

The claimant averred that the termination of employment was unfair both substantively and procedurally and prayed for: a declaration that termination of employment was unfair, Kshs.886,778.27 comprising unpaid salary (March-May 2022), leave days, unpaid holidays, underpayment, overtime, unpaid off days, house allowance, service pay, compensation, certificate of costs and interest.

The respondent denied all the allegations made by the claimant but did not adduce any evidence in support of its case.

After considering the respective cases, evidence and submissions by counsel, the trial court found that termination of the claimant's employment was unfair for want of notice and decreed that termination of the claimant's employment was unfair, awarded salary in *lieu* of notice, compensation, underpayment, house allowance, leave days, and public holidays total Kshs.191,535.77, certificate of service, costs and interest.

This is the judgment the appellant seeks to overturn based on eight (8) grounds of appeal.

The learned trial magistrate is faulted for having erred in law and fact by:

- 1. Misunderstanding and analysing of the evidence.*
- 2. Awarding the claimant salary in lieu of notice, compensation, underpayment, leave, house allowance and public holidays, yet the claimant had not proved that termination of employment was unfair or entitlement to any of the awards.*

Appellant's submissions

As to whether termination of the respondent's employment was unlawful, counsel cited the provisions of Section 47(5) of the Employment Act to submit that the respondent was duty bound to prove that his employment had been terminated and the termination was unfair or wrongful and no evidence to establish the same had been provided and there was no evidence of summary dismissal.

Counsel, further submitted that the respondent had admitted, on cross-examination that she was aware that the assignment site had been allocated to another security provider and declined to be redeployed to the Kisumu Office and the appellant was free from blame.

Counsel submitted that the respondent was not entitled to the declaration that termination of employment was unlawful, damages for unlawful termination, notice pay, unpaid holidays, off days and overtime.

According to counsel, the respondent was not underpaid and only worked for 7 months and tendered no evidence of non-payment of house allowance.

Finally, counsel submitted that the respondent was not entitled to severance pay as she had not been declared redundant.

Counsel urged the court to allow the appeal.

Respondent's submissions

As to whether termination of employment was unfair, reliance was placed on Section 43(1), 45(1) and (2) and Section 2 of the Employment Act as well as the decision in **Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others** [2014] eKLR and **Kenfreight (EA) Ltd V Benson (K) Nguti** [2016] eKLR to urge that the respondent was declared redundant without compliance with the law.

The decision in **Mary Njeri Miingi V Peter Macharia & another** [2016] eKLR was cited for the proposition that uncontroverted evidence carried substantial weight, to urge that the appellant failed to prove that there was a genuine redundancy.

On reliefs, counsel submitted that the respondent was entitled to salary in *lieu* of notice on account of Section 35(1)(c) and 40(1)(f) of the Employment Act, unpaid leave days by reason of section 28(1) of the Employment Act and Section 74(1) on records, underpayment under Regulation of Wages (Amendment) Orders 2018 and 2022, house allowance under Section 31 of the Employment Act and the decisions in **Johnson Otsieno Ogola V Hatari Security guards** [2021] eKLR and **Dede Esi Annie-Amanor Wilks V Action Aid International** [2014] eKLR, on minimum standards.

In addition, counsel submitted that the respondent was entitled to public holidays, compensation for unlawful termination of employment and costs of the suit.

Analysis

From the eight 8 grounds of appeal, it is discernible that the appellant was contesting the trial court's appreciation

and analysis of the evidence on record and the awards made.

Before delving into the grounds of appeal, it behoves the court to reiterate its role as the first appellate court in this instance as enunciated in judicial pronouncements.

In **Selle and another V Associated Motor Boat Co. Ltd & others** [1968] EA 123 Lestang V P stated:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial ... is by way of a 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 in this respect..."

See also **Abdul Hameed Saif V Ali Mohamed Sholan** [1955] 22 EACA 2010 and **William Diamonds Ltd V Brown** [1970] EA 1 since the appellant's appeal is grounded on the appreciation and evaluation of evidence

by the trial court, it is the essential for this court to analyse the evidence comprehensively.

During the hearing on 4th June 2025, the respondent adopted his written witness statement and produced his exhibits, namely, a copy of her national identity card and two pages of her bank statement from Equity Bank.

Significantly, the bank statement showed that the respondent received a salary from the respondent three (3) times only and in 2020, paid on 16th September 2020, 16th October 2020 and 10th November 2020, when Kshs.6,916 was paid.

For unexplained reasons the bank statements for 2021 and 2022 were not provided.

While the document establishes that the respondent was an employee of the appellant for 3 months in 2020, it does not show what happened thereafter bearing in mind that termination of employment allegedly took place in May 2022.

It is trite law that he who alleges must prove the allegations by evidence.

Section 107 of the Evidence Act provides:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

Under Section 108 of the Act

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

In this case, the respondent bore the burden of prove that he was an employee of the appellant from July 2020 to May 2022, and had to do so on a preponderance of probabilities.

Regrettably, the credible evidence on record reveals that he only worked and was paid for only 3 months and had not claimed that the salary for any month in 2021 or 2022 was outstanding as per the written witness statement dated 11th October 2024.

In **Mbogo V Settlement Land Trustee** [20235] KECA 561 (KLR) the Court of appeal held:

“It is necessary for parties to know that even in an undefended suit, the burden of proof is not lowered. The only advantage a party in such a suit is that the evidence remains uncontroverted but it must nevertheless prove that claim as pleaded”.

Hancox JA expressed similar sentiments in **Kabugi & another V Kabiya & 3 others** [1983] KECA 38 (KLR) as follows:

“...The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validity defended that burden May become easier to discharge”.

See also Halsburys laws of England Vol. 17 paragraph 260 which defines the concept of proof.

During cross-examination, the respondent stated that she worked from March to May 2023 notwithstanding the fact that the written witness statement and the Memorandum of Claim indicated that her employment was terminated in May 2022.

Strangely, the respondent could not recall the date of employment or the alleged termination of employment preferring the month only and assuming she was employed in July 2020 as alleged, the first salary was paid in September and had no claim for the salary for July and August 2020 or reference to late payment of salary or it was paid in cash is via Mpesa.

The only credible evidence on record is that the respondent was an employee of the appellant from September to November 2020 and the court so finds.

The trial court was faulted for the awards made based on its finding that termination of the respondents employment by the appellant was unfair.

It is trite law that for a termination of employment to pass muster or the fairness test, it must be shown that the provisions of the Employment Act have been complied with. Specifically, it must be demonstrated that the employer had a valid and fair reason to terminate the employee's employment and conducted it in accordance with a fair procedure.

Put in alternative terms, there must have been a substantive justification and procedural fairness as exquisitely captured by Ndolo J. (as she then was) in **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR and the Court of Appeal in **Naima Khamis V Oxford University Press (EA) Ltd** [2017] eKLR

The Court of Appeal held:

“...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.

According to the respondent, termination of employment was substantively and procedurally unfair because the appellant neither provided a reason for the termination nor comply with the procedural requirements.

During the hearing the respondent confirmed on cross-examination that she was fired by the respondent. That they call her through a phone call.

In her witness statement, the respondent stated that in the month of May, the supervisor informed her that there would be no more work.

From the evidence, on record it is uncertain as to when in the month of May, the respondent's employment was terminated.

The month of May has 31 days but the respondent could not recall when a life changing event took place. She could even recall who called her, if it was a call, cell-phone number or what she did thereafter.

Strangely, the respondent was persuading the court to find that her employment with the respondent was unfairly terminated by an unnamed supervisor on an unknown date and the learned trial magistrate found as much.

Respectfully, this court is of a different view.

Section 47(5) of the Employment Act provides

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.

This provision has been construed to mean that the employee must establish a *prima facie* case of unfair termination of employment or wrongful dismissal for the burden of proof to shift to the employer to justify the same. See **Mwangi V Cathmed Ltd** [2025] 2681 (KLR).

The employee must discharge the evidential burden under Section 47(5) of the Employment Act.

In **Omar Ndaro Zuma V Modern Coast Express** [2019] KEELRC 20232 (KLR) Ndolo J. (as she then was) held:

“The import of section 47(5) of the Employment Act is that an employee alleging unfair termination or wrongful dismissal must lay before the court the actual circumstances leading to his exit from employment. It is not enough for an employee to simply say “my employment was unfairly terminated” they must prove ingredients of the unfair termination or wrongful dismissal”.

In **Nicholus Kipkemoi Korir V Hatari Security Guards Ltd** [2016] KEELRC 1044 (KLR) Abuodha J held:

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect to find in his or her favour”.

After careful consideration of the evidence on record and guided by the foregoing pronouncements on the import of Section 47(5) of the Employment Act, the court is not persuaded that the respondent discharged her burden under the provisions of Section 47(5) of the Act.

This finding is fortified by the fact that even assuming the supervisor informed or called the respondent and communicated that there would be no more work for the respondent, what did the respondent do? The respondent’s case was styled as though the unnamed supervisor was the employer yet he was not.

In her witness statement, the respondent was unambiguous that her employer was the respondent not the supervisor.

It is puzzling that the respondent adduced no evidence as to what she did after the alleged communication. To whom was the uniform handed over and when?

Evidence of whether she reported to the appellant's office to confirm the status of the employment or collect her final dues would have accorded the allegations some aura of credibility, which they lacked.

Having found as above, it is clear that the claim for salary in *lieu* of notice and compensation for unlawful termination were unsustainable and were for dismissal.

In the court's view, the trial court erred in finding that termination of the respondent's employment was unfair.

Appropriate relief

The claim for salary in *lieu* of notice ought to have been dismissed. It was not merited.

The respondent's witness statement made no reference to any unpaid salary for March to May 2022.

The claim was unproven and was for dismissal.

The court is in agreement with the trial court.

On leave days, the respondent's witness statement made no reference to any outstanding leave days. The claim lacked supportive evidence and ought to have been dismissed.

As regards unpaid holidays, the respondent tendered no evidence of having been at the work place on those days and confirmed the same on cross-examination.

The claim was not proved and was for dismissal.

The claim for overtime lacked particulars or supportive evidence and was for dismissal as was the claim for off-days.

The court is in agreement with the trial court.

Needless to belabour, the claims for unpaid leave days, public holidays, off-days and overtime are claims for special damages which in law must be specifically

pleaded and strictly proved and no evidence was adduced to establish the claims.

As regards service pay, the respondent's written witness statement stated that she was a registered member of the National Social Security Fund (NSSF) but during cross-examination she indicated that she was not a member of but had no NSSF statement to show that deductions were not remitted.

Having admitted that she was enrolled, the respondent could not retract the evidence in court and allege otherwise.

The trial court correctly rejected the claim because it was unproved and was for dismissal as the trial court found.

Having found as above, the claim for compensation, as already adverted to was for dismissal.

The only sustainable claim, in the court's view, was underpayment.

The respondent's bank statement revealed that her salary was Kshs.6,916.00 per month yet the salary for a

Day Guard in 2020 was Kshs.7,240.95 plus house allowance at 15% of Kshs.1,086.14, total Kshs.8,327.09 Less Kshs.6,916.00=Kshs.1,411.09 as underpayment.

The relevant wage guidelines was the Regulation of Wages (General) (Amendment) Order 2018 effective 1st May 2018 which bound all employers.

Payment of salary or wage below the prescribe minimum wage is unlawful as held by the Court of Appeal in **Ng'ang'a V Christ the King Parish & another** [2023] KECA 1100 (KLR).

See also **Irungu Githae V Mutheka Farmers Co-operative Society** Ltd [2019] eKLR where the court stated:

"...Under the law, any employer paying below the minimum wage commits an offence".

The respondent qualified for underpayment for 3 months only Kshs.4,233.28.

It is trite law that an appellate court ought not interfere with the exercise of discretion of a trial court unless it is demonstrated that the exercise was improper or

injurious or more specifically in any of the circumstances outlined in **Mbogo & another V Shah** [1968] E. A. 93 and by Madan JA in **United India Insurance Co. Ltd and another V East Africa Underwriters (Kenya) Ltd** [1985] eKLR.

In this appeal, the court is satisfied that the appellant has made a case for interference with the exercise of discretion by the trial court in making of wards.

In the upshot, the appellant's appeal is partially successful to the extent that all monetary awards made by the trial court are set aside save for underpayment which is adjusted to Kshs.4,233.28.

Other awards by the trial court are upheld.

Parties shall bear own costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 4TH DAY OF FEBRUARY 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

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