

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E061 OF 2025

JACKSON ONKANGA KAYAGA.....APPELLANT

VERSUS

WINGUARDS SERVICES LIMITED.....RESPONDENT

(Being an Appeal against the Judgement and decree of Hon. Emily M. Mwamuye, SRM, dated 20th March, 2025, in Mombasa Chief Magistrate's Court, E.L.R. Cause No. E698 of 2023).

JUDGMENT

Background

1. By a Memorandum of Claim dated 2nd November 2023, filed in the above-mentioned lower court suit, the Appellant sued the Respondent, contending that at all material times he was an employee of the Respondent, whose employment they unlawfully and unfairly terminated, and sought the following remedies against them:-

- a) The Respondent be ordered to pay the Claimant his terminal and contractual dues amounting to Ksh. 401,901.2/=
- b) Costs of this claim and interest thereon at court rates.
- c) A declaration that dismissal of the Claimant from work was unfair and unjust;
- d) Any other or further relief as this Honourable Court may deem just.

2. The cumulative sum stated above was expressed to encompass;

- a) One month's salary in lieu of notice of KShs. 15,141.95.00.
- b) Unpaid House allowance from 1st November, 2018 - 31st October, 2021 of Kshs. 76,485/=
- c) Leave pay from November 2018 to November 2020 at the rate of 21 days per-year, amounting to Ksh. 31,775/=

- d) Underpayment as night guard from 1st November, 2018 to 31st October, 2018 amounting to Ksh57,468/=
- e) Unpaid public holidays from 1st November, 2018 to 31st October, 2021, a period of three years amounting to Kshs.11,093.00/=
- f) Service pay for two years in employment from November 2018 to 31st October 2021, amounting to Ksh.17,471.4/=
- g) Compensation for unfair termination of Ksh.181.703.40.00/=

3. The Respondent opposed the Appellant's claim vide the Reply to Memorandum of Claim dated 28th February, 2024. The Respondent denied unlawfully and unfairly terminating the Appellant's employment. The employment relationship between them and the Appellant terminated when the service provision agreement between them and the Kenya Revenue Authority expired on 31st October 2021. The Appellant's employment was contingent upon the continued existence of the service provision contract. As such, the Appellant's cause of action was denied, and

his entitlement to the reliefs he had sought was also denied.

4. After hearing the parties in their respective cases, the learned trial Magistrate dismissed the Appellant's case in its entirety. The dismissal is the subject of the instant appeal.

Appellant's case before the trial court

5. The Appellant asserted that he was employed by the Respondent beginning in November 2018 as a Night Guard at its K.R.A. assignment in Mombasa, earning a monthly salary of KShs. 13,500. He indicated that he served diligently and without interruption until 31st October 2021, when he was verbally notified by the Respondent's General Manager that his services were no longer needed.
6. He stated that his employment was terminated without prior notice, without a disciplinary hearing, and without compliance with the mandatory requirements of sections 35 and 41 of the Employment Act, 2007, rendering the termination unfair, unlawful, and unprocedural.

7. Although the Respondent's Manager promised to pay his terminal dues upon termination, the Respondent failed to honour that promise, and no payments were made despite his demand and notice of intention to sue.
8. The Appellant maintained that throughout his period of employment, he worked seven days a week from 6.00 a.m. to 6.00 p.m., was not paid a house allowance, was underpaid contrary to the Regulation of Wages (General) (Amendment) Order, 2018, was denied annual leave, and worked on public holidays without compensation.

The Respondent's Case before the Trial Court

9. The Respondent asserted that they employed the Appellant as a security officer on 1st November 2018 at a consolidated monthly salary of KShs. 13,500, and that his employment was expressly contingent on the continuity of the security service provision contract between it and their client, the Kenya Revenue Authority, where the Claimant was stationed.

10. The contract with the Kenya Revenue Authority ended on 31st October 2021, and as a result, the Claimant could not continue to be retained thereafter.
11. The Respondent stated that under the terms of the employment contract, the Appellant was entitled to one day off each working week and to twenty-one days of annual leave for each year worked, which the Respondent had always granted. In fact, the Appellant proceeded on leave on 1st March 2019 and 1st August 2020.
12. It was further asserted that the Appellant was at all material times at liberty to raise any issue concerning salary and/or overtime worked during the course of employment, but he never raised any at all.
13. In early October 2021, the Appellant was informed by his supervisor that the contract between the Kenya Revenue Authority and the Respondent was coming to an end, and that he was advised to report to his immediate supervisor on 1st November 2021 for redeployment after the contract expired on 31st October 2021.

14. The Respondent Appellant abandoned his position on 31st October, 2021. His employment was never officially terminated, whether unlawfully or otherwise, and he only returned the company uniform and workbooks several weeks after abandoning his job.

Judgment by the lower Court.

15. After hearing both parties and considering their submissions, the trial Court found that the termination of the Appellant's employment was not at the Respondent's initiative and dismissed his case for unfair termination in its entirety.

The Appeal

16. Dissatisfied with the decision of the trial Court, the Appellant filed the instant appeal, challenging the decision in its entirety and setting forth the following grounds.

- a) The learned trial magistrate erred in law and in fact in finding that the Claimant deserted employment.
- b) The learned trial magistrate erred in law and in fact by failing to find that the Respondent did

not plead desertion of employment by the Claimant as a defence in its Reply to the Memorandum of Claim dated 28th February 2024.

c) The learned trial magistrate erred in law and in fact by failing to find that the evidence by the Respondent's Human Resource Manager in relation to the Claimant's alleged desertion of employment is futile and has no probative value for being at variance with the Reply to the Memorandum of Claim dated 28th February 2024.

d) The learned trial magistrate erred in law and in fact by failing to find that the Respondent did not prove that it sought the Claimant's whereabouts and issued him with ultimatums to return to work, but the Claimant refused to do so.

e) The learned trial magistrate erred in law and in fact by failing to find that a disciplinary hearing in respect to the Claimant's alleged desertion was capable of being conducted on 12th

November 2021 when he allegedly returned his uniform, but the same was never conducted.

- f) The learned magistrate erred in law and in fact by failing to find that the Respondent did not prove that the Claimant was advised through his supervisor that at the end of the Respondent's contract with KRA on 31st October 2021, he should report to his immediate supervisor on 1st November 2021 for redeployment.
- g) The learned magistrate erred in law and in fact by failing to find that the Claimant was unfairly and unlawfully terminated from employment by the Respondent.
- h) The learned magistrate erred in law and in fact by failing to award the Claimant one (1) month's salary in lieu of notice.
- i) The learned magistrate erred in law and in fact by failing to award the Claimant leave pay for the period between November 2018 and November 2020.

- j) The learned magistrate erred in law and in fact by failing to award the Claimant underpayment for the period between 1st November 2018 and 31st October 2021.
- k) The learned magistrate erred in law and in fact by failing to award the Claimant compensation for unfair and unlawful termination.
- l) The learned magistrate erred in law and in fact in failing to consider or properly examine the evidence and the submissions tendered by the Appellant.
- m) The learned magistrate wholly and completely disregarded the evidence as led by the appellant together with its written submissions summarising the evidence, applicable law, and case law, hence arriving at an unjust decision.

Appellant's submissions

17. The Appellant's Counsel argued that the learned trial Magistrate erred in holding that he had deserted employment, despite the Respondent's explicit averment

in its pleadings that the Appellant's employment terminated following the expiry of its contract with Kenya Revenue Authority, which ended in October 2021.

18. Parties are bound by their own pleadings, and any evidence that tends to be at variance with the pleadings is to be rejected. The learned trial Magistrate ought to have treated the Respondent's evidence on desertion as such. She erred, therefore, in founding her judgment on evidence that was totally at variance with the Respondent's pleadings. To support this submission, reliance was placed on the decision of **Daniel Otieno Migore v South Nyanza Sugar Co Limited [2018] eKLR.**

19. It was further submitted that where the employer asserts desertion as the reason for terminating an employee's employment, the employer must demonstrate that it made efforts to trace the employee, ascertain why he is not reporting to work, and, where applicable, inform him that it intends to undertake disciplinary proceedings against him for the infraction of desertion, and indeed,

subject him to a disciplinary hearing. To buttress this submission, support was sought in the cases **James Ashiemi Namayi v Menengai Oil Refineries Ltd (2016) eKLR**, and **Stanley Omwoyo Onchwero v BOM Nakuru YMCA Secondary School (2015) eKLR**.

20. The Appellant's Counsel argued that the Respondent did not demonstrate any attempt to locate the Appellant and the issuance of an ultimatum demanding his return to duty. The two matters that must be proven when an employee alleges desertion. The trial court erred by not addressing and giving weight to this omission.

21. The Respondent cannot be heard to say that it was unable to trace the Appellant. It had the opportunity to initiate disciplinary proceedings when the Appellant returned his work uniform. The Respondent was under a duty to comply with the procedural fairness requirements under Section 41 of the Employment Act, 2007. The Respondent's witness admitted in cross-examination that the Appellant was not subjected to a disciplinary hearing. He was not accorded an opportunity to make a

representation on whatever ground was prompting the Respondent's action against him.

22. As such, the termination was procedurally unfair. Reliance was placed on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**. The learned trial Magistrate erred in not so finding.

23. It was also argued that the Respondent failed to prove that the Appellant was advised to report to his supervisor on 1st November 2021 for redeployment, and that no documentary or other evidence was tendered to support that allegation. He submitted that the Respondent had failed to discharge the burden of proof under section 43 of the Employment Act.

24. On remedies, the Appellant's Counsel submitted that in the circumstances of the matter, the Appellant was entitled to the reliefs he had sought. Under section 28 of the Employment Act, annual leave is a statutory entitlement for an employee. The Respondent asserted that this right, which the Appellant often enjoyed, without placing forth any evidence. Sections 10[1]. 10[3][a][i] and

10[7], required it to prove the same. As they didn't, the learned Magistrate should have awarded the relief.

25. The Appellant pleaded, particularised the extent of the salary underpayment, and set out the legal basis for the claim. According to the Regulation of Wages [General] [Amendment] Order, 2018, the minimum wage for a Night Watchman is KShs. 15,141.95. Inarguably, the Appellant earned KShs. 13,000, which is lower than the stipulated minimum wage. The learned trial Magistrate had no reason not to award the relief.

26. As the Appellant established that his employment was unfairly terminated, an award for compensation for unfair termination, and notice pay would be availed to him.

Respondent's submissions

27. The Respondent submitted that the appeal is devoid of merit and should be dismissed, contending that the learned trial Magistrate properly evaluated the evidence and correctly dismissed the Appellant's claim for unfair termination.

28. The Respondent's Counsel submitted that the evidence presented by the parties clearly supports the learned trial magistrate's finding that he deserted duty. After the Respondent's contract with the Kenya Revenue Authority expired, the Appellant was advised to report to his supervisor for redeployment. However, he did not do so. Instead, he returned his uniform on 12th November 2021. As emerged from his evidence during the trial, he had, at that time, joined the employment of another security company, Hatari Security Limited.

29. The Appellant's failure to report for redeployment and his subsequent return of his uniform demonstrated an intention not to continue working for the Respondent. The trial magistrate was therefore justified in concluding that the Appellant had deserted his employment and that he had not been unfairly dismissed.

30. The Respondent argued that the claim that desertion was not pleaded is misleading. They pointed out that paragraph 5 of the Reply to the Memorandum of Claim stated that the Appellant was temporarily absent due to

the lapse of the third-party contract with KRA. Additionally, the Respondent emphasised that desertion was explicitly mentioned in its witness's statement dated 19th August 2024 and was reaffirmed during the oral testimony of Human Resource Manager Caleb Otieno.

31. In response to the allegation that the Respondent failed to trace the Appellant or issue an ultimatum, the Respondent submitted that it was under no obligation to do so, given the Appellant's clear conduct in returning his uniform shortly after deserting his workstation and securing alternative employment. It was argued that insisting on a disciplinary hearing in those circumstances would have been impractical, unnecessary, and conducted in bad faith, particularly where the Appellant had effectively chosen to resign.

32. The Respondent further submitted that the Appellant failed to prove that he was terminated at all, let alone unfairly terminated, thus failing to discharge his legal burden under Section **47(5) of the Employment Act, 2007**. To support this point, reliance was placed on **Pius**

**Machafu Isindu v Lavington Security Limited [2017]
KECA 225 (KLR).**

33. Regarding terminal dues, the Respondent submitted that the Appellant was not entitled to one month's salary in lieu of notice or compensation for unfair termination because he was not terminated but instead abandoned his employment and returned company property.
34. With regard to unpaid leave, the Respondent submitted that the claim was statute-barred as a claim for continuing injury, which ought to have been filed within twelve months of cessation of employment. Reliance was placed on section 89 of the Employment Act and the case of **Chimera Chimoyo Alfán v Steel Makers Limited [2021] KEELRC 1018 (KLR)**. The Respondent further submitted that, in any event, documentary evidence in the form of leave forms for 2019 and 2020 showed that the Appellant applied for and was granted annual leave.
35. Regarding the claim for underpayment, the Respondent contended that it was similarly a claim for continuing injury and, consequently, barred by the statute of

limitations pursuant to section 89 of the Employment Act. Reliance was placed on the case of **Stephen Kamau Karanja & another v Family Bank Ltd [2014] KEELRC 1387 (KLR)**. Additionally, the Respondent referenced the remuneration clause in the employment contract, which mandated the employee to report any salary discrepancies within seven days, noting that the Appellant did not raise any such complaint during the course of employment.

36. In conclusion, the Respondent submitted that the trial magistrate correctly dismissed the Appellant's claim for lack of merit, evidential proof, and for being time-barred in respect of continuing injuries.

Analysis and determination

37. This being a first appeal, I am reminded of my primary role as a first appellate court, namely, to re-evaluate, re-assess, and reanalyse the material and draw my own conclusions, bearing in mind that I neither saw nor heard the witnesses testify. See also. **Selle & Another vs.**

**Associated Motor Boat Co Ltd & Others [1968] EA
123.**

Analysis and Determination

38. Before I delve into the principal issues presented to this Court, which form the basis of this appeal, I deem it necessary to note that a memorandum of appeal should not invariably serve as a platform for verbosity, extensive submissions, or unwarranted division of grounds. Instead, such points can be effectively consolidated into a limited number of concise grounds for appeal. The memorandum of appeal in this appeal is couched in a manner that I discourage litigants and or counsel from drafting and presenting their memorandums of appeal.

39. I have carefully considered the parties' pleadings and evidence before the trial Court, and submissions by their respective Counsel in this appeal, and conclude that the instant appeal revolves around these principal issues;

- a) Was the ground of desertion pleaded by the Respondent, so as to correctly form a basis for the

trial Court's dismissal of the Appellant's suit for unfair termination?

b) Was the Appellant's employment terminated unfairly and unlawfully?

c) Was the Appellant entitled to the reliefs he had sought?

40. Inarguably, pleadings are written statements of the parties setting out the material facts on which each party relies in support of their claim or defence, as the case may be. The object of pleading is to define the issues so as to enable the other party and the court, to know what case has to be met. It is indeed a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto.

41. I have carefully read the Respondent's Reply to the Memorandum of Claim, dated 28th February 2024, and find no difficulty in concluding that desertion was not expressly or implicitly pleaded as the reason for the termination of the Appellant's employment. I am not

persuaded by the Respondent's Counsel's submissions that it was.

42. This Court hadn't lost sight of the Respondent's Counsel's submissions that a witness statement is part of a party's pleadings. As such, the Respondent pleaded desertion through its witness statement, which expressly asserts that the Appellant abandoned his employment. In my view, a witness statement is not a pleading; it is a document that contains a party's evidence and, as practice has it, may be adopted as evidence in chief, without the person who is the maker of the statement being required to testify on the matters it contains.

43. It is here that this Court must point out that where any evidence by a party is at variance with that party's pleadings, nothing turns on such evidence. On the same breath, it should be stated that if a witness statement filed by a party is at variance with that party's pleadings, nothing shall turn on that statement to the extent of its inconsistency with the pleadings. In my view, it matters not that the statement was filed contemporaneously with the pleadings.

44. Having stated the aforementioned, I must point out at this juncture that, contrary to the submissions of the Appellant's Counsel, the learned trial Magistrate did not make a finding that the Respondent had established desertion against the Appellant, and make it the reason for the dismissal of his case for unfair termination.

45. However, after scrutinising the trial Court's Judgment, and the material that was placed before it, I cannot help but hold that she founded the dismissal on a matter that was not pleaded. The learned Magistrate held;

"17. As per the evidence during cross-examination, it emerged that the Claimant returned his uniform on 12th of November 2021. This was an overt act pointing to the fact that the employee simply did not wish to work anymore.

18. In conclusion, I do find that the claimant himself terminated his employment when he returned his uniform. In the final analysis, the Claimant has failed to prove on a balance of

probabilities that he was unfairly terminated by the respondent.”

46. The learned trial Magistrate, in this statement, was not alluding to desertion, which she found, in paragraph 16 of the impugned Judgment, to be unproven by the Respondent as the employer, but to constructive resignation. Constructive resignation was not pleaded; the learned trial Magistrate erred in basing her decision to dismiss the Appellant’s unfair termination claim on it.

47. A careful consideration of the Respondent’s pleadings reveals their explicit position that the life of the Appellant’s employment contract was contingent on the continuity of the service provision contract between the Respondent and a third party, the Kenya Revenue Authority. The contract with the third party came to an end, and as such, the Appellant’s employment contract had to follow suit and so it did.

48. The Appellant’s employment contract under the clause **‘termination of the agreement’** provided for instances and events that could precipitate termination of the contract. It provided *inter alia*

“That the service contract is tied to the 3rd parties, and in the event that the employer’s contract is, for any reason, terminated by the 3rd party, I accept that my contract automatically terminates.”

49. There was no dispute that, at all material times, the Respondent was contracted with the Kenya Revenue Authority to render security services at its premises and that the Appellant was deployed at one of those premises. Further, the contract was fixed-term, running from 1st November 2018 to 31st October 2021.

50. Where an employment contract is expressly made contingent upon, and co-extensive with, the subsistence and continuity of the employer’s contract with a third party, the duration of such employment is intrinsically and inseparably linked to the life of the said third party, regardless of the cause thereof, the employment contract shall, by operation of its own terms and without the necessity of any further act, notice, or intervention by either party, automatically lapse and stand terminated. In such circumstances, no prior notice of termination shall be

required or deemed necessary, the cessation of the third-party contract constituting, in itself, a complete and self-executing condition that brings the employment relationship to an end.

51. Section 47[5] of the Employment Act 2007 places a legal burden on the employee to prove that an unlawful termination or wrongful dismissal occurred. This Court has held that this duty requires the employee, *prima facie*, to show that the termination or summary dismissal was without adherence to the dictates of procedural and substantive fairness.

52. Having found as I have hereinabove [para. 51], it definitely would not be possible for an employee to assert that a contract which terminated upon the occurrence of an event upon which it was contingent was substantively and procedurally unfair. The employee cannot be heard to assert that he /she discharged his/her legal burden under Section 47[5] of the Employment Act.

53. By reason of the foregoing premises, although I depart from the reasoning adopted by the learned trial

Magistrate, who found that the Appellant's claim for unfair termination was not proved on a ground that did not arise from, nor flow out of, the parties' pleadings, I nevertheless arrive at the same ultimate conclusion. Upon a proper consideration of the material before the trial Court and the circumstances of the matter, it is clear that the appellant had no sustainable cause of action for unfair termination against the Respondent. Accordingly, the claim for unfair termination cannot be maintained.

Whether the Appellant is entitled to the reliefs sought

54. From the outset, it is important to note that the Appellant sought relief in the lower court that fell into two categories. The first category comprised those that were tied to and dependent on his claim for unfair termination. The second comprised those that were not. Ordinarily, those dependent on a claim for unfair termination, such as notice pay and compensation for unfair termination pursuant to the provisions of Section 49[1][c], would not be available to the employee where the claim fails. Indeed, in this case, they are unavailable to the Appellant.

55. The Appellant had sought compensation for earned but unutilized leave days. The Respondent attacked this claim on two fronts: first, that, as the documentary evidence presented would show, Appellant applied for and took annual leave for the years 2019 and 2020. Second, the claim for earned but untaken leave days, in the circumstances of the matter, was a continuous injury claim, and which, by dint of the provisions of Section 89 of the Employment Act, was time-barred.

56. Section 89 of the Employment Act, 2007, provides;

“Notwithstanding the provisions of section 4[1] of the Limitation of Actions Act, no civil 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 of, or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

57. There is no doubt that for claims falling under the doctrine of **continuing injury**, the method of calculating time for

determining whether they are statute -barred is different from that used for ordinary employment claims arising under the Employment Act or an employment contract. In other words, the limitation period for continuing injury claims is computed differently from the limitation period applicable to general employment -related claims.

58. In the **German School Society &Another vs Ohany & another [2023] KECA 894[KLR]**, the Court of Appeal stated;

“ 33. Undeniably, the above provision in peremptory terms bars civil actions or proceedings based or arising out of the Employment Act unless the same is commenced within three years next after the act, neglect, or default complained of. However, where there is a continuing injury or damage, the action must be brought within twelve months after the cessation thereof. The statutes of limitation are enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is

presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.

59. In light of the foregoing, and the circumstances of the dispute that was before the trial Court, I am not hesitant to conclude that the Appellant's claim for compensation for earned but unutilized leave days was a continuing injury claim. Noting that the termination was alleged to have taken place on the 30th October 2021, [the date of the cessation of the injury], the claim would be made within time if only it were filed by 1st November 2022. I note that the Statement of Claim was filed on the 2nd November 2022, thus outside the twelve-month period. As such, the claim was time-barred.

60. By parity of reasoning, the claim for underpayment must also fail.

Conclusion

61. In conclusion, no reason comes forth as a basis upon which this Court can disturb the learned trial Magistrate's Judgment. Consequently, I find the Appeal lacking in merit; it is hereby dismissed, with costs.

Read Signed and Delivered this 19th day of February 2026.

OCHARO KEBIRA

JUDGE.