in the evening so as to fit in the school timetables. 21. He was exclusively employed as a school bus driver, and it was impossible for him to have continuously

worked for the entire day. As a matter of fact, he worked considerably fewer hours. He used to report to work by 6:00 am, drop the learners off by 7:30 am and then he used to take a break till 1:30 pm, where he did a second trip back by 2:30 pm, then went on another break till 4:00 pm, where he did the last trip and reported by 5:30 pm. Working late/early is not synonymous with overtime. Whether or not an employee works overtime is not a matter of when he gets into work and the time he leaves. Rather, it is on the actual number of hours worked. Regulations 5 & 6 of The Regulation of Wages (General) Order, 1982 Legal Notice 120 of 1982, provide that; "The normal working week shall consist of not more than fifty-two hours of work spread over six days of the week." 23. Given the nature of the Claimant's work, it was necessary for him to work late and early, but in fact he worked for fewer hours than employees in other departments. 24. In the case of Kenya Union of Commercial Food and Allied Workers v Nairobi Bottlers Limited [2015] eKLR, the Court stated that an employer has a right to regulate working hours as provided under Section 27 of the *Employment Act*. 25. The same position was reiterated in Esther Wanjiku Nderitu v African Quest Safaris Limited [2014] eKLR where the court held that; "The *Employment Act*, 2007 has not explicitly provided for what should happen in case an employee works during his rest days or public holidays. Section 10(3) of the *Employment Act*, 2007 appears to suggest the issue is left to the parties' autonomy. ... Therefore at a contractual level, it was permitted for the Respondent to require the Claimant to work on Sundays, beyond the set times and on public holidays... The Regulation of Wages (General) Order has set out the hours of work and for payment of overtime and the formula for calculating overtime. It has also provided for weekly rest days and for the deferment of the weekly rest days by mutual consent, and holidays with full pay." Clearly, from all the lengthy breaks in between, it is implausible to suggest that the Claimant worked overtime. The court should also take judicial notice that for quite a long time, schools had been closed during the COVID-19 pandemic, and the Claimant could therefore not have been working during that period.

Decision

27. The ground of appeal was -The Honourable Magistrate erred in law and in fact by failing to pronounce and give a determination on the issue of the overtime worked despite the admission made by the respondent on the hours worked.

28. The court found that the respondent concurred with the appellant during cross-examination that the appellant worked from 6 am to 5:30 pm. The job of a driver is regulated. The hours of work are provided under Regulation 5 of the Regulations of Wages Order 1982, thus. ‘’Hours of work

    (1)The normal working week shall consist of not more than fifty-two hours of work spread over six days of the week.’’ The claimant worked for 10 ½ hours per day thus in 6 days of the week he worked total of 63 hours beyond the weekly prescribed 52 hours. He thus proved overtime claim and the court finds the trial court erred in fact and law in failing to find so.

29. Overtime payment is provided for regulation 6 as follows-‘Overtime shall be payable at the following rates—(a)for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;(b)for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.’’ The claimant pleaded he worked for 12 years and 10 months, thus a total of 154 months. The court finds that the appellant was a monthly contract employee, hence his working hours are between the time of reporting to work and exit. Whether he works or stays idle during the period does not matter, as he was not a piece-rated or casual worker. Consequently, the court awards of overtime at rate of 1.5 hours thus 63-52(11 hours per week total 44 hours per month thus 2 ½ hours x1.5 x 154 x 20days x 291.80/8.66 hours per day (52 days in 6 days per week amounts to 8.66 hours per day thus payable wage of Kshs 33.69 per hour. The total overtime award is thus Kshs. 389,119.50

Whether the appellant is entitled to payment of house allowance.

Appellant's submissions

30. It is trite that provision of reasonable housing to an employee is not only recognized under Section 31 of the *Employment Act* but also Article 41 and 43 of *the Constitution*. Payment of a house allowance is a Statutory requirement and one that is couched in mandatory terms. Employers are bound by Section 31(1) of the *Employment Act*, 2007, to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. In this case, the Respondent admitted that the Appellant was not living in the staff quarters since 2019. The Appellant was never provided with an itemized pay-slip but there is also a claim for underpayment which clearly shows that the employee was never paid any house allowance

Respondent's submissions

31. Further, Regulation 4 of The Regulation of Wages (General) Order, 1982 Legal Notice 120 of 1982 provides that; "4. Housing allowance An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the First or Second Schedule, be paid housing allowance equal to fifteen per cent of his basic minimum wage." A plain reading of the provision makes it clear that an employee is only entitled to a house allowance if he is not provided with free housing accommodation. At trial, the Respondent's witness testified that the Claimant was provided with accommodation at the school premises up until he voluntarily moved out in December 2019. This was not denied by the Appellant. 33. It was incumbent upon him to prove the contrary by showing proof of payment of accommodation and rent in another place, which was not done. Having failed to discharge this burden, he was not entitled to any house allowance as he had accommodation within the school.

Decision

32. The trial court found no proof of the claim. The respondent pleaded that they provided for accommodation and the claimant voluntary moved out in 2019 leaving the house unoccupied. There was no reply filed to challenge this position. I have no basis to interfere with the finding of the trial court. The respondent discharged its duty to provide housing.

Whether the appellant is entitled to underpayment.

33. I have considered this issue and found that the trial court addressed the issue rightfully applying the relevant wages orders. I find no basis to interfere.

Whether the appellant is entitled to annual leave.

34. The court held that, as this was a school, the claimant was not working during school holidays. I do agree that workers in schools take leave during school holidays, and hence, there is no basis to interfere. I upheld the same findings inStanley Ngugi Gacheru v Eunice Brookman Amissah [2018] KEELRC 440 (KLR where the court found the claimant was not entitled to leave pay having been on school holidays. The Court stated-'From the evidence on record the Claimant was on leave on more days in a year beyond those stipulated in his Letter of Appointment and under Section 28 of the *Employment Act*. The Respondent cited the Case of Brookhouse Schools Limited v Dorcas Njeri Gichuhi [2016] eKLR, where Ndolo J. stated that an employee whose schedule of work provided for more days available for leave cannot claim leave days. This was also the decision in Edward W. Obuya v M.M. Shah & M.V. Shah Academy & another [2016] eKLR. The Claimant's service can be equated to a programmed schedule

as held in these two cases and he would therefore not be entitled to additional leave days having been on leave in some instances for almost half a year."

Conclusion

35. The appeal is allowed partially. The Judgment and Decree of the Hon. C. Mwaniki (PM) delivered on 13th March 2025 in Ruiru MCELRC E063 of 2024 is set aside and substituted as follows-

    Judgment is entered for the claimant against the respondent as follows-

    a. Notice pay Kshs 32,280.75

    b. Overtime Kshs. 389,119.50

    c. Underpayment of Kshs. 102845.25

    d. Total sum above Kshs 524,245.50, payable with interest at the court rate from the judgment date.

    e. Costs of the suit.

36. Appellant is awarded costs of the suit.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF JANUARY, 2026.

J.W. KELI,

JUDGE

In The Presence Of:

Court Assistant: Otieno

Appellant – Ms. Mwenda

Respondent- Chahilu h/b Ms Wamaitha