Mistry V. Naran Mulji & Co v Ali (Civil Appeal E055 of 2023)
[2026] KECA 497 (KLR) (13 March 2026) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E055 OF 2023

AK MURGOR, J MOHAMMED & GW NGENYE-MACHARIA, JJA

MARCH 13, 2026

BETWEEN

MISTRY V. NARAN MULJI & CO ..... APPELLANT

AND

MWAMLEU TSUMA ALI ..... RESPONDENT

(Being an appeal against the Judgement and Decree of the Employment and Labour Relations Court at Mombasa (A.K. Nzei, J.) delivered on 9th February 2023 in ELRC Cause No. E002 of 2022)

JUDGMENT

1. This second appeal by Mistry V. Narani Mulji & Co. (the appellant) challenges the decision of Mombasa Employment and Labour Relations Court (A. K. Nzei, J.) delivered on 9th February 2023 in ELRC Appeal No. E002 of 2022.

   Mwamleu Tsuma Ali (the respondent) filed a claim in Mombasa Chief Magistrate's Court, being ELRC Cause No. 231 of 2020 alleging his unfair dismissal from employment by the appellant.

2. In his Statement of Claim dated 5th February 2020, the respondent pleaded that he was employed as a casual labourer by the appellant on 4th April 2009 in the position of a Security Officer until 7th July 2019 when he was declared redundant. His claim was that he worked continuously for 7 days a week earning a wage of Kshs.500 per day, which amount was below the minimum prescribed by the law.

3. The respondent stated that his termination of employment on account of redundancy was unfair, and he particularised it as follows:

   a. The appellant failed and/or neglected to issue requisite notices of the intended redundancies as contemplated under Section 40 (1) of the *Employment Act*, Cap 226;

b. The appellant failed to inform the respondent on the selection criteria adopted to declare him redundant and that there was no regard to seniority in time, skill, ability and reliability of the respondent as contemplated under Section 40(1) (c) of the *Employment Act*, Cap 226;

c. The appellant failed to pay the respondent all his terminal and contractual dues prior to termination on account of redundancy contrary to the provisions of Section 40(1) (d) (e) (f) and (g) of the *Employment Act*, Cap 226;

d. The appellant had no genuine reason to declare the respondent redundant and that there was nothing to suggest or even show that work had reduced in order to downsize on the work force and that due process was not followed.

4. The respondent also claimed: contractual and terminal dues of Kshs.3,625,589.43 constituting one month's salary in lieu of notice; salary arrears from 1/9/2018 to 7/7/2019; underpayment; leave days and severance pay for the years between 2009 – 2019; refund of unremitted NHIF and NSSF deductions; unpaid rest days; overtime allowance; and public holidays.

5. The respondent thus prayed for judgment against the appellant for:

> "a) a declaration that his termination of employment on accountant of redundancy was unfair, unjust and wrongful;
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> b. the appellant to pay him compensation equivalent of 12 months' salary for unfair termination on account of redundancy at Kshs.216,558;
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> b. the appellant be ordered to pay his terminal and contractual dues amounting to Kshs.3,625,589.43;
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> b. costs of the claim and interests in (b) and (c) at court rates; and
>
> b. any other relief that the court may deem just and fit to grant."

6. In its Response to Statement of Claim dated 5th June 2020, the appellant admitted that it employed the respondent on a casual basis, but denied that it employed him from 4th April 2009 until 7th July 2019 when he was declared redundant. The appellant further denied: that the respondent earned Kshs.500 per day which was below the minimum amount prescribed by the law and any underpayments pleaded by the respondent; that on 7th July 2019, the respondent was informed that, as from this date, his services would be terminated on account that the appellant was downsizing on employees; that the respondent was not given notice that he be would terminated; and that the respondent was unjustifiably and unfairly dismissed without following the due process as required by the law and without payment of terminal and contractual dues.

7. The appellant further contended that it engaged the services of the respondent sometime in February 2017 as a casual employee, and that he did not work for a continuous period of one (1) month as he only worked when need arose; that the respondent's employment was subject to renewal on a daily basis; that it was for this reason that the respondent showed up for work in the month of June 2019; and that there was no employment contract between it and the respondent and, therefore, the allegations of unfair termination on account of redundancy could not arise.

8. The appellant denied that: the respondent was entitled to the claim of salary arrears; compensation for unfair termination; one month's pay in lieu of notice; severance pay; underpayment for years worked; payment of leave days earned; and unpaid overtime hours worked.

9. At the hearing, the respondent (PW1) testified that he was the appellant's employee where he worked as a security guard since 4th April 2009 earning a daily wage of Kshs.250 for 6 days; that as at the time of his termination, he was earning Kshs.500 per day working 7 days a week from August 2018; that the appellant started paying for his NSSF and NHIF contributions in the year 2017; and that he was terminated via a telephone call on 6th July 2019 without being given a letter or notice prior to the termination. The respondent produced as exhibits the documents in the List of Documents dated 5th February 2020 and in the Supplementary List of Documents dated 3rd December 2020.

10. Mohe Muranja Angole (PW2) testified that he was employed as a security guard by the appellant on 30th November 2010; that the respondent was employed before him in the year 2009; and that he was also terminated via a telephone call on 9th June 2019 by his supervisor.

11. Peter Orina Ajulu (DW1), a supervisor with the appellant, testified that the appellant was a construction company which depended on contracts and tenders, and that, as such, it employed its workers on a casual basis. He stated that the respondent was a casual worker assigned to provide security services, and that he would be paid on a weekly basis; and that the appellant paid the NSSF and NHIF contributions for all its employees, even those who worked for less than a month.

12. DW1 admitted that the respondent was being paid Kshs.500 per day, but that that amount was not an underpayment. He denied that the respondent worked overtime and during public holidays. He stated that the respondent was not terminated, but that it is the contract at the site where he (the respondent) worked that ended.

13. In his Judgment dated 15th December 2021, the learned trial Magistrate (Hon. G. Kiage-SRM) held that by dint of Section 37 of the *Employment Act* ('the *Employment Act* or the Act'), respondent having worked for a period of more than 2 years, was deemed to have been engaged on a monthly basis; that, as such, Section 35 (1) (1)(c) of the Act was applicable; that the appellant failed to demonstrate that the respondent's termination from employment was both substantively and procedurally fair, hence the respondent was unlawfully terminated from employment.

14. On the reliefs sought, the trial court awarded the respondent as follows:

i.	One month's salary in lieu of notice	-	Kshs.	13,000.00
ii.	Unpaid leave allowance (13,000/26 x 30 days)	-	Kshs.	15,000.00
iii.	Severance pay (6,500 x 1 ½ years)	-	Kshs.	9,970.00
Total	-	Kshs.	37,750.00	

15. On appeal to the ELRC, the respondent complained that: the trial court erred in failing to award compensation for unfair termination; the trial court erred by finding that the respondent failed to

provide evidence that he was paid salary for 210 days that he had worked prior to his unfair termination; the trial court erred in disregarding the evidence that the respondent was employed in 2009 which was not controverted, thereby erroneously awarding severance pay for 1 ½ years; and that the trial court erred in finding that the respondent did not lay any basis for seeking the reliefs of underpayment, unremitted NSSF and NHIF deductions, overtime allowance, unpaid rest days and public holidays.

16. The learned Judge (Nzei, J.) found that it was proved that the respondent was employed by the appellant on 4th April 2009 as a security guard on a casual basis; and that the validity of the documents produced by the respondent were not challenged, neither was the evidence of PW2.

17. The learned Judge agreed with the finding of the trial court that the respondent's employment status was converted from casual employee to a term contract under Section 37 of the *Employment Act*, hence Section 35(1) (c) of the Act was applicable. However, the Judge held that the respondent could not be said to have worked for the appellant for only 2 years, when the uncontroverted evidence was that he had been in employment since 4th April 2009; and that, therefore, the respondent was not a casual employee as at the time of termination in July 2019.

18. Having found that Section 35(1) (c) of the *Employment Act* was applicable to the respondent, the learned Judge held that the appellant failed to comply with Section 40 of the *Employment Act*, hence the respondent's termination of employment was unfair.

19. As to the entitlement of the respondent's salary at the time of termination, the learned Judge held that the respondent was entitled to Kshs.15,141.95 per month, being the monthly wage for a night watchman rendering services in Nairobi, Mombasa and Kisumu cities as provided for under Regulations of Wages (General) (Amendment) Order, 2018. The prayer for severance pay was declined as termination of the respondent's employment was not proved to be on account of redundancy. The claim for the unremitted NSSF and NHIF deductions were also declined on the findings that once statutory deductions are effected on an employee's salary or earnings, the money deducted ceases to be the employee's entitlement and any complaint ought to be

    directed to the statutory bodies responsible for receiving the remittances. The learned Judge also declined to award the claim for overtime pay, unpaid rest days and public holidays for want of proof.

20. Ultimately, the first appellate court partially allowed the respondent's appeal. It set aside the decision of the trial court of 15th November 2021, and entered judgement in favour of the respondent against the appellant as follows:

i.	Compensation for unfair termination of employment an equivalent of six months' salary (Kshs. 15,141.95 x 6)	-	Kshs.	90,851.00
ii.	One month's salary in lieu of notice	-	Kshs.	15,141.00
iii.	Salary underpayment as prayed by the respondent	-	Kshs.	700,701.95
iv.	Unpaid leave	-	Kshs.	105,000.00
Total	-	Kshs.	911,695.60	

21. Aggrieved by the decision, the appellant filed the instant appeal based ten (10) on grounds of appeal, which grounds we have condensed into the following three (3) grounds faulting the learned Judge for:

    i. Finding that the respondent was employed as a security guard from 4th April 2009 on a casual basis;

    ii. concurring with the trial court on the issue of conversion of the respondent's employment status from a casual employee to a term contract and finding that the respondent was unfairly terminated; and

    iii. awarding the respondent Kshs. 90,851 being six months' salary for compensation for unfair termination, Kshs.15,141.95 being one month's salary in lieu of notice, Kshs.700,701.95 being salary underpayment and Kshs.105,000 being salary leave pay for 10 years despite him being a casual employee.

22. We heard this appeal on 4th June 2025. Learned counsel Mr. Matheka was present for the appellant while Ms. Kamau, learned counsel was present for the respondent. Both counsel relied on the respective parties' written submissions which they orally highlighted. Those of the appellant are dated 30th May 2025 while of the respondent are dated 23rd May 2025.

23. The appellant submitted under the heads of the awards made by the ELRC. On the award of compensation for unfair termination equivalent to six (6) months' salary and one month's salary in lieu of notice, it was submitted that the learned Judge erred in finding that the respondent had been employed since 4th April 2009; that Judge relied on a document, being a list of names of 32 employees; that in the list; the employment dates of the respective employees were not in any chronological order; that besides, the document (list) was also not signed; and that the probative value of the document was not tested, hence it could not have been the foundation of evidence upon which the respondent

could anchor his claim that he was employed by the appellant on 4th April 2009. Counsel referred to the decision of this Court in Parkar & Another vs. NQ & 2 Others (2023) KECA 908 where a distinction between admissibility and probative value of a document was made; and that it was held that: 'admissibility of a document is one thing and its probative value quite another ...that a document may be admissible yet may not carry any conviction and weight or its probative value may be nil...mere production of a document as an exhibit by the court cannot be held to be a due proof of its contents'; that, accordingly, the mere production of that document was not, of itself, proof of the date that the respondent was employed by the appellant, and therefore be used as a basis upon which it could be concluded that the respondent was a permanent employee, which was the basis for the award of compensation for unfair termination and one month's salary in lieu of notice.

24. On the issue of underpayment, it was submitted that the burden of proof rested with the respondent, to prove that he was entitled to the amount; that the respondent neither submitted on it before the ELRC nor was it an issue in his witness statement; that the respondent did not demonstrate how, based on the then applicable Regulations of Wages (General) (Amendment) Order, the amount was arrived at; that having not testified on this award or referred to it in the witness statement, it was an error on the part of the learned Judge to award the same; that, in any event, the claim under this head was time-barred, the Claim having been filed three years after the respondent ceased his employment; and that, for the same reason, the claim for unpaid leave days was also time-barred.

25. Finally, the appellant submitted that the respondent was not unfairly terminated as he was informed well in advance of the termination on account of loss of work/redundancy.

26. On behalf of the respondent, it was submitted that the appellant did not adduce any evidence to corroborate its assertion that it employed the respondent as from February 2017; that, in contrast, the respondent produced a list of security guards that was generated by the appellant's former supervisor showing all the guards who were employed by the appellant; that the respondent was listed at No. 21, and against his name, it was shown that he was employed on 4th April 2009; that the respondent also produced a membership card from Kenya National Private Security Workers Union which indicated the appellant as the respondent's employer; that the card showed that the respondent was a member of the Union as from 14th June 2013; and that further, the appellant vide a letter dated 16th February 2016 to NSSF requested registration of its staff including the respondent as NSSF subscribers which was a testament that indeed the respondent was employed prior to February 2017.

27. The respondent urged that his evidence was corroborated by that of PW2, who confirmed that he was already in employment when he joined the appellant in the year 2010; that the appellant's supervisor (DW1) under cross- examination stated that he had been in employment since 1998, but that it was not until 2017 that he was registered as a subscriber to NSSF; that this negates the appellant's submission that the respondent could not have been in employment prior to the year 2017 just because he was not then registered with NSSF; that Section 10(7) and 74of the *Employment Act* places a legal burden on the employer to produce written particulars of employees and, in this instance, the appellant failed to produce the records contrary to the legal obligation. The decision of Meshack Kilo Ikulume vs. Prime Fuels Kenya Limited (2013) KEELRC 921 (KLR) was relied upon in which the ELRC held that an employer is obligated to keep and produce records in legal proceedings pursuant to Section 10(2), (3), (7) and 74 of the *Employment Act*. The respondent urged us to find that the trial court correctly found that the respondent's employment commenced in April 2009.

28. It was further submitted that by dint of Section 37(1) of the *Employment Act*, the respondent's employment converted from a casual to a regular term of employment by virtue of his continuous service of 10 years, which fact was not controverted. Reliance was placed on the decision of this Court of Chemilil Sugar Company vs. Ebrahim Ochieng Otuon & 2 Others (2015) KECA 202 (KLR) in

which the Court held that respondents in that case having worked undisputedly for periods ranging one to fifteen years as casual employees, their employment converted to term contracts by operation of law under Section 37 of the *Employment Act*.

29. The respondent also contended that he was unfairly terminated, and that the burden lay upon the appellant as per Section 43(1) of the *Employment Act*, to prove existence valid reasons for termination; that the appellant failed to do so, as a consequent to which his termination was unfair pursuant to Section 45 of the *Employment Act*; and that this was vindicated by the fact that he was terminated by way of a telephone call without notice against the tenets of unambiguous law. The decision of this Court in Nebert Bernard Muriuki vs. Multimedia University of Kenya (2020) KECA 37 (KLR) was referred for the submission that an employer must comply with Section 43 as read with Section 45(2) of the *Employment Act* even when the reason for termination is redundancy; and that, in any event, the appellant failed to comply with Section 40 of the Act in so far as the conditions it was required to comply with were concerned if it was to advance the claim that his termination was on account of redundancy.

30. To the respondent, he continued to remit NSSF deductions until July 2019, and hence the assertion that he stopped working in January 2029, was untenable; that the award equivalent of six months' salary as compensation for unfair termination was merited as it was a discretionary award pursuant to Section 49(1) (c) of the *Employment Act*; that since he was no longer a causal employee by virtue of Section 37(1) and (3) of the *Employment Act*, he was entitled to notice or pay in lieu thereof; and that under Section 40(1) (f), an employer is mandated to pay an employee who is declared redundant one month's salary in lieu of notice.

31. As to the award of underpayment, the respondent submitted that his minimum wages were subject to Regulations of Wages (General) Order which was periodically amended, but that the appellant failed to adjust his wages accordingly; that his daily wage increased from Kshs.250 in April 2009 to Kshs.350 in December 2013 and subsequently to Kshs.500 in December 2017 which remained his wage until termination of his employment; that the appellant did not rebut or challenge the specific computations of payments as pleaded, or offer alternative figures; and that, as such, the learned Judge was justified in adopting the figures he arrived at.

32. As to the accrued leave days, it was submitted that Section 28(1) of the *Employment Act* entitles every employee to 21 days of paid annual leave after every 12 consecutive months of service; that the respondent served for 10 years without being granted leave and in the absence of any records to the contrary, the award of unpaid leave was merited.

33. We have considered the record of appeal, the oral and written submissions for and against the appeal, the cited authorities and the law. Our limited jurisdiction in this second appeal is provided for under Section 72(1) of the *Civil Procedure Act* which is that it must be on matters of law only. It reads:

> Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from a decree passed by a subordinate court of the first class on an appeal from a subordinate court of the third class, on a question of law only.

34. In Kenya Breweries Ltd vs. Godfrey Odoyo (2010) KECA 498 (KLR), it was succinctly put as follows on the role of the second appellate court:

> "In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a

fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA

> 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

35. It is undisputed that the respondent was once employed by the appellant as a security guard. In its response to the claim, the appellant admitted that it employed the respondent as a security officer on a casual basis, but denied that this period spanned from 4th April 2009 to 7th July 2019. Instead, the appellant averred that it employed the respondent sometime in February 2017 as a casual employee, and was quick to add that the said engagement did not create an employment contract since the respondent did not work at any time for one month continuously, but would be engaged on a need basis.

36. The respondent justified his position of being employed from 4th April 2009 by producing a list containing the names of persons employed by the appellant as security guards between the year 1992 and 2014. A perusal of the list indicates that the respondent was indeed listed as one the appellant's alleged employee as a security guard, and was slotted as No. 21. The respondent then joined the Kenya National Private Security Workers Union (hereinafter 'the Union') and in his membership card, the employer is indicated as the appellant. From the receipts produced as issued by the Union, the respondent made a monthly contribution of Kshs.150 to the Union from May 2013 to February 2014. There was a period of paucity when no contributions were made, but the respondent resumed making contributions from the month of March to July 2016.

37. On its part, the appellant produced a list of payment vouchers for casual labourers of various dates between 8th October 2015 and 11th February 2016. The respondent together with others were being paid a daily wage of Kshs.400.00 for 6 days a week. It was not until 8th February 2016 that the appellant wrote to the National Social Security Fund confirming that the respondent together with other employees would formally be taken in as their staff as opposed to sub-contractors. There is evidence that the appellant remitted National Social Security Fund (NSSF) statutory dues on behalf of the respondent from 1st February 2017 to 31st July 2019.

38. within a period, or a be to expected be A casual employee is defined under Section 2 of the *Employment Act* as follows:

> ...an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.

39. Section 37 of the Act provides as follows:

> 1. cannot work which one than not less of working days which the aggregate to the continuous amount in equivalent month; or Performs reasonably completed
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> (b) Notwithstanding any provisions of this Act, where a casual employee-
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> number of working days amounting in the aggregate to the equivalent of three months or more,

2. In calculating wages and continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

3. An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would be entitled to under this Act had he not initially been employed as a casual employee.

4. Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

5. A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply".

40. In Rashid Odhiambo Allogoh & 245 others vs. Haco Industries Limited (2015) KECA 376 (KLR), this Court held:

> "With the enactment of the *Employment Act* 2007, considerable attention is paid to provisions of section 37 thereof which provides for conversion of casual service to permanent employment. In particular, subsection 37
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> (5) provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee."

41. Similarly, in Chemelil Sugar Company vs. Ebrahim Ochieng Otuon & 2 others (2015) KECA 202 (KLR), this Court held that:

> "The undisputed facts were that the respondents worked for the appellant in various capacities for periods ranging between one year and fifteen years. Even if the respondents may have commenced employment with the appellant as casual employees, their terms were converted to term contracts by operation of law under Section 37 of the *Employment Act*."

42. In as much as the respondent is purported to have been the appellant's employee from 4th April 2009, there was no evidence on record to confirm whether he worked continuously. The list of payment vouchers from between 8th October 2015 and 11th February 2016 is a testament that the respondent was a casual labourer as he was being paid a daily wage of Kshs.400.00. It cannot be said that the respondent has been a permanent employee from 4th April 2009 until 7th July 2019 when he was allegedly terminated on account of redundancy. We also do not find merit in the appellant's argument that: it only engaged the respondent in February 2017; the respondent did not work at any one time continuously for one month; and that he only resurfaced in the month of June 2019 for the reason that it (the appellant) started remitting the respondent's statutory dues to NSSF on 8th February 2016. For this reason, and by dint of the provisions of Section 37(1) (a) and (b), the respondent's contract

of service was presumably converted from a casual to permanent employee/term contract. We are therefore ready to accept the evidence that the respondent was formally employed as a permanent employee on 8th February 2016.

43. The reason proffered for the respondent's termination was that the appellant was downsizing its workforce. We do not think, just as the learned Judge did, that this was enough proof to conclude that the termination was on account of redundancy. Even so, the respondent was to be subjected to the lawful procedure of termination as provided for under the *Employment Act*. The respondent testified that:

> " I was terminated via telephone call. It is on 6/7/2019 from a superior by the name Peter."

44. An unfair dismissal or termination occurs when an employer terminates an employee's contract without valid reason (substantive fairness) or fails to follow proper legal procedures (procedural fairness). It constitutes termination without good reason or by way of a fair procedure or both.

45. In our view, the sudden termination by telephone call constituted summary dismissal as provided for under Section 44(1) of the *Employment Act*. The reasons for the termination nonetheless ought to have been in writing, and thereafter the respondent be summoned to make representations before the termination was effected. The respondent was therefore unfairly and unlawfully terminated contrary to Section 45(2) of the *Employment Act* which provides as follows:

> A termination of employment by an employer is unfair if the employer fails to prove-
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> a. that the reason for the termination is valid;
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> b. that the reason for the termination is a fair reason-
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> i. related to the employees conduct, capacity or compatibility; or
>
> ii. based on the operational requirements of the employer; and
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> c. that the employment was terminated in accordance with fair procedure.

46. This Court has over and again emphasised that an employee is entitled to a fair and lawful procedure before termination, irrespective that the termination was summarily carried out as in the instant case. In Highlands Mineral Water Company Limited vs. Shaeen (Civil Appeal 183 of 2028) [2023] KECA 1133(KLR) (22 September 2023) (Judgment), this Court rendered itself thus:

> " In order for termination to be fair in the eyes of the law, it has to be both substantively and procedurally fair. Apart from a valid reason of termination, the employer must follow fair procedures for termination in accordance with the Act. In any form of termination, the employer is required to prove the reasons for the termination otherwise, it will be termed as unfair. Every employee has the right not to be unfairly dismissed."

47. In Janet Nyandiko vs. Kenya Commercial Bank Limited (2017) eKLR, and which we fully adopt, the Court summarized those procedures as follows:

> "Section 45 of the Act makes provision, inter alia, that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the

same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

48. It is our view that, in the absence of advancing any valid reason, and for failing to follow proper legal procedures in terminating the respondent, his termination of employment by the Appellant was both unfair and un-procedural.

49. As to the salary the respondent earned from 8th February 2016, the respondent pleaded that, as at the time when he was allegedly declared redundant, he was being paid a daily wage of Kshs.500. However, since there was no evidence adduced in this respect, the best document to guide the Court on the applicable basic minimum monthly wage would be The Regulations of Wages (General) (Amendment) Order, 2018 which was in force as at the time of termination.

50. The respondent was employed as a night security guard, and the learned Judge rightly adopted the sum of Kshs.15,141.95, being the monthly salary of a night watchman working in Mombasa under the aforesaid Regulations, which we hereby adopt and uphold.

51. As per Section 49(1) (c) of the *Employment Act*, an award for compensation for unlawful termination is discretionary. It reads as follows: -

> 1. Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following
>
> (a) .....;
>
> (b) .....;
>
> (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

52. The learned Judge awarded one month's salary in lieu of notice of Kshs.15,141.95, which we would uphold.

53. The appellant stated that the claim for unpaid leave days and underpayments was time barred. As to the unpaid leave days, Section 28(1) (a) of the *Employment Act* provides that an employee is entitled to twenty-one (21) leave days with full pay after working every twelve consecutive months with his employer. It reads as follows:

    1. An employee shall be entitled-

        a. after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;

        b. where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

54. On the other hand, Section 90 of the *Employment Act*

    provides:

> Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.

55. In the case of The German School Society & another vs. Ohany & Another (2023) KECA 894 (KLR), this Court defined a "continuing injury" under Section 90 of the *Employment Act* as follows:

> A continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action.

56. In Nganga vs. Christ the King Parish & another (2023) KECA 1100 (KLR), this Court held:

> " Perhaps to add our understanding, a continuing wrong simply put, is a wrong arising out of a continuous breach of an obligation which transcends a single completed act or omission. The obligation so breached must be one borne of law or agreement between parties and which gives rise to an actionable claim. And, as this Court stated in The German School Society & another (supra), the existence of a continuing wrong is an exception to the rules of limitation of actions hence a claimant is within their right to seek reliefs emanating from the date when the continuing wrong commenced."

57. The respondent was terminated on 7th July 2019. The claim was filed before the Magistrate's Court on 11th March 2020, which was a date within the three years' statutory period. The appellant's argument that the claims for underpayment and leave without pay were time barred is therefore both unmerited and without basis.

58. A tabulation of the period between 8th February 2016 and 7th July 2019, amounts to three calendar years, which is the period that the respondent was in permanent employment. He was therefore entitled to three calendar years of leave pay which equates to a sum of Kshs.45,425.85.

59. On the alleged underpayments, the respondent asserts that he was being paid Kshs.500 as the daily wage. There is no evidence in terms of a payslip or payment voucher to confirm the figure. Be that as it

may, the appellant's supervisor who testified as DW1 confirmed that the respondent earned Kshs.500 per day. The award of the underpayments will be determined by the Regulation of Wages Order then applicable. Therefore, as a casual employee between 1st May 2015 to 8th February 2016, the applicable schedule to determine the underpayment would be the Regulations of Wages (General) (Amendment) Order, 2015 where a night watchman ought to have been being paid Kshs.586.40 as the daily wage. The tabulations for that period is as follows:

The time period between 1st May 2015 to 7th February 2016 is 8 months and 8 days. The daily wage of a night watchman was	Kshs. 586.40
Less payment made by the appellant	(Kshs. 500.00)
The daily underpayment	Kshs. 86.40
Kshs. 86.40 x 6 days x 8 months	Kshs. 4,147.20
Add, additional 7 days from 1st February to 7th February 2016 Kshs. 86.40 x 7 days	Kshs. 604.80
Total underpayment from 1st May 2015 to 8th February 2016 = 4,147.20 + 604.80	Kshs.4,752.00

60. As observed hereinabove, the presumption is that the respondent was permanently employed from 8th February 2016 until 7th July 2019 when he was terminated. This deduction is arrived at based on the fact that it was from February 2016 that it was demonstrated that the appellant was remitting the respondent's statutory deductions. Taking into account the fact that the respondent's duty as a night watchman entailed providing security, for 6 days a week, we shall exercise discretion and tabulate the number of days worked in a month to be 21 days. The applicable schedule to determine the underpayment would be the Regulations of Wages (General) (Amendment) Order, 2018 which provided the monthly salary of a night watchman as Kshs.15,141.95. The tabulation for the underpayment under this limb will then be as follows:

> The period between 8th February 2016 - 7th July 2019 is a period of approximately 41 months. The respondent was being paid a daily wage of Kshs. 500/= instead of a salary of Kshs. 15, 141.95/= per month.

The computation of the daily wage is Kshs. 500 x 21 days	Kshs. 10,500.00
The monthly underpayment (Kshs. 15,141.95 - 10,500)	Kshs. 4,641.95
Total underpayment from 8th February 2016 - 7th July 2019 - Kshs. 4,641.95 x 41 months	Kshs.190,319.95
The cumulative total underpayment is Kshs. 4752.00 + 190,319.95	Kshs.195,075.95

61. Lastly, as regards compensation, the learned Judge awarded the respondent compensation equivalent to 6 months' salary of Kshs.90, 851.70. Considering that the respondent worked with the appellant for 4 years, we consider that 4 months compensation would be appropriate and applicable in the circumstances. On the basis of minimum wage for 4 months, the compensation awarded is Kshs. 60,567.80.

62. In the end, we find that the appeal partially succeeds. We enter Judgement for the respondent as follows:

    a. The award of 6 months' salary compensation for unfair termination of Ksh.90,851.70 is hereby set aside and substituted therefor with an award of Kshs.60,567.80.

    b. The award of one month's salary in lieu of notice of Kshs.15,141.95 is hereby upheld.

    c. The award of unpaid leave of Kshs.105,000.00 is hereby set aside and substituted therefor with a sum of Kshs. 45, 425.85.

    d. The award of salary underpayment of Kshs. 700,701.95 be and is hereby set aside and substitute therefor with a sum of Kshs. Kshs.195,071.95.

    Total payable .... Kshs. 346,491.45.

63. Since the appeal partially succeeds, the respondent is entitled to half costs of this appeal, which we hereby grant.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2026.

A. K. MURGOR

.....

JUDGE OF APPEAL JAMILA MOHAMMED

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR