

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E235 OF 2024

CREST SECURITY SERVICES LIMITED ..... APPELLANT

VERSUS

MARCUS JEFWA KITSAO ..... RESPONDENT

*(Being an Appeal from the entire Judgment by M. L. Nabibya, SPM delivered  
on 17<sup>th</sup> October, 2024 in MCELRC No. E252 of 2023)*

**JUDGMENT**

**Background**

1. In the above-stated lower court suit, the Respondent sued the Appellant for various reliefs, thus;
  - I. A declaration that the Respondent's termination/dismissal of the Claimant's employment was illegal, and/or unlawful, and/or unfair.

- II. A declaration that the Claimant's monthly wages ought to have been KShs. 13,572.90 as per the Regulation of Wages (GENERAL)(AMENDMENT) Order 2018.
- III. An award of 12 months' compensation for unfair and/or unlawful termination of employment at Kshs.162,874.80/=
- IV. 1 Month Salary in lieu of Notice Kshs. 13,572.90
- V. Accrued Leave days KShs.73,579.13
- VI. Unremitted NSSF KShs.1,200.00
- VII. Overtime pay Kshs.567,684.00
- VIII. Underpayment since May 2018, KShs. 30,404.30
- IX. Service pay @15 days' pay(5yrs) Kshs. 32,315.00
- X. An award of Certificate of Service to the Claimant.
- XI. Costs of this suit and interest thereon at court rates.
- XII. Any other relief that the court may deem fit to grant.

2. The Appellant challenged the Respondent's claim with a Response to the Statement of Claim dated 8th August 2023. The Appellant acknowledged that the Respondent was its

employee, having engaged him as a security guard under an employment contract dated 14th October 2016. However, it argued that the termination of the Respondent's employment was fair and justified.

### **The Respondent's case before the trial court**

3. The Respondent stated that he was employed by the Appellant on 15<sup>th</sup> October 2015 as a day security guard with a salary of KShs. 12,926 at the time of termination.
4. He further stated that during his employment, he was never provided with a written contract or letter of appointment. He also mentioned that he received pay slips and that statutory deductions were made from his salary.
5. On 6th April 2022, he was summarily dismissed from employment without notice, and additionally, without justification or compliance with the legally prescribed procedure.

6. He argued that the termination constituted an unfair and unlawful dismissal, as he was not issued a notice to show cause, was denied a proper disciplinary hearing, and had not engaged in misconduct justifying summary dismissal. Furthermore, he claimed that due process was not observed and that his terminal dues were not settled.
7. The Respondent argued that throughout his entire period of service, he had no previous disciplinary record, warnings, or adverse reports, and that his ongoing employment by the employer indicated satisfactory performance.
8. He further stated that he worked six days a week from 6:00 a.m. to 6:00 p.m., amounting to twelve hours each day, and argued that he was entitled to overtime pay for hours worked beyond the statutory working hours.
9. He also stated he was not permitted to proceed with his annual leave, and despite this, the Appellant did not compensate him for the earned but unused leave days.

10. Additionally, the Respondent alleged that from May 2018 until termination, the Appellant never paid him a salary in accordance with the Regulation of Wages (General) (Amendment) Orders, which was applicable at the relevant time for a day guard working within Mombasa City. He claimed underpayments amounting to KShs. 30,404.30. He also contended that although statutory deductions were made, some were not remitted, entitling him to service pay.

#### **Appellant's case in the lower court**

11. The Appellant acknowledged that the Claimant was its employee, having been employed as a security guard under an employment contract dated 14th October 2016, but denied all allegations concerning unfair dismissal, underpayment, overtime, and unpaid leave.

12. The Appellant's case was that on 1st April 2022, the Claimant was found at his workstation dressed in civilian clothes while on duty. When questioned by his supervisor, the Claimant allegedly became aggressive. The supervisor

took photographs of the Claimant, after which the Claimant allegedly grabbed the supervisor's phone and threw it down, causing severe damage to the device.

13. Following this incident, the Claimant was invited to a disciplinary hearing scheduled for 6th April 2022, and the invitation was duly served upon him. The Appellant argued that, after reviewing the Claimant's disciplinary record, it was concluded that his employment should be terminated.
14. The Appellant also argued that the Claimant had a record of disciplinary problems during his employment. Specifically, he faced a disciplinary hearing on 23rd February 2022 for absenteeism, resulting in a warning letter. This warning was considered final and signaled that any additional misconduct would result in termination.
15. Through the testimony of its Field Officer, Samson Konde, the Appellant stated that the Claimant had previously taken annual leave on several occasions and was therefore not entitled to further leave pay. The Appellant denied that the

Claimant worked overtime and asserted that all statutory deductions, including NSSF, were properly remitted.

16. The Appellant stated that the Claimant's employment was not unfairly terminated, as he had been accorded prior warnings and ample notice, and that the dismissal following the April 2022 incident was justified in light of his disciplinary history.

### **Judgment of the Lower Court**

17. After hearing the parties on their respective cases, the trial court found in favour of the Respondent. It determined that the dismissal of the Respondent from employment was unfair and, consequently, awarded him various reliefs, both declaratory and compensatory.

### **The Appeal**

18. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

- I. THAT the Learned Magistrate erred in fact and in law in determining that the Respondent was terminated without notice and thus entitled to the prayer for an award of Kshs.13,572/= as notice pay, yet the Appellant's pleadings, testimonies, and submissions were that he was terminated lawfully.
- II. THAT the Learned Magistrate erred in fact and law in holding that the Respondent was unfairly dismissed without the Respondent discharging his burden of proof as provided under Section 47 (5) of the Employment Act.
- III. THAT the Learned Magistrate erred in fact and in law in holding that the Respondent's employment with the Appellant was unfairly terminated contrary to the evidence adduced by the Appellant, which clearly demonstrated valid reasons for the termination, and that due process was followed.
- IV. THAT the Learned Magistrate erred in fact and law in holding that the Respondent's was unfairly terminated and awarded compensation for unfair termination

equivalent to eight (8) months' salary at KShs. 108,584/=

- V. THAT the Learned Magistrate erred in fact and law in awarding the Respondent accrued leave pay of KShs. 29,860/= despite the Respondent testifying and further confirming in his submissions that he took his annual leave.
- VI. THAT the Learned Magistrate erred in fact and law in awarding the Respondent compensation for alleged underpayment of Kshs.30,404/= without sufficient evidence or proof that the Respondent was entitled to such an award.
- VII. THAT the Learned Magistrate erred in fact and law by awarding overtime pay of KShs. 567,684/= to the Respondent without sufficient proof that the Respondent worked beyond the stipulated hours, contrary to the evidence and submissions presented by the Appellant.
- VIII. That the learned Magistrate erred in law and fact by awarding the Respondent unremitted National Social

Security Fund (NSSF) contributions, of Kshs. 1,200/=despite proof that the Appellant had made all necessary remittances as required by law.

IX. That the learned Magistrate erred in law and fact by awarding service pay of Kshs.32,315 to the Respondent without considering that the Respondent was already a registered member under the National Social Security Fund (NSSF), and thus not entitled to service pay under Section 35(6) of the Employment Act,2007.

X. THAT the Learned Magistrate erred in fact and in law in misapprehending the evidence and misapplying, misunderstanding, and overlooking the Appellant's pleadings, testimonies, and submissions in arriving at the instant determination.

### **Appellant submissions**

19. The Appellant contended that the Respondent acknowledged during cross-examination that he was invited to and participated in a disciplinary hearing on 6th April 2022.

Furthermore, documentary evidence presented demonstrated that there were legitimate grounds for termination and that due process was duly observed. Consequently, the trial Court should have found that the Respondent did not satisfy his statutory burden pursuant to Section 47[5] of the Employment Act. Therefore, there exists no substantive basis for the trial Court to determine that the Respondent's dismissal was unjustified.

20. The Appellant further argued that the Respondent's dismissal was lawful and justified in accordance with section 44 of the Employment Act, as it was based on acts of insubordination and gross misconduct. Moreover, the Respondent's employment contract explicitly permitted summary dismissal.

21. Employment Act, and notice pay, the Appellant argued that the eight months' salary award as compensation and one month's notice pay were wrongly granted, unjustified, and not supported by evidence. The Respondent having failed to

prove that the dismissal was unfair, a grant of the relief could not be justified.

22. It was further submitted that the Appellant placed forth before the trial Court documentary evidence that unambiguously demonstrated that the Respondent at all material times took his annual leave days. The Respondent did not in any way discount this evidence. The learned trial Magistrate's finding that he was entitled to unpaid leave was without basis, therefore.

23. On underpayment, the Appellant argued that the Trial Magistrate did not recognise that underpayment is a continuing injury that must be claimed within twelve months from when it stops, as set out in section 89 of the Employment Act. As such, the relief ought not to have been granted. To buttress this submission, the Appellant placed reliance on **Kalu Works Limited v Mnalo (Appeal E158 of 2024) [2024] KEELRC 13419 (KLR)**.

24. Regarding overtime pay, the Appellant argued that the award of KShs. 567,684 was made in error because overtime is a form of special damages that must be proven strictly. It contended that the Respondent failed to present evidence of hours worked beyond the normal schedule and did not produce attendance records or any other proof to support the claim. Reliance was placed on **Gathuthi Tea Factory v Kamunya (Employment and Labour Relations Appeal E023 of 2024) [2025] KEELRC 1367 (KLR)**, as well as section 107 of the Evidence Act, to back the submission that the burden of proof rested with the Respondent.
25. Regarding unremitted NSSF contributions, the Appellant argued that the trial Magistrate erred by awarding the alleged unremitted contributions despite evidence that the Appellant had dutifully remitted them to the relevant Authority. The Appellant also contended that, in cases of non-remittance, the matter could only be addressed through the mechanisms outlined in the NSSF Act and not through a claim like the present one. To support this argument,

reliance was placed on **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR.**

26. On service pay, the Appellant argued that the award was contrary to section 35(6) of the Employment Act because the Respondent was a registered member of the National Social Security Fund, as shown by his own documents and payslips. It was contended that membership in NSSF disqualifies an employee from receiving service pay, and reliance was again placed on **Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR.**

### **Respondent's submissions**

27. The Respondent argued that the Learned Trial Magistrate correctly found that the termination of the Respondent's employment was both procedurally and substantively unfair. Additionally, the grounds of appeal are a true reflection of

the Appellant's failure to appreciate and a misinterpretation of the relevant evidence and principles.

28. The Respondent submitted that the evidence on record clearly demonstrated that the termination of his employment did not conform with the dictates of procedural fairness. Although he was served with a notice to show cause and invited to a disciplinary hearing, his request to have a fellow guard, Ramadhan Juma, who witnessed the incident forming the basis of the charges, present as a witness was arbitrarily declined.

29. He further stated that statements recorded during investigations, including those of the said witness, were not made available to him, that the charges were not read or explained to him during the hearing, and that the minutes of the disciplinary proceedings were never provided to him, culminating only in a summary dismissal letter. The Appellant's own witness conceded these procedural deficiencies.

30. The Respondent argued that the Appellant's claim that he failed to meet the burden of proof under section 47(5) of the Employment Act was a legal misstatement. He asserted that the responsibility for proving both substantive justification and procedural fairness falls on the employer, and he pointed out that the Appellant did not establish compliance with sections 41 and 45 of the Employment Act.

31. The Respondent relied on **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and **Winnie Mbeti Mutua v Brockenhurst Kenya Limited [2021] eKLR** to support the argument that both procedural and substantive fairness must be established for a termination to satisfy the fairness criteria. He argued that the trial Magistrate correctly concluded that the termination was unfair and that there are no grounds for this Court to interfere with the trial Court's finding.

32. Concerning the remedies awarded, the Respondent submitted that once the trial court established the termination as unjust, it was authorized under section 49 of

the Employment Act to grant suitable reliefs. Regarding notice pay, the Respondent contended that even in cases of alleged summary dismissal under section 44 of the Employment Act, the employer is still required to adhere to the procedural safeguards outlined in sections 41 and 45, which the Appellant neglected to follow. Accordingly, the award of notice pay was lawful and correctly granted.

33. Regarding compensation for unfair dismissal, the Respondent argued that the award of eight months' salary was a matter of judicial discretion that was neither excessive nor arbitrary. He stated that the trial court considered relevant factors, including his over five years of service, and that the Appellant failed to show any misjudgment or abuse of discretion.

34. Reliance was placed on **Edward Sargent v Chhotabhai Jhaverbhat Patel [1949] 16 EACA 63** and **Mbogo & Another v Shah [1968] EA 93** to emphasise the limited circumstances under which an appellate court may intervene in discretionary awards.

35. Regarding the accrued but unused leave days, the Respondent submitted that the Appellant's argument was misleading, as the trial court did not issue a blanket award but instead limited the leave claim to three years in strict accordance with section 90 of the Employment Act. He argued that this demonstrated judicial prudence and a careful evaluation of the evidence and limitation principles, and therefore revealed no error.
36. Regarding compensation for underpayment, the Respondent argued that the Appellant relied on an inapplicable statutory provision by citing section 89 of the Employment Act, which relates to contracts made abroad. He submitted that his claim for underpaid salary was properly made and not outside the limitation of time set out in section 90 of the Act. His claim, which was in respect of the period from May 2019 to April 2022 and filed on 17th May 2023, was well within time. As such, the trial Court did not make any error in

awarding compensation under the head. The relevant Wage Order was correctly applied.

37. Regarding overtime, the Respondent submitted that although the Appellant characterised the claim as for special damages, it failed to acknowledge the statutory obligation imposed upon employers by section 74 of the Employment Act to maintain employment records, including hours worked. He contended that the Appellant did not produce such records and that its own witness admitted that the Respondent worked twelve hours daily. Accordingly, the trial court was justified in relying on this evidence and in drawing reasonable inferences in favour of the Respondent.

38. On unremitted NSSF contributions and service pay, the Respondent submitted that the Appellant could not rely on section 35(6) of the Employment Act to dismiss the service pay claim when it had failed to remit statutory NSSF contributions. He pointed out that a provisional NSSF statement revealed gaps in remittances and that the trial court correctly found the claim for unremitted NSSF

contributions to be proven. The Respondent argued that the awards were equitable and lawful and aimed at preventing the Appellant from benefiting from its own misconduct.

### **Analysis and determination**

39. As a first Appellate Court, this Court is responsible for reexamining and reassessing the evidence presented before the trial Court and forming its own conclusions. However, it must continually remind itself that it neither observed nor heard the witnesses testify. See **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**

40. I have carefully considered the record, the grounds of appeal, and the parties' submissions. The following central issues emerge for determination in this appeal. Thus:

- a) Whether the Learned Magistrate erred in finding that the Respondent was unfairly terminated from employment by the Appellant.
- b) Whether the Respondent was entitled to the remedies granted by the trial Court.

**Whether the Learned Magistrate erred in finding that the Respondent was unfairly terminated from employment by the Appellant**

41. When evaluating whether a termination or summary dismissal of an employee was fair, the provisions of sections 41, 43, 45, and 47(5) of the Employment Act 2007 become essential and must be taken into account by the Court. It is important to reiterate that, for a termination or summary dismissal to be deemed fair, it must be shown that both statutory requirements—substantive justification and procedural fairness—were satisfied in the decision-making process and the decision itself.

42. As the parties rightly appreciated, Section 47[5] of the Employment Act delineates a reverse burden of proof. The employee initially bears the burden of proof and is required to demonstrate that an unfair termination or wrongful summary dismissal has occurred. Only after this demonstration does the burden shift to the employer to justify the termination or summary dismissal.

43. To satisfy the legal burden under this provision of the law, the employee must demonstrate *prima facie* that the process leading to the decision to terminate/summarily dismiss, and or the decision to terminate or summarily dismiss lacked procedural fairness and or substantive justification.
44. The Appellant contended that the Respondent failed to discharge the legal burden, and as such, his case ought to have collapsed at that point.
45. I have carefully considered the Respondent's evidence on both procedural unfairness and substantive justification, and in particular that to the effect that the Appellant's witness was not allowed to be present during the disciplinary hearing, and that he was not supplied with the witness statements of alleged witnesses, and the Appellant's witness's evidence on the same, and come to the conclusion that *prima facie*, the Respondent managed to demonstrate that the summary dismissal was unfair. I am not persuaded,

therefore, that he failed to discharge his burden under section 47[5] of the Employment Act, as alleged by the Appellant.

46. **Section 41 of the Employment Act** sets out the tenets of procedural fairness. Duty lies on the employer to show that the edicts of procedural fairness as contemplated under this provision were adhered to. It is required that the employer notify the affected employee that the employer is contemplating terminating their employment and the reasons therefor. The employer must allow the employee an adequate opportunity to prepare and make a representation on the grounds, while accompanied by an employee of his own choice, or a trade union representative [if the employee is a member of a union]. Lastly, the employer must consider, before making a final decision on the matter, the representations made by the employee and, where applicable, the accompanying person.

47. It is important to note that procedural fairness constitutes a constitutional requirement. See **Chief Registrar Judicial**

**Service Commission & Another vs LMN [2025] KSEC 53**

**[KLR].** As a result, the constitutional principles of a fair hearing, as articulated in Article 50, and of fair administrative action, as outlined in Article 47, are pivotal in cases involving unfair terminations of employment.

48. The Respondent acknowledged receipt of a show cause letter and participated in the disciplinary hearing to which he was summoned. At this juncture, it is reasonable to infer that the principles of procedural fairness were upheld. Nonetheless, the conduct exhibited during the hearing appeared to diverge from the standards of procedural fairness. The Respondent asserted that, although he had a witness he wished to call to testify—being an individual who witnessed the incident that resulted in the disciplinary hearing and subsequent dismissal—the Appellant declined to permit such testimony. In my view, the Appellant did not discount this assertion. The trial magistrate's conclusion that this constituted a want of procedural fairness was sound.

49. **Section 43 of the Employment Act** places a legal burden on the employer to prove the reasons for termination, failing which the termination is deemed unfair by dint of the provisions of Section 45 of the Employment Act.
50. Section 45[2] places an additional legal obligation on the employer to show that the reason for the termination or summary dismissal was fair and valid. Without such proof, the law considers the termination or summary dismissal to be unfair. In my considered opinion, the learned trial Magistrate's finding of the substantive justification for the summary dismissal did not arise from a thorough analysis of the evidence and material available before her. Though she correctly found that the summary dismissal was substantively unfair.
51. This Court has repeatedly emphasised that procedural and substantive fairness are interconnected in certain situations. When an employee is denied the chance to properly challenge the reasons the employer cites for an intended action—such as by not allowing them to call colleagues or

key witnesses in their defence—it violates their legitimate expectation. In my view, if the employee is not given the opportunity to contest the reasons, those reasons cannot be considered fair grounds for dismissal or termination.

52. Ultimately, I conclude that the termination was substantively unfair.

### **Whether the Respondent was entitled to the remedies sought**

53. Section 48 of the Labour Institutions Act mandatorily states that an employer cannot have the liberty to offer an employee a term or condition of employment that is inferior to that specified in a Wage Order applicable to that employee.

54. Flowing from this, Subsection 5 grants an employee, who received wages or salary below the statutory minimum at any specific time or during a particular period in the course of their employment, the right to claim the difference between the actual remuneration received and the amount

that should have been earned had the employer complied with the minimum wage regulation at that relevant time.

55. It would not be open to the employer to claim, 'but the contract of employment entered into by the parties provided for the lower salary.' By operation of the law, any contractual clause that contravenes the minimum wage requirement applicable to an employee is overridden, and instead, the minimum wage becomes a term of the contract.

56. Indeed, as submitted by Counsel for the Appellant, the monthly salary underpayment constitutes a continuing injury under the provisions of section 89 of the Employment Act. However, I am not persuaded by the plainly mistaken submissions made by Counsel regarding how he believes the computation for limitation of time should be undertaken. From the definition of the doctrine and its legal purpose, it should be clear that, for the purposes of calculation, the time to file a claim based on an alleged continuing injury ends twelve months after the cessation [the last act that forms part of the continuing injury] of the continuing injury. For

salary underpayment, the twelve-month period starts on the date the last underpaid salary was paid. Also see **The German School Society & another v Ohany & another [2023] KECA 894 [KLR]**.

57. For purposes of the matter before the learned trial Magistrate, in my view, the cause of action for salary underpayment would lapse twelve months after the termination date. Considering the date of termination of the Respondent's employment, 6<sup>th</sup> April 2022, and the date of filing of this suit, 18<sup>th</sup> May 2025, I hesitate not to conclude that the claim for salary underpayment was time barred. The learned trial Magistrate erred in awarding compensation under the head.

58. By parity of reasoning, I hold that the award for compensation for overtime ought not have been granted. It is hereby set aside.

59. The trial court awarded the Respondent a sum equivalent to eight months' salary, amounting to KShs. 108,584, as

compensation for wrongful termination. An award of the remedial relief provided under section 49(1)(c) of the Employment Act is discretionary and is granted based on the specific circumstances of each case. The authority to review and alter a decision made in the exercise of discretion can only be exercised if it is demonstrated that those particular circumstances recognised by law exist. In this instance, the Appellant has failed to establish such circumstances. Accordingly, I shall not disturb the award.

60. In **Mbogo & Another v Shah [1968] EA 93**, cited by Counsel for the Respondent, the Court held;

***“An Appellate Court will interfere if the exercise of discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon, or failed to take into consideration matters which it should have taken into consideration, and in doing so arrived at a wrong conclusion.”***

61. The Respondent's employment could be terminated with a twenty-eight-day notice under section 35 of the Employment Act. Undoubtedly, no notice was issued. Having agreed with the trial Court that the dismissal of the Respondent was unfair, I am unable to disturb the award of notice pay, as there is no basis for it.

62. Undoubtedly, the Respondent was a member of NSSF. Section 35[6] of the Employment Act provides that the benefit of service pay is not available to employees who are members of a registered pension or provident fund under the Retirement Benefits Act, or who are covered by a gratuity or service pay scheme under a collective agreement or the National Social Security Fund. The Respondent was not entitled, therefore, to relief of service pay.

63. In the sum, the Appellant's appeal succeeds in the following terms;

- a) The award of KShs. 30,404, by the learned trial Magistrate under the head 'underpayment' is hereby set aside.
- b) The award of KShs. 567, 684 under the head 'overtime' is hereby set aside.
- c) The award of service pay is set aside.
64. As the appeal has succeeded partially, each party shall bear its own costs of this appeal.

**Read Signed and Delivered this 12<sup>th</sup> Day of March 2026.**

**OCHARO KEBIRA**

**JUDGE.**