



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT KISUMU
APPEAL NO. E096 OF 2025

PRIDE KINGS SERVICES LTD.....**APPELLANT**

VERSUS

SIMON KHAHO AKHOI.....**RESPONDENT**

(Being an appeal from the Judgment and Decree of Hon. B. Ileri (CM) in Kisumu C MELRC No. E279 of 2024 delivered on 9th September 2025)

JUDGMENT

1. This appeal arises from the Judgment of Hon. B. Ileri (CM) delivered on 9th September 2025 in **Kisumu C MELRC No. E279 of 2024, Simon Khaho Akhoi v Pride Kings Services Ltd.** Being aggrieved by that decision, the Appellant lodged a Memorandum of Appeal with this court dated 5th November 2025 setting out the following grounds:

- (a) *The Learned Magistrate completely misunderstood the evidence before her, and wrongly analysed the evidence and therefore came to wrong conclusions of fact law.*
- (b) *The Learned Magistrate erred in law and in fact by awarding the sum of Kenya Shillings Sixteen Thousand Nine Hundred and Fifty Nine as salary in lieu of notice without taking in to consideration that the Claimant did not prove that he was unfairly terminated.*
- (c) *The Learned Magistrate erred in fact and in law by awarding the sum Kenya Shillings Thirty Three Thousand Nine Hundred and Eighteen as unpaid salary without taking in to consideration that the same was not proved.*
- (d) *The Learned Magistrate erred in fact and in law by awarding the sum of Kenya Shillings One Hundred and Eighteen Thousand Two Hundred and Sixty Two for underpayment without taking in to consideration that the same was not proved.*
- (e) *The Learned Magistrate Erred in fact and in law by awarding the sum of Kenya Shillings Thirty Six Thousand*

One Hundred and Twenty Six as service pay without taking in to consideration that the same was not proved.

(f) The Learned Magistrate erred in fact and in law by awarding the sum of Kenya Shillings One Hundred and Fifteen Thousand Two Hundred as house allowance without taking in to consideration that the same was proved.

(g) The Learned Magistrate erred in law and in fact by awarding the sum of Kenya Shillings Thirty Three Thousand Nine Hundred and Two without taking in to consideration that the Claimant did not prove that he was unfairly terminated

(h) The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion.

2. On the basis of these grounds the Appellant urged the court to allow the appeal, re-appraise the evidence and arrive at an independent conclusion and award it costs of the appeal.

3. The appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant identified two issues for determination namely,

(i) whether the Respondent was unlawfully terminated from employment and

(ii) whether he was entitled to the damages awarded by the Trial Court.

5. On the question of termination of employment, the Appellant submitted that the Respondent voluntarily left employment. It asserted that after expiry of its contract with Sinohydro where the Respondent had been deployed, he refused to report to Kisumu for redeployment. Accordingly, the Appellant maintained that the Respondent had not discharged his burden of proving that an unfair termination of employment had occurred under section 47(5) of the Employment Act, to cause a concomitant obligation for it to justify reasons for dismissal under section 43(1) of the same act. In support of its position the Appellant drew the Court's attention to the lack of evidence, in the pleadings and testimony during cross-examination demonstrating that the

Respondent's employment was unlawfully terminated. On the issue of entitlement to the damages sought, the Appellant submitted that the Respondent was not entitled to damages for unlawful termination having failed to prove he was unlawfully terminated from employment. On notice pay, the Appellant contended that the Respondent was not entitled to notice pay since he declined redeployment after the Sinohydro Corporation assignment ended. Moreover, it submitted that it had no control over the termination of the contract with Sinohydro hence it could not issue prior warning. Regarding unpaid holidays, off days, and overtime the Appellant submitted that they should be disallowed as no evidence had been produced before the trial court to show that the Respondent worked overtime, on holidays, or during off days. On underpayment the Appellant submitted that the Respondent was being paid Kshs. 7,500/- as opposed to Kshs. 7,770/- stipulated in the Regulation of Wages Orders for 2017 and 2018, hence there was no underpayment. On house the matter of allowance, the Appellant submitted that no evidence in form of payslips was produced evincing non-payment. The Appellant also submitted that the Respondent

was not entitled to severance pay because his employment did not terminate on account of redundancy. In conclusion the Appellant submitted that the Trial Court misdirected itself in arriving at the decision it did. Accordingly, the Appellant urged the Court to allow the appeal.

Respondent's Submissions

6. The Respondent on his part identified five issues for determination, namely:

- (a) Whether the appeal was incompetent for want of a certified copy of the decree;
- (b) Whether the termination of the Respondent's employment met the substantive and procedural fairness test;
- (c) Whether the awards made by the Trial Court were lawful and proven;
- (d) Whether the appeal meets the threshold for appellate interference; and
- (e) Who should bear the costs of the appeal.

7. On the first issue, the Respondent submitted that the absence of a certified decree in the record of appeal rendered the present appeal fundamentally defective and incapable of being entertained by the court. He asserted that the decree was the foundational document upon which this Court could derive jurisdiction to interrogate the correctness of the Trial Court's decision. Moreover, he averred that without it this court would be denied the basis for ascertaining the issues determined by the trial court as well as the specific reliefs granted. The Respondent relied on section 65(1) of the Civil Procedure Act and the provisions of Order 42 of the Civil Procedure Rules, particularly Order 42 Rule 13(4)(f), which require that the record of appeal contains the judgment, order or decree appealed from. Further supporting the position, the Respondent relied on **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] KESC 8 (KLR)**, where the Court held that without a proper record of appeal a court cannot determine an appeal and that omission of the requisite documents renders the appeal incompetent and deprives the court of jurisdiction. Reliance was also placed on the case of **Kilonzo**

David t/a Silver Bullet Bus Company v Kyalo Kiliku & another [2018] KEHC 6055 (KLR), where the court held that omission to include the decree or order appealed from in the record of appeal is not a mere procedural technicality that can be cured by Article 159(2)(d) of the Constitution because the requirement is mandatory. The Respondent further cited the case of **Paul Karenyi Leshuel v Ephantus Kariithi Mwangi & another [2015]**, in which the court, while referring to **Municipal Council of Kitale v Fedha (1983) Civil Appeal No. 7 of 1998** (unreported), emphasized the importance of including the decree in the record of appeal and held that failure to do so renders the appeal incompetent because an appellate court can only overturn what has been demonstrated to exist.

8. Turning to the issue of termination of employment, the Respondent submitted that the Trial Court rightfully found that he was unlawfully terminated. He maintained that the court properly applied sections 41, 43 and 45 of the Employment Act hence its finding should be upheld. In support of his position, he highlighted his testimony to the effect that he was dismissed verbally without reason or

notice, as well as the fact that no disciplinary hearing was conducted. Moreover, he submitted that the Appellant did not rebut his evidence through witnesses or documents. In support of the requirement for procedural fairness, the Respondent relied on the decision in the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**, where the court held that section 41 of the Employment Act is couched in mandatory terms and that failure by an employer to comply with those provisions renders the termination unfair because the employee must be informed of the charges and given an opportunity to defend themselves in the presence of a fellow employee or union representative. The Respondent also relied on **Stella Kanana Gitonga & 2 others v Bliss GVS Healthcare Limited [2022] eKLR**, which cited the Court of Appeal decision in **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] KECA 409 (KLR)**, where it was held that an employer must explain to an employee the reasons for termination in the presence of another employee or union official in a language the employee understands and must give the employee an opportunity to be heard before the

decision to terminate employment is made. He submitted that the Trial Magistrate equally relied on these authorities justifying his finding of unlawful termination.

9. On the awards given, the Respondent submitted that the Trial Court correctly found that he was entitled to the reliefs granted as they were supported by statute and uncontroverted evidence. He asserted that the Appellant failed to discharge its evidentiary burden thus the trial court could not be faulted. On the award of Kshs. 16,959/- as pay in lieu of notice, the Respondent submitted that it was justified on account of his dismissal without notice contrary to section 36 of the Employment Act, which mandates termination without notice only upon payment of remuneration equivalent to the notice period. As for the Kshs. 33,918/- as unpaid salary for March and April 2022, the Respondent submitted that they were justified by the Appellant's failure to adduce evidence of payment despite being the custodian of employment records.
10. On the question of underpayment, the Respondent urged this Court not to disturb the Trial Court's award of Kshs.

118,262.80 as his salary was below the minimum stipulated in the relevant Wages Orders. He relied on section 48(1) of the Labour Institutions Act, which provides that minimum wages prescribed in a wages order constitute mandatory terms of employment that cannot be varied by agreement. With respect to house allowance, the Respondent submitted that the award of Kshs. 115,200/- was justified as he was not paid house allowance as required under section 31 of the Employment Act. Moreover, the Respondent asserted that the Appellant failed to produce any payslips to demonstrate that house allowance was being paid. Regarding the award of Kshs. 36,917/- as service pay by the Trial Court, the Respondent submitted that it was proper since, despite his membership in NSSF and NHIF, there was no proof of remittance of contributions by the Appellant.

11. The Respondent also supported the award of Kshs. 33,918/- as compensation for unfair termination, maintaining that the termination was unlawful due to the Appellant's failure to adhere to procedural and substantive fairness requirements under the Employment Act, particularly

sections 40 and 45. In any case the Respondent argued that the award of two months' salary as compensation was reasonable and not excessive so as to warrant interference by this Court. As to whether the Appellant had invoked this Court's appellate interference of the findings in the Trial Court, the Respondent submitted that the Appellant did not adduce evidence worth the Court's intervention. Additionally, the Appellant had not demonstrated any misdirection in law or fact hence the appeal does not meet the threshold for appellate interference. On costs the Respondent urged the Court to award them to him citing section 27 of the Civil Procedure Act. In conclusion, the Respondent urged the Court to find that the appeal lacked merit and to dismiss it in its entirety with costs.

Disposition

12. This being a first appeal, I am obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before that Court in order to arrive at my own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd**

[1968] EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

"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 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 in this respect."

[Emphasis supplied]

13. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have duly evaluated the evidence the parties presented in the Trial Court, and which evidence and documents in support thereof, are before this Court and I have come to the following determination.

14. The issues for this Court must determine are:

- a. Whether the Respondent was unfairly terminated from employment;
- b. Whether the Respondent was entitled to the orders granted; and
- c. Whether there is a competent appeal before me.

15. On the first issue, the Appellant seeks reversal of the finding of the Learned Magistrate asserting that the Court misdirected itself in the determination that there was unfair termination. On the one hand, the Appellant asserts that the Respondent resigned from his employment by failing to report to Kisumu for redeployment. The Respondent is said to have voluntarily left employment. It is also asserted that after expiry of the Appellant's contract with Sinohydro where the Respondent had been deployed, the Respondent refused to report to Kisumu for redeployment. This second aspect of the reasons for the end of the Respondent's contract is indicative of redundancy or circumstances that would lend themselves to declaration of a redundancy. In the Court's considered opinion, the alleged refusal of the Respondent to report to Kisumu for redeployment and the Appellant

assertion that it had no control over the termination of the contract with Sinohydro hence it could not issue prior warning, does not comport with the alleged voluntary departure of the Respondent. It is the finding of this Court that there was unlawful termination of the Respondent from employment after the lapse of the contract with Sinohydro.

16. The second issue is on the awards granted. The Appellant was the employer and had records which would have dispelled the claim had they been availed. Under sections 43 and 45 of the Employment Act, it was incumbent upon the Appellant to prove there was no unfair or unlawful termination. The Appellant's failure to demonstrate there was payment of the sums led to the grant of the relief by the Court. Instructively, the statutory minima set by the Wages Orders is not a suggestion but must be met. No contract that permits payment of sums below the guidelines can be said to be lawful. Where the payments are called into question, the true north on payment is the wages order. If the payment in question is below the statutory minimum provided, a court is entitled, as the Learned Magistrate found, to award the difference. The Appellant failed to demonstrate payment of

house allowance and therefore the sums awarded were properly granted.

17. On the question of the competence of the appeal before the Court, the proper approach would have been to file a motion for the striking out of the appeal. Raising the issue at the tail end of submissions on the merits of the Appeal is casual and the Court will not waste its precious time determining whether there was a competent appeal before it.

18. In the final analysis, the Court upholds the findings of the Learned Magistrate as he neither misdirected himself on the facts or the law. He arrived at the correct conclusions on all points in dispute and therefore his decision cannot be overturned. In fact, it is commendable how the Court analysed the issues surrounding wages orders and the issue of house allowance and the termination of employment. Appeal is accordingly dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Kisumu this 10th day of March

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**

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