

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT  
MOMBASA**

**APPEAL NO. E167 OF 2025**

**ALI KIBET MOHAMED ..... APPELLANT**

**VERSUS**

**PEEGEE SECURITY LIMITED ..... RESPONDENT**

**[Being an appeal from the judgment of Hon. Lewis Gatheru delivered on 8 August 2025  
in Mombasa CMELRC No. E154 of 2023]**

**JUDGMENT**

The appeal arises from the judgment delivered on 8 August 2025 in Mombasa CMELRC No. E154 of 2023. The appellant is seeking that the judgment be set aside and another judgment be issued in favour of the appellant.

The grounds of appeal are that the learned magistrate erred in law and fact by unreasonably awarding the appellant two months' salary in compensation without considering the duration of time worked. House allowance was denied on the basis that the appellant failed to produce pay slips despite the same not being provided to him by the employer. Leave pay was not awarded despite proof that it was not allocated. The trial failed to analyse underpayments despite evidence that the appellant was employed as a medium-sized motor vehicle driver, a fact not disputed by the respondent, the employer. The award of costs at 50% is not justified, and the entire judgment should be reviewed with the awards as claimed.

The appellant's case was that on 2 January 2019, the respondent employed him as a driver for conducting patrols and responding to alarms raised by security guards within Mombasa, Kilifi, and Kwale Counties. His wage was ksh. 14,400 per month, which was below the minimum wage for a driver in Mombasa County. On 9 February 2023, the appellant was wrongly accused by the respondent of stealing Ksh. 12,000 litres of oil at Blue Jay Investments Company Yard. The allegations were based on a CCTV review that showed a well-built individual who resembled him, and, based on incorrect information, he was arrested and placed in police custody. Upon careful review of the CCTV footage, the Office of the DCI Investigations determined that it was not the appellant, and the case against him

was withdrawn on 23 February 2023. He returned to work on 27 February 2023, when he was summoned and informed that his services were no longer required and that he should go home to await payment of his terminal dues. This resulted in the unlawful and unfair termination of employment. There was no notice of justification, and his terminal dues remained unpaid. He claimed the following:

- a) Notice pay Ksh. 14,400.
- b) Unpaid public holidays for 4 years, Ksh. 9,600.
- c) Unpaid leave for 4 years, Ksh. 40,320.
- d) House allowance for 50 months Ksh. 108,000.
- e) Underpayments for 50 months Ksh. 431,970.
- f) 12 months' compensation Ksh. 172,800.
- g) Unremitted NHIF for 50 months, Ksh. 25,000.
- h) Service pay for 4 years Ksh. 28,800.
- i) Certificate of service.
- j) Costs of the suit.

In reply, the respondent denied the claims and counterclaimed. The case was that the appellant admitted to the theft and that he also recorded this information with the police. Upon his arrest, the appellant returned to the office but was not dismissed by the manager, as alleged. He was interrogated regarding the theft and for failing to report for work upon release from custody. Security duties had to be performed regardless of the appellant being in police custody. Several instances of misconduct marred the appellant's employment. He was granted leave, and his wages included a housing allowance. The claims for notice pay, public holidays, leave, and underpayments are without merit.

In the counterclaim, the respondent's case was that, on 9 February 2023, the appellant was arrested for involvement in theft that occurred between 22 and 23 December 2022, and that he admitted to having brought a buyer of fuel that had been siphoned from the respondent's client. The fuel was valued at Ksh. 12,000. The client has since withheld payment of the respondent's bills amounting to Ksh. 1,263,404 by reason of the theft, which the respondent counterclaims from the appellant. The counterclaim is for the following:

- a) Ksh. 1,263,404, the cost of fuel stolen on account of the appellant's actions, and Ksh. 1,830,000 amount claimed by the client.
- b) Costs of the counterclaim.

The learned magistrate heard the parties and held that the appellant's claims beyond 3 years were time-barred. There was an admission of statutory payment, and the claims, therefore, were not justified. Payment of house allowances was not justified because the appellant failed to produce any payslips, and clause 6 of the employment contract provided for a consolidated salary inclusive of the house allowance. On the underpayments, the learned magistrate held that:

*... the respondent claims that the claimant had not told the court the category of the motor vehicle he used to drive. They state that the salary was Kes 19,874 and that the minimum wage for drivers of light-weight vehicles was Kes 19,668.30. I do not agree with the respondent that there is insufficient explanation to allow the award of this claim.*

The learned magistrate held that the termination of employment was unfair and awarded the appellant compensation of 2 months' pay plus 50% of his costs.

The appellant submitted that on 9 February 2023, the Appellant was accused by the Respondent's servants of stealing 12,000litres of oil at Blue Jay Investments Company yard. The allegations of theft were based on CCTV footage showing a well-built individual who resembled the Appellant; as a result, the Appellant was arrested and remained in custody for 9 days due to an inability to pay cash bail.

A careful review of the CCTV footage, the Office of the Directorate of Criminal Investigations realised that the person captured in the CCTV footage was not the Appellant, and, vide an order dated 23 February 2023, the suit against the Claimant was withdrawn for lack of evidence to prosecute the Appellant. The Mariakani Court therefore released the Appellant. On 27 February 2023, and upon reaching the Respondent's office, he was summoned by the Respondent's manager, known as Nelson, and the Supervisor, known as Edson Simiyu, who told him that his services were not needed. He was instructed to return home and wait for the computation of his terminal dues.

The appellant submitted that Section 41 of the Employment Act (the Act) provides the minimum standards of a fair procedure that an employer ought to comply with, as held in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

Despite being arrested for alleged theft, the charges against the Appellant were withdrawn on 23 February 2023, 14 days having elapsed. The Appellant stated that he was arrested based on CCTV footage in which he was wrongly identified, and that the DCI later discovered that the

person in the footage was not the Appellant. His absence from work was excusable, given the circumstances of his wrongful arrest.

In **Godfrey Anjere v Unique Suppliers Limited [2015] eKLR**, the court held that:

*In a dismissal for absconding duties, the employer must show the steps it took to inform the employee that their dismissal would result if they failed to report back to work. This is necessary to avoid any injustice to an employee who may be away from work for a lawful or reasonable excuse, such as illness or circumstances beyond their control, and yet is unable to communicate with the employer in good time.*

In the case of **Joseph Nzioka v Smart Coatings Limited [2017] eKLR**, the court held that:

*Dismissal on account of absconding must be preceded by evidence showing that a reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee, calling upon such employee to show cause why his services should not be terminated on account of absconding from duties.*

There was no show-cause letter issued to the Appellant, the Appellant was not invited to any disciplinary meeting, and no such hearing was held between the Appellant and the Respondent. He is entitled to notice pay, underpayment of wages, unpaid public holidays, house allowances, and compensation with full costs.

The respondent submitted that on 2 January 2019, the Appellant was employed by the Respondent as a patrol driver, providing security services across several counties, at a monthly salary of Kshs 14,400. The Appellant worked until 9 February 2023, when he was arrested for being involved in fuel theft at Blue Jay Investment, the premises of one of the Respondent's clients. The theft occurred on the night of 22 and 23 December 2022, and the Appellant admitted in his recorded statement at the police station that he had personally brought the buyer of the stolen fuel to the other guards with whom he had colluded. The stolen fuel was valued at Ksh 1,850,030, which the respondent counterclaimed.

Although the Appellant was released from custody on 23 February 2023, he only reported back to work on 28 February 2023. He was interrogated regarding the theft charges and his absenteeism after his release. He confirmed his involvement in the fuel theft but failed to give a reason for his failure to report to work after his release. The Appellant left the Respondent's premises and failed to resurface despite the Respondent's efforts to trace him. A letter of desertion was therefore issued to him.

The respondent submitted that upon the findings by the trial court, it effected full payment of the total decretal sum of Kshs 63,900/-towards full and final settlement of the suit, which the Appellant's Advocates acknowledged in the Appellate Court's proceedings. The Respondent contends that the Appeal is spent, the parties having bound themselves to the outcome of the trial Court, thus extinguishing the right of appeal as held in the case of **Ng'ang'a v Mwangi & another (Civil Appeal E013 of 2022) [2023]**.

The trial court exercised its discretion and entered the awards, which have since been fully settled. Costs awarded are at the discretion of the court under section 12(4) of the Employment and Labour Relations Court Act.

### **Determination**

As this is a first appeal, the court is required to review the record, reassess the findings, and reach a conclusion. However, note that the trial court had the opportunity to see and hear the witnesses.

On the given facts, the last communication of the respondent to the appellant about his employment was a notice dated 27 March 2023 over alleged desertion of duty. The notice is copied to the Labour Officer. However, upon the notice of alleged desertion, the respondent did nothing.

In the notice, the respondent acknowledges that the application remained in effect until 9 February 2023, when he was alleged to have been involved in theft. In the Memorandum of Response filed by the respondent, it is admitted that the appellant was arrested following the alleged theft of fuel with Ksh. 12,000. However, despite the notice of alleged desertion, the respondent did nothing to invoke the motions of sections 35, 41 or 44 of the Act that requires the employer to issue notice to the employee to address workplace misconduct or gross misconduct as held in **Simon Mbithi Mbane v Inter Security Services Limited [2018] KEELRC 2234** and the case of **Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR** that emphasised that for a termination or summary dismissal to be fair, there must be substantive justification and a fair procedure.

Therefore, a termination of employment over alleged desertion of duty that is devoid of due process is unlawful and unfair under the provisions of sections 41 and 45 of the Act. The respondent did not take any efforts to address the alleged desertion by the appellant. A report to the Labour Officer must be premised on the employer having failed to trace the employee

through his last known address as stated under his contract of service, as required under section 10(3) of the Act.

The trial court's finding that the employment was terminated unfairly was proper.

For award purposes, a termination of employment that is devoid of due process is deemed to attract notice pay and compensation.

In this case, the appellant claimed underpayment of his wages.

The applicant's case is that he was operating a medium-sized motor vehicle in the course of his duties as a patrol employee. The respondent did not clarify this issue. The witnesses called did not address the type of vehicle the appellant was driving while performing his patrol duties.

A driver, allocated a medium-sized motor vehicle in Mombasa in February 2023, had a basic wage of Ksh. 25,804.15, but the applicant claimed Ksh. 23,039.40, which is commensurate with a driver of a light car

In this context, the appellant classified him as a light car driver, which shall be the applicable rate. Under the basic rate of Ksh. 19,668.30 and the due house allowance at 15%, the due gross wage is  $\text{Ksh. } 2,950.45 + 19,668.45 = \text{Ksh. } 22,618.55$ .

On the wage paid at Ksh. 14,400, there was an underpayment of Ksh. 8,218.55 per month.

Parties to an employment contract cannot agree to an underpayment of wages below the legal minimum approved by the Minister. The contract of service giving the wage as inclusive of the house allowance, which is below the legal threshold, is invalid to that extent.

The employer is the legal custodian of all work records under section 10(6) and 74 of the Act. Upon filing his claim, the respondent, in response, should have filed the work records, including pay slips. There was no compliance. Unlike proceedings premised under the Evidence Act, in employment disputes, it is the employer's duty to produce. Such duty was not discharged. It cannot be applied to negate the claims by the appellant as an employee.

In this regard, an underpayment being a continuing injury that accrues monthly, under section 89 of the Act, the appellant can only claim for such underpayments inclusive of house allowances for 12 months only.

The underpaid wages, inclusive of the house allowance, are payable in KSh.  $8,218.55 \times 12 =$  Ksh. 98,622.60.

Notice pay is due based on the gross wage Ksh. 22,618.55.

The compensation awarded by the court will be calculated at the applicable rate of the due gross wage.  $22,618.55 \times 2$  months = Ksh. 45,237.10 since the award of compensation is discretionary upon the trial court. Unless such discretion is demonstrated to have been applied improperly, the court should not disturb the award. Save for the arithmetic clarification, the award of compensation is sound.

In employment disputes, costs do not follow the cause, unlike in commercial disputes. In this case, the learned magistrate was conscious of section 12 of the Employment and Labour Relations Court Act and allocated 50% of the costs. This is discretionary and shall not be disturbed.

On the claim for untaken leave days, the appellant admitted that he was arrested on 9 February 2023. He was arrested and remained in custody, and only returned to the shop floor on 27 February 2023. Absence from duty without the employer's permission, even in a case of being in custody, is ground for summary dismissal. Save for the respondent not addressing the notice of desertion dated 27 March 2023 properly. Under the due process envisaged under sections 35 and 41 or 44 of the Act, the appellant was, in fact, absent from duty. To claim leave days not taken on this background would be unjust enrichment.

Further, the respondent filed various records in response to the appellant's application for leave. Cumulatively, the claim for untaken leave days does not suffice. Such a right should have been rationalised under the provisions of section 28 of the Act and secured within the appellant's rights under section 89 of the Act.

On the claim for untaken public holidays, these are not indicated as to how they accrued.

The claims for payment of unremitted NHIF dues were well addressed and dismissed. On this basis, the claim for service pay is also well addressed and dismissed.

In the penultimate, there was profound silence on the counterclaim. I will leave it at that.

**Accordingly, the judgment in Mombasa CMELRC No. E154 of 2023 is reviewed in the following terms:**

- a) Employment terminated unfairly.**

- b) Compensation ksh. 45,237.10.**
- c) Notice pay Ksh. 22,618.55.**
- d) Underpayments inclusive of house allowance Ksh. 98,622.60.**
- e) Each party to bear its costs.**

Delivered in open court at Mombasa, this 19th day of February 2026.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Omar

..... and .....