



REPUBLIC OF KENYA



**Wambugu & another v Lungah & 5 others (Appeal E262 of 2025)
[2026] KEELRC 128 (KLR) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 128 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E262 OF 2025
JW KELI, J
JANUARY 23, 2026**

BETWEEN

MICHAEL WAMBUGU 1ST APPELLANT

NAFUUMART SUPERMARKET LIMITED 2ND APPELLANT

AND

BILTON ALUVALE LUNGAH 1ST RESPONDENT

CYRUS MWANIA MULEI 2ND RESPONDENT

RAPHAEL MUTISYA 3RD RESPONDENT

GEOFREY NGAIRA KHALWALE 4TH RESPONDENT

JOSEPH MUTUA MWALILI 5TH RESPONDENT

LILIAN NTHENYA MUNYAO 6TH RESPONDENT

JUDGMENT

1. The Appellant herein, dissatisfied with the Judgment and Decree of the Hon. S.N. Muchungi (PM) delivered on 25th April 2025 in Nairobi MCELRC No. 1724 of 2019 filed a Memorandum of Appeal dated the 14th of May 2025 seeking the following orders: -
 - a. The appeal be allowed
 - b. Judgement be entered in favour of the Appellants as set out in the counter-claim and the Respondents suit in the lower court be dismissed.
 - c. The Respondent be condemned to pay the costs of this appeal and those in the court below.



Grounds Of The Appeal

2. The Honourable Magistrate erred in law and fact by holding that the Respondent did not prove that the Claimants absconded from duty while several witnesses proved that the Claimants absconded from duty.
3. The Honourable Magistrate erred in law and fact by failing to make a finding that Michael Wambugu, being a Director of Nafuumart Supermarket Limited, a limited liability company was not personally liable for the 2nd Appellant's debts.
4. The Honourable Magistrate erred in law and fact in considering extraneous matters to decide the suit.
5. The Honourable Magistrate failed to make a clear finding that she had entered Judgement against the Respondents making the judgment unenforceable.
6. The Honourable Magistrate erred in law and fact by holding that the salaries did not include house allowances for the Respondents.
7. The Honourable Magistrate erred by failing to enter judgement for the Respondents on the Counter-claim as it was unchallenged.
8. The Honourable Magistrate erred by awarding the Claimants house allowance when it was clear the salary was gross and inclusive of house allowance.
9. The Honourable Magistrate erred in law and fact in basing her decision on irrelevant and extraneous circumstances.

Background To The Appeal

10. The Respondents filed a suit against the Appellants vide a statement of claim dated 10th September 2019 seeking the following orders: -
 - a. A declaration that the Respondents' act of terminating the Claimants' employment was un-procedural and amounted to unfair termination of the Claimants.
 - b. Kshs. 3,786,531.00 against the Respondents as particularized in Paragraph 4 of this Statement of Claim.
 - c. Costs of the suit.
 - d. Interest on (b) and (c) above.
 - e. Such further or other relief as this Honourable Court may deem fit. (pages 3-9 of Appellants' ROA dated 27th May 2025).
11. The Respondents filed the witness statement of the 1st Claimant made with the authority of the other claimants and dated 10th September 2019; list of witnesses of even date; and separate lists of documents all of even date with the bundle of documents attached (pages 11-62 of ROA).
12. The claim was opposed by the Appellants who entered appearance and filed separate defences both dated 13th November 2019 (pages 63-65 and 69-79 of ROA). The 2nd Respondent's defence contained a counterclaim seeking the following orders:
 - a. The said sum of Kshs. 989,688/-.
 - b. Costs of this suit and interest at court rates.



- c. Any further remedy that this Honourable Court may deem fit to grant.
13. The Appellants also filed a list of witnesses dated 13th November 2019 (page 68 of ROA); witness statement of the 1st Appellant dated 13th November 2019 (pages 66-67 of ROA); witness statement of Beth Wanjiru Mwangi dated 1st September 2020 (pages 87-88 of ROA); witness statement of Mary Nyoike of even date (pages 89-90 of ROA); witness statement of Paul Maina dated 17th August 2020 (pages 91-92 of ROA); witness statement of Samuel Loleku Mamirek dated 17th August 2020 (pages 93-94 of ROA); list of documents with the bundle of documents attached dated 1st September 2020; and further list of documents dated 1st September 2020 (pages 101 and 95-98 of ROA). In the record of appeal, the Appellants appear to have attached the Claimants/Respondents bundle of documents after this list of documents on pages 102-108 of the ROA, rather than the documents listed in their own list of documents. On page 131 of the ROA in the judgment, the Trial Magistrate indicated that these documents (the ones listed in the Respondents list of documents including the OB Number were not availed in court.
 14. In reply to the 1st Appellant's defence, the Claimants/Respondents filed a response dated 26th November 2019. They similarly filed a response dated 26th November 2019 to the 2nd Appellant's defence and counterclaim(pages 81-84 of ROA).
 15. The Claimants/Respondents' case was heard on the 25th of October 2023 with the 1st Respondent testifying on his own behalf and on behalf of the other Respondents. He relied on his filed witness statement as his evidence in chief and produced the documents attached to all the Claimants/ Respondents list of documents as their exhibits. He was cross-examined by counsel for the Appellants, Mrs. Kiarie (pages 114-118 of ROA).
 16. The Appellants' case was also heard on the same day with the Appellants calling four witnesses: the 1st Appellant as DW1; Mary Nyoike as DW2; Paul Maina as DW3; and Beth Wanjiru as DW4. They all relied on their filed witness statements as their evidence in chief, and DW1 produced the Appellants' documents attached to their list of documents and further list of documents as aforesaid. DW2 produced her medical report. All the witnesses save for DW3 were cross-examined by counsel for the Respondents Mr. Nyawade. In the case of DW3, Mr. Nyawade indicated that he had no questions for cross-examination (pages 119-124 of ROA).
 17. The parties took directions on filing of written submissions after the hearing, and complied.
 18. The Trial Magistrate Court delivered its judgment on the 29th of April 2025 partially allowing the Claimants/Respondents' claims in respect of notice pay, house allowance, leave pay, compensation for unfair termination, underpayment and days worked in July 2019. The trial court declined to award the Claimants/Respondents service pay, but awarded them costs and interests (judgment at pages 127-134 of ROA). The court dismissed the Appellants' counterclaim for lack of evidence.

Determination

19. The Appeal Was Canvassed by way of written submissions. Both parties complied

Issues for determination

20. The Appellants submitted on all grounds of the appeal.
21. On their part, the Respondents identified the following issues for determination in their submissions dated 6th November 2025:



- i. Whether the trial court erred in law and fact by awarding the prayers as sought by the respondents.
 - ii. Whether the trial court considered the appellants' case.
22. The court, having considered the grounds of appeal, was of the considered opinion that the issues for determination in the appeal were –
- a. Whether the trial court erred in finding unfair termination of employment
 - b. Whether the trial court erred in the reliefs granted.
 - c. Whether the trial court erred in failing to determine the issue of which respondent was liable for the judgment.

Whether the trial court erred in finding unfair termination of employment.

The appellant's submissions

23. The Learned Magistrates wrongly held that the Claimants did not abscond from work. She placed a duty on the Appellants that the law does not place on them. The Appellants called 4 witnesses who gave evidence and were not shaken in cross-examination. The Learned Magistrates ought to have given reasons why she would dismiss the evidence of 4 witness and choose to believe the one witness for the claimant. The 4 Appellants' witnesses stated that the Claimant was under investigation for theft and that a specific Occurrence Book Number was given. It was the word of the Claimant's witness against that of 4 witness who gave cogent evidence and were not shaken at all. The Claimant did not report a dispute to any labour office either.
24. We wish to Argue Ground 3 of Appeal and as follows: The 1st Respondent Bilton Avulale Lungahi gave evidence on his own behalf and on behalf of all the other Respondents. However, there was no letter of authority filed or produced from the 2nd Respondent, 3rd Respondent, 4th Respondent 5th and 6th Respondents giving him authority to do so. This means the claims by the other Respondents were not proved. This is an issue that the court, Suo Motu ought to have observed and made a finding on Under Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Each claimant must either testify on their own behalf or give written authority (filed in court) for one claimant to represent or testify on behalf of the others. In the absence of that authority, the testimony only applied to the case of the 1st Respondent, and the other claims were not proved, as the evidence he gave did not automatically extend to the other Respondents. The court then relied on extraneous matters. We wish to rely on the following cases: In the case of Kahindi Katana Mwangi & Another v Canon Assurance (K) Ltd [2013] eKLR, the High Court held that where there are multiple plaintiffs, one cannot act for the others without proper written authority as required under Order 1 Rule 13 of the Civil Procedure Rules, 2010. The court found that failure to file such written authority renders the entire suit null and void ab initio. What is extraneous matters in the Law? It is evidence that ought not to have been considered. In view of the fact that the other claimants, now the Respondents did not give evidence, the consideration of their claims was evidence that was not called before the trial court and therefore extraneous.

Respondent's submissions

25. It is trite that for the Respondent to prove that the Claimants had absconded duty, they must provide evidence showing attempts at reaching the employee and a show cause letter should be issued to such an employee calling upon him/her to explain why disciplinary action should not be taken against him/



her. Whereas the Appellant herein alleges that there were witnesses who testified to the same, there was no such evidence before the trial court. In the case of *Owudu v Digital Sanitation Services Limited* (Appeal E 109 of 2023) £20241 KEELRC 917 (KLR) (18 April 2024) the court held that: "17.First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer."

Decision

26. The relevant grounds of appeal were-
- a. The Honourable Magistrate erred in law and fact by holding that the Respondent did not prove that the Claimants absconded from duty while several witnesses proved that the Claimants absconded from duty.
 - b. The Honourable Magistrate erred in law and fact in basing her decision on irrelevant and extraneous circumstances.
27. This being 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''
28. The Court considered the pleadings by the parties, evaluated the evidence by parties and the cross-examination and came to same conclusion as the trial court that there was no prove of valid reasons for the termination of employment on basis of absconding. The defence of absconding advanced by the appellant was not proved as the 1st appellant told the court they had stolen and feared arrest yet the alleged police booking abstract was not produced nor was the alleged manager Kioko called as a witness. The said Kioko, it was established at the hearing before the trial court was not in office and had left several months before the termination. The appellants failed to discharge the burden of employer under section 43 of the [Employment Act](#) on the validity of the reasons for the termination.
29. The appellant did not also produce evidence of notice to show cause to the respondents on the alleged absconding. The court was of the opinion that, on the allegation, the employer is obliged to comply with section 41 of the [Employment Act](#) to end the employer-employee relationship. In *Owudu v Digital Sanitation Services Limited* (Appeal E 109 of 2023) £20241 KEELRC 917 (KLR) (18 April 2024) the court held that: "17.First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer." A notice to show cause was also necessary



on the alleged misconduct of theft. For the foregoing reasons, I find no basis to interfere with the finding of the trial court. 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). The termination in the instant appeal failed fairness test on both the substantive and procedural requirements. On the issue of authority to plead, I find this was not an issue before the trial court. It cannot be raised for the first time at the appeal level.

Whether the trial court erred in the reliefs granted

Appellant’s submissions

30. The learned Magistrates erred by giving awards that time barred and making a finding that the Respondent were entitled to house allowance. The salaries were inclusive of house allowances. The court erred by holding that the salary did not include house allowance. Without setting out the basic salary of ,it was erroneous to hold that the salary did not include house allowance. Further and most importantly, any claim beyond 3 years for salaries, alleged house allowance was time barred. The Claims for Bilton Aluvale Lungahi, Raphael Mutisya, Joseph Mutua Mwalili and Lilian Nthenya Munyao, going further that 3 years were time barred and was therefore an extraneous claim. 5. GROUND 4 OF APPEAL In the case of Beatrice Kahai Adagala -VS- postal Corporation of Kenya (2015) eKLR, the employee claimed salary arrearsafter3 years and the court struck it out. See also G4S Security Services Ltd (2018) eKLR.

The respondent’s submissions

31. The Appellants did not provide evidence of payment of house allowance or a consolidated salary through a pay slip indicating the same and therefore, the trial court did not err in law and fact by awarding the Claimants with the House Allowance. Section 74(1) of the *Employment Act* also requires that:-‘Where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated, particulars of the house allowance paid to the employee [must be set out].”

Decision

32. The grounds of appeal were –
- a. The Honourable Magistrate erred in law and fact by holding that the salaries did not include house allowances for the Respondents.
 - b. The Honourable Magistrate erred by awarding the Claimants house allowance when it was clear the salary was gross and inclusive of house allowance.



33. Housing is a basic condition of employment under section 31 of the [Employment Act](#) to wit- ‘31. Housing
- (1)An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”
34. The appellants submit that the salary paid was inclusive of the house allowance. The court, on re-evaluation of the evidence before the trial court, found that the extract of the muster roll produced by the appellants had the column of gross pay blank. The appellants did not produce a payslip. Section 74(1) of the [Employment Act](#) also requires that, where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated, particulars of the house allowance paid to the employee must be set out. The appellant submitted the award of housing beyond 3 years was unlawful as the claims had expired and relied the decision in Beatrice Kahai Adagala -VS- postal Corporation of Kenya (2015) eKLR, where the employee claimed salary arrears after 3 years, and the court struck it out.
35. The claim for housing is a continuing injury claim and is renewed each month it is not paid, hence accrued until cessation or termination. Section 89 of the [Employment Act](#) 2007 provides as follows; “Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#) (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” The decision relied on by the appellants of Court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] e KLR was overtaken by decision of same court in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) where the claimant in the case submitted that alteration of terms of her contract of service in the years 1997 to 2004, 2007 and 2009 and the resultant underpayments and loss of benefits were a continuing injury within the meaning of section 90 of the [Employment Act](#) . The claimant/appellant filed the claim on 11th December, 2014, and was awarded backpay for the said years, way outside the 3-year period before termination. The Court of Appeal upheld the backpay award and stated as follows- ‘41. Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant’s argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90”(emphasis given). The ground of appeal based on awards beyond 3 years to termination being expired fails.
36. On award of leave- the appellant did not raise a specific ground of appeal and on perusal of the evidence before the trial court I did not find any evidence to controvert the claim for leave.
37. The compensation awarded was based on years of service for the individual respondent. This court found the award to be in compliance with the criteria under section 49(4) of the [Employment Act](#).



38. On counterclaim- the appellant's witness Beth Wanjiru was an accountant working for Nafuu hardware an enterprise of the 1st appellant and stated she was asked to take stock at the supermarket She told the trial court she prepared a list of missing goods compared with sales as pleaded in the counterclaim. Beth told the court she had the report and admitted it was not in court.(page 124 of ROA) The appellant failed to produce the report in support of their counterclaim. The court finds no basis to interfere with the finding by the trial court that there was no evidence produced to prove the counterclaim.

Whether the trial court erred in failing to determine the issue of which respondent was liable for the judgment

39. The trial court in judgment the trial court simply stated-‘I hereby make the following awards in respect of the claimants. ’ The court then agreed with appellants that the trial court erred in fact and law by failing to specify which respondent/appellant was liable to pay the claimants. the 1st appellant in defence had contested liability stating the 1st appellant was a limited company and there was no basis to join him in the suit. The respondent submitted that -It is also trite that a company is a separate Legal entity from its directors as was held in the case of Salmon Vs Salmon and Co. Limited (1896) UKHL. Therefore a Company's director or former director cannot be held personally liable for the 2nd Appellant's debts. The court finds that it is not contested that only the 2nd appellant was liable for the judgment being a limited company as there was no application to lift the veil of the company.

Conclusion

40. In the upshot, the appeal fails save for the finding of error on omission to declare the respondent against whom the judgment was issued. The court upholds that the judgment and Decree of the Hon. S.N. Muchungi (PM) delivered on 25th April 2025 in Nairobi MCELRC No. 1724 of 2019 and declares that the judgment is against the 2nd appellant . Each party to bear own costs in the appeal.

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

Appellants – Wandaka

Respondent – Ms. Kariuki

