REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E76 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

PRIDE KINGS SECURITY SERVICE.....APPELLANT

VERSUS

PATRICK OGOBA OKUKUMA.....RESPONDENT

JUDGMENT

This is an appeal from the Judgment of Hon. V. Adhiambo delivered on 9th September 2025 in Kisumu MCELRC No.E272/2024 **Patrick Ogoba Okukuma V Pride Kings Services Ltd**.

The facts of the case were that the claimant was employed by the respondent in August 2020 as a night security guard at Kshs.7,000.00 per month, working from 6pm to 6am, with no off days or leave or overtime and worked during public holidays as well.

According to the claimant, on 8th May 2023 the Area Controller informed him his contract had been terminated because the client had not renewed the security contract.

The claimant stated that his salary for April 2023 and 8 days of May 2023 was not paid and prayed for a declaration that termination of employment was unfair, Kshs.1,300,411.56 comprising salary in *lieu* of notice, underpayment, unpaid wages, off days, leave days, house allowance, public holidays, overtime severance pay, service pay and compensation.

The respondent's case was that the claimant was not its employee. By its response to Memorandum of Claim, the respondent denied all claims by the claimant and tendered no witness or evidence.

After considering the evidence and material before the court and submissions by the counsel, the learned trial magistrate found the claimant's uncontroverted and found in his favour awarding compensation, unpaid leave, underpayment, salary in *lieu* of notice, house allowance and costs and interest.

This is the judgment appealed against by the appellant which contends that learned trial magistrate erred in law and fact by awarding pay in *lieu* of notice, compensation, underpayment, house allowance and leave.

The appellant faulted the trial court for misunderstanding the evidence, wrongly evaluating it and arrived at wrong conclusions.
Thus, the trial court was assailed for having misapprehended and applied the evidence on record and made unjustiable awards.

The appellant prayed that the appeal be allowed.

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. That there was no evidence of summary dismissal.

Counsel, further submitted that the respondent had admitted on cross-examination that he was aware that 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 he had not been declared redundant.

Counsel urged the court to allow the appeal.

Respondent's submissions

On termination of the respondent's employment reliance was placed on **Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others** [2014] eKLR, on the requirements for redundancy as were the provisions of

Section 43 (1) and 45(1), and (2), and Section 2 of the Employment Act to urge that the respondent's services had become superfluous.

Reliance was also placed on **Kenfreight (EA) Ltd V Benson K. Nguh** [2016] eKLR as well as **Mary Njeri Mungi V Peter Macharia & another** [2016] eKLR, on the weight of uncontroverted evidence to urge that the claimant's evidence was unchallenged.

According to counsel, the respondent was declared redundant.

Concerning the reliefs prayed for, counsel submitted that the respondent was entitled to salary in *lieu* of notice on account of Section 35(1) and 40(1) of the Employment Act, unpaid annual leave, underpayment, unpaid house allowance. Reliance was placed on the decisions in **Johnson Otsieno Ogola V Hatari Security Guards Ltd** [2021] eKLR and **Dede Esi Anne -Amanor-Wilks V Action Aid International**.

Counsel submitted the respondent was entitled to compensation for the unlawful termination of employment. Counsel urged the court to award costs.

Analysis and determination

As adverted to elsewhere in this judgment, the trial court's judgment was faulted on misapprehension of evidence and the awards.

Before delving in to the issues, it is important to restate the role of the first appellate court as captured by the Court of Appeal in **Gitobu Imanyara & others V Attorney General** [2016] KECA (KLR) as follows:

"This being the first appeal, it is trite law this court is not bound necessarily to accept the findings of fact by the court below and that 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 never seen nor heard the witnesses and should make due allowances in this respect. See ***Selle & another V Associated Motor Boat Co. Ltd & others*** *[1968 EA 123 and* ***William Diamonds Ltd V Brown*** *[1970] EAl".*

See also the sentiments of the court in **Peters V Sunday Post Ltd** [1958] EA 424.

On matters evidence, it is important to underline the fact that although the appellant filed a response which comprised denials of all the respondent's allegations, it did not tender an iota of evidence in support of its denials.

It is trite law that pleading are mere averments and not evidence. Proof is the foundation of evidence as held in **CMC Aviation Ltd V Cruis Air Ltd (1)** [1978] KLR 103.

Thus, and as the learned trial magistrate acknowledged, the respondent's evidence was unchallenged.

However, it is trite law that unchallenged evidence and proof on a balance of probabilities are not synonymous. The party suing remains liable to prove its case on a preponderance of probabilities failing which it is dismissed.

The provisions of Section 107, 108 and 109 of the Evidence Act are unambiguous on the burden of proof.

Under Section 107

(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 facts it is said that the burden of proof lies on that person.

Section 108 provides:-

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.

The mantra of he who alleges shoulders the burden of proof has been underscored in countless decisions such as **Mary Wambui Kabuguo V Kenya Bus Services Ltd** [1977] eKLR where the Court of Appeal stated.

"The age long principle of law is that he who alleges must prove..."

Similarly in **Karugi & another V Kabiya & 3 others** [1983] KECA 38 (KR) the court stated:

"The burden on the plaintiff to prove his case, remains the same..."

Finally, in **Mbogo V Settlement Land Trustees** [2025] KECA 561 the court of Appeal added:

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

The respondent's claim was that he was employed around August 2020 and worked until May 8th 2023 when his employment was terminated.

On employment, the respondent tendered no employment contract, which the appellant ought to have provided or an employment card or badge save for a copy of his national identity card.

However, he availed a bank statement showing that he received a salary from the appellant on 16th October 2020, 10th November 2020 and 10th December 2020, only.

Arguably, the only credible evidence of there having been an employment relationship between the respondent and the appellant was from around September 2020 to December 2020.

The respondent availed no shred of evidence to prove that he rendered any services to the appellant in 2021, 2022, or 2023, having admitted that his monthly salary was paid via his bank account.

Without a written contract of service to show the duration of employment or payment of salary or staff card or anything to show that he was at work in 2023, the court has nothing to rely on for a finding that he was still at work bearing in mind that his bank statement was incomplete.

The statement for 2023 would have effortlessly demonstrated he was employed in January, February, March, April and May 2023, whether he was paid or not.

On termination of employment, it is trite law that for a termination of employment to pass the fairness test or muster, it must be proved that there was a substantive justification for the termination of employment and the procedure followed was fair as held in **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR. The Court of Appeal expressed similar sentiments in **Naima Khamis V Oxford University Press (EA) Ltd** [2017] eKLR.

In sum, the provisions of Section 41, 43, 44, 45 and 47(5) of the Employment Act must be complied with.

Significantly, 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 interpreted to mean that the employee must demonstrate a *prima facie* case of unfair termination of employment for the burden of proof to shift to the employer.

While construing this provision in **Nicholus Kipkemoi Korir V Hatari Secuirty Guards Ltd** [2016] KEELRC 1044 (KLR) Abuodha J stated:

"The 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 pleadings which are not backed by any evidence and expect the court to find in his or her favour".

Concerning termination of his employment, the respondent stated that he was employed by the appellant company and therefore had a contract of service with the company, it's nature notwithstanding and only the appellant could terminate their relationship.

The respondent further stated that on 8th May 2023, the Area Controller, his supervisor called him and informed him that his employment had been terminated.

The alleged controller's name was not disclosed nor what the respondent did thereafter.

The court is at a loss how a supervisor or Area Controller could terminate the respondent's employment via a call. The number from which the call was made was not disclosed yet he was the immediate supervisor and in any event he was not the employer or its voice as no evidence to that effect was adduced.

The dearth of evidence as to how the parties separated is baffling.

The respondent's written witness statement was silent on what action he took after he received the alleged news on termination of employment, not even going home to await further communication on payment of terminal dues. The allegation that attempts to contact the supervisor for his dues was unsuccessful could not avail the respondent for the simple reason that the alleged Area Controller/Supervisor was not his employer and did not pay his salary. Only the employer could terminate the employment relationship.

The respondent adduced no evidence of having reported to the employer's office to follow up his due and had no evidence of having called the supervisor after the alleged call from him.

Strangely, the respondent did not seek any form of assistance until October 2024 more than 16 months later.

The learned trial magistrate reasoned that because the owner of the assignment site did not renew the security

contract, termination of the respondent's employment was fair and legitimate, but unfair for want of notice.

With respect, this court is of a different view on account that no evidence was adduced to show that indeed the alleged client did not renew the contract with the appellant. Only the appellant had in it possession verifiable evidence of whether the contract was renewed or not.

In the court's view, the learned trial magistrate fell into error on this issue because the appellant adduced no evidence to show why and how it terminated the respondent's employment if that was the case.

A careful re-evaluation of the evidence before the court and the analysis of the evidence by the learned trial magistrate reveals a disconnect.

Some credible evidence of a call having been made by the alleged nameless supervisor coupled with the actions the respondent took to confirm the information with the employer and follow up on his dues, if any, would have enhanced the credibility of the allegations about the call and the alleged termination of employment.

From the evidence on record, the court is satisfied that the respondent not only failed to prove that his employment was terminated by the respondent on 8th May 2023, but also failed to demonstrate that the alleged termination of employment was unfair.

The court was not persuaded that an unfair termination of employment or separation had taken place as alleged by the respondent.

This finding is reinforced by the earlier finding that the respondent failed to prove that he worked at any time after December 2020.

Having found as above the claim for compensation was unsustainable and unmerited.

However, vested rights were recoverable as applicable and only for the duration served, namely, September 2020 to December 2020, 4 months.

(i) The declaration sought was unmerited

(ii) Underpayment

It is evident that the respondent was underpaid, having served as a night guard at Kshs.7,000 only per month.

Under the relevant Regulation of Wages (General) (Amendment) Order 2018, the salary of a night guard was Kshs.8,366.35, Kshs.1,255.00 house allowance, Total Kshs.9,621.35=Kshs.7,000=Kshs.2,621.30 x 4 months=Kshs.10,485.21

(iii) Unpaid wages for April 2023 and 7 days May 2023

This claim was not prove and it is declined.

(iv) Unpaid off days

This claim was not evidentiary proved and it is declined.

(v) Unpaid leave days

The respondent was entitled to prorate leave for 4 months Kshs.3,482.90

(vi) Unpaid public holidays

The respondent adduced no evidence of having been at work on any of the public holidays.

The prayer is declined.

(vii) Overtime

The claimant tendered no credible evidence of having worked overtime.

The statement that he worked from 6:00pm to 6:00am is not prove that he worked as such every day. The claim was not substantiated.

The trial court did not award overtime.

(viii) Severance pay

The respondent tendered no evidence to prove that he was declared redundant for severance pay to be awarded.

The trial court was of the same view.

(ix) Service pay

Service pay is payable under the provisions of Section 35(5) of the Employment Act in circumstances in which an employer was not a member of a registered pension scheme or provident fund scheme or provident fund scheme, gratuity or service pay scheme or other scheme operated by the employer or the National Social Security Fund (NSSF).

With no evidence to prove that the respondent was a member of any such schemes or funds, the respondent qualified for service pay for the period served, Kshs.3,261.35

The trial court did not award service pay.

(x) Compensation for unlawful termination

Having found that the respondent failed to prove that termination of his employment was unfair, the claim for compensation was unsustainable contrary to the holding of the trial court.

From the foregoing it is clear that a case for interference with the exercise of discretion by the trial court as espoused in **United India Insurance Co. Ltd & 2 others V East African Underwritters (K) Ltd** [1985] E.A 898 has been made.

See also **Mbogo and another V Shah and Matiba V Moi & 2 others** [2008] IKLR 670.

The award for underpayment is adjusted to Kshs.10,485.21 and the total award is Kshs.13,968.11

Other orders of the trial court are upheld.

In light of the partial success of the appeal, parties shall bear their own costs.

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