



**Pride Kings Services Limited v Wafula (Civil Appeal E028 of 2025)  
[2026] KEELRC 767 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KEELRC 767 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL E028 OF 2025  
NJ ABUODHA, J  
MARCH 13, 2026**

**BETWEEN**

**PRIDE KINGS SERVICES LIMITED ..... APPELLANT**

**AND**

**BROWN NYONGESA WAFULA ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of the Hon. A. Nyoike at Milimani  
Commercial courts CMELRC No. E2040 of 2024 delivered on the 24th day of January, 2024)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 3<sup>rd</sup> February, 2025 the Appellant appeals against the whole of the Judgment and decree of Hon. A. Nyoike delivered on 24<sup>th</sup> January, 2024.
2. The Appeal was based on the grounds that:
  - a. The Learned magistrate completely misunderstood the evidence before him, wrongly analysed the evidence and before came wrong conclusions of fact and law.
  - b. The Learned magistrate erred in law and in fact by awarding the sum of Kenya Shillings Ninety -One Thousand Two Hundred and Nine for unfair termination 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 of Kenya Shillings One Hundred and One Thousand Seven Hundred and Ninety-Six for overtime without taking in to consideration that the Claimant proved that the used to work overtime.
  - d. The Learned magistrate erred in fact and in law by awarding the sum of Kenya Shillings Ninety-One Thousand Six Hundred and Twenty for house allowance 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 Twenty-Nine Thousand Five Hundred for paternity leave 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 Eight Thousand Five Hundred as costs without following the due procedure.
  - g. The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion.
3. The Appellant prayed that the Appeal be allowed with costs and the court be pleased to reassess and re-appreciate the evidence afresh and to arrive at independent conclusion.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates Otieno & Achieng' Advocates filed written submissions dated 20<sup>th</sup> November, 2025 and on the issue of whether the Appellant followed the due procedure in terminating the employment of the Respondent counsel submitted that it was clear from the pleadings and the evidence of the Appellant during the trial that there was no evidence that his services were terminated by the Appellant and the Respondent's allegations that he tried to follow up on the issue of his termination by the supervisor and the same fell on deaf ears were mere allegation since the same was not backed up with any evidence. That the Appellant was not entitled to a declaration of unlawful termination of employment as he is the one who left employment on his own volition.
6. On ground 2 counsel submitted that the Appellant was not entitled damages for unlawful termination as it is the Respondent who voluntarily relinquished and terminated his employment, consequently the substantive and procedural fairness protections assured under section 35, 40, 41 and 45 of the *Employment Act* should not apply to him for that reason the Respondent was not entitled to damages for unlawful termination.
7. On leave pay counsel submitted that no evidence was placed before the court to show that he applied for leave and the same was denied furthermore the leave arrears for more than five years cannot be paid as the same is beyond the required 3 years of *limitation of actions Act*.
8. On the issue of unpaid holidays, offs days and overtime no evidence was produced before the court to show that the Claimant used to work overtime, during his off days and during holidays therefore the same should not be a supervisor therefore should not be allowed.
9. On the issue of underpayment, counsel submitted that the Appellant was a night watchman and at the time of his termination he was stationed at the Pride Kings main office and according to the gazette notice no.114 he was supposed to earn Kshs.15,600 yet he was being paid Kshs12,000/-which means that he was not being underpaid.
10. On the issue of allowance for paternity leave no evidence was brought before the court such as a letter requesting for paternity leave or a birth notification to show that in deed the Respondent went for paternity leave therefore the same should not be paid.

### **Respondent's Submissions**

11. The Respondent's Advocates, Onesmus Masua & Company Advocates filed written submissions dated 3<sup>rd</sup> October, 2025 and on the issue of whether the termination of the employment of the



- Respondent was wrongful, unfair and unlawful counsel submitted that the learned Magistrate correctly analysed the evidence before her and came to a correct conclusion that the Respondent did not demonstrate on a balance of probability that it had valid reasons for terminating the Claimant's employment adding that the Respondent also failed to prove that it accorded the Claimant an opportunity to be heard to defend his case against termination.
12. Counsel relied on Section 43(1) of the *Employment Act* on proof of reason for termination which burden is placed on employer and failure to do so, renders such termination unfair. Reliance was further placed on Section 45 (2) of the *Employment Act* on what amounts to unfair termination.
  13. It was submitted that the Claimant was not subjected to any disciplinary process; that he was not taken through appropriate disciplinary process in terms of Section 41 of the *Employment Act* and therefore the termination was wrongful, unfair and unlawful. Counsel relied on the case of John Wafula Simiyu v Star Publications Limited where the court found the termination unfair for failure to adhere to disciplinary process.
  14. It was submitted that there was no disciplinary proceedings at all. The Respondent's employment was terminated by a phone call from the branch manager. The Respondent was instructed not to report to work again. The Respondent was not issued with a certificate of service contrary to Section 51 of the *Employment Act*. Again, upon termination of Employment, he was not paid his terminal dues such as pending annual leave days and prorata salary for 26 days worked in July 2023.
  15. On the issue of the legal position on failure to call witness(es) counsel submitted that the Appellant did not call any witness(es) to testify. The failure to adduce any evidence by the Appellant may well mean that the Respondent had attained the standard prescribed in civil proceedings.
  16. Counsel relied on among others the case of Janet Kaphiphe Ouma & Another-vs-Maries Stopes International (Kenya) v Kisumu HCCC No. 68 of 2007, while submitting that where the defence does not call any witness their defence remains mere allegations and the Plaintiff's evidence usually uncontroverted. That in the case, the only evidence on record was from the Respondent and a memorandum of response to claim which contained mere denial. The evidence of the Respondent was not rebutted.
  17. On the issue of whether the Claimant was entitled to the relief sought counsel submitted that the evidence adduced by the Respondent was uncontroverted and as such, the Appeal should be dismissed with costs. The Appellant did not call any witness(es) and as such the evidence of the Respondent was not at all challenged. That the Respondent was entitled to the relief sought in the Memorandum of Claim and as allowed by the learned Magistrate.
  18. On the claim for unfair termination -Kshs. 91,209.90 counsel submitted that the six months' salary awarded by the learned Magistrate was just and reasonable. That no evidence or reason had been raised that would warrant interference with the said discretionary award.
  19. On the claim for overtime -Kshs 101,796.75 counsel submitted that it was the Respondent's evidence that he worked from 6pm to 6am as a night guard and thus he worked overtime for four hours which evidence was not rebutted. Counsel relied on section 74 of the *Employment Act* which mandates the employer to keep employment records including rest days. That failure to submit those records should be interpreted in favour of the employee while placing reliance on the case of Maurice Wandera Egesa v Inter-Security Limited (2016) eKLR.
  20. On the claim for house allowance-Ksh 91,620.00 counsel submitted that the learned Magistrate correctly awarded this claim on grounds that the Respondent was neither housed by the Appellant nor was he paid house allowance as per section 31 of the act. That the award was justified.



21. On the claim for paternity leave-Kshs12,668.04 counsel submitted that the Respondent in the trial court attached letters written to the Appellant and acknowledgement of birth notification as a result the learned Magistrate was satisfied by the evidence. That the trial court correctly indicated that the Respondent notified the Appellant of his new borns but was denied paternity leave.
22. It was submitted that the Memorandum of Appeal in paragraph 5 on paternity leave is erroneous. The learned Magistrate awarded the sum of Ksh. 12,668.04 only and not Ksh. 29,500.00 as indicated in the memorandum of appeal.

### **Determination**

23. The court has considered the pleadings and submissions filed by the both parties herein and observes that it is now more or less settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424.The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
24. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent while finding that the termination was unfair in terms of unfair termination at Kshs 91,209.9, Underpayment Kshs 168,380.50, House allowance Kshs 91,620, Overtime Hours Kshs 101,796.75, notice pay Kshs 15,201.65, paternity Leave Kshs 12,668.04 and unpaid leave of Kshs 29,503.90. The Appellant appeals on the whole of the Judgment fronting 7 grounds of appeal which this court will frame in to two issues which are:-
  - i. Whether the trial court erred by finding that Respondents' termination of employment was unfair and unlawful
  - ii. Whether the trial learned Magistrate erred in awarding the Respondent his terminal dues.

### **Whether the trial court erred by finding that Respondents' termination of employment was unfair and unlawful**

25. The Appellant never disputed employing the Respondent but the dispute is on how he left the Employment. The Appellant alleged that the Respondent left employment at his own volition whereas the Respondent alleged that he was called by the branch manager and instructed not to report to work on 26<sup>th</sup> July 2023 after working for 45 months since November, 2019 working as a security officer (night guard).
26. The courts have always held that for termination to pass fairness test there should be both substantive and procedural fairness. This court refers to the holding in Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR among others.



27. This court is of the view that in as much as the Respondent had a duty under section 47(5) of the [Employment Act](#) to prove that termination occurred this court finds that the Respondent illustrated that the termination had occurred and the burden shifted to the Appellant to illustrate that the reasons for the termination were fair under the said provision more so when a defence of desertion is raised by the employer it is its duty to justify this ground.
28. The Appellant alleged that the Respondent deserted his own duties at his own volition and he was not terminated. Under Section 44(4) (a) of the [Employment Act](#) 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Appellant relied on the defence of desertion that the Respondent had no intention of returning to the place of work.
29. The Appellant had a duty under section 43 and 47(5) of the Act to justify the grounds of termination and demonstrate the reasons were fair and valid, failure to which would lead to a finding of unfair termination under section 45 of the Act.
30. On the issue of desertion the court is guided by the sentiments in the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR, where the court held that:-
  18. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.
31. This court has in a number of times pronounced itself on the issue of absconding of duties by an employee with the recent case being Owudu v Digital Sanitation Services Limited (Appeal E109 of 2023) [2024] KEELRC 917 (KLR) (18 April 2024) (Judgment) holding as follows:-
  17. First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer.
  18. Further, under Section 18(5) (b) of the Act, where the employer cannot trace the employee, notice must be issued to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken its legal duty to properly end employment.
32. In this particular case no notice was issued to the Respondent upon absconding duty or to the labour office and his terminal dues deposited there. In addition, if the Respondent absconded duties the Appellant did not demonstrate that it commenced any disciplinary action against the Respondent under Section 41 of the [Employment Act](#) after he allegedly failed to report on duty. In Joseph Nzioka v Smart Coatings Limited [2017] eKLR Nduma J. observed that
 

“Dismissal on account of absconding must be preceded by evidence showing that 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 duties.”
33. In this present case, the Appellant did not illustrate any efforts of contacting the Respondent to inform him that they were considering terminating his services due to absconding of duties. The court agrees



with the trial court that the Appellant did not on a balance of probabilities discharge its onus of establishing that the Respondent absconded/deserted duty. The Appellant did not issue any show cause letter to the Respondent or any hearing before termination hence it also failed on the procedural fairness under section 41. This court agrees with the trial court finding that the Appellant terminated the Respondent's services unfairly.

Whether the trial learned Magistrate erred in awarding the Respondent his terminal dues.

34. The court notes that the minimum salary between May, 2022 to July 2023 was Kshs 16,959.00 as per the Regulation of Wages (General) (Amendment) Order, 2022 while between November 2019 to April 2022 it was Kshs 15,141.95 as per the Regulation of Wages (General) (Amendment) Order, 2018. The hourly rate was Kshs 153.00 and Ksh 136.55 respectively for a night guard while the daily pay was Kshs 813 and 726 respectively. These figures will be important in calculation of the dues.
35. The trial court having found the termination to be unfair it was justified in awarding damages for unfair termination. On the issue of the trial court awarding the Respondent 6 months' salary which the Appellant felt was excessive in the circumstances. This court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.
36. This court will therefore disturb the awards herein if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. This court notes that the award of compensation is discretionary on the court but the court should be guided by considerations set out under Section 49(4) of the Employment Act in awarding the damages herein.
37. The court takes note of period of service of 45 months and the nature of termination which was unfair and finds that 6 months was justified and reasonable compensation. The court finds no reason to disturb this award but the same will be based on the last minimum salary of Kshs 16,959.00 x 6 =Kshs101,754/=
38. The award of one-month salary pay in lieu of notice was also justified after finding the Respondent was unfairly terminated without notice as provided for under section 36 of the Employment Act but as per the last salary of Kshs 16,959.00/=. The Respondent was also entitled to paternity pay having illustrated that he requested for the same from the Respondent in writing but the same was denied. However, the same ought to be calculated as per minimum wage of Kshs 726.55/= per day by 28 days hence Kshs 20,343.00 as claimed not the amount awarded by trial court.
39. On the claim for leave pay, housing allowance, underpayments and overtime pay this court appreciates that it is continuing injury which the Claimant must file his suit within 12 months after cessation of employment as per section 90 of the Employment Act. This court notes that the employment relationship herein ended in 26<sup>th</sup> July,2023 and the Claim was filed in November, 2023 which was within 12 months as required. The Appellant improperly construed the above provision to be limited to three years. The right position is that so long as the Claimant filed their claim in 12 months period they are entitled to their continuing injury claims.



40. In among other cases the court of Appeal in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR the court held as follows: -

Regarding ‘a continuing injury’, the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant’s dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

41. This court appreciates that leave is an entitlement of an employee under section 28 of the *Employment Act*. The Appellant as the custodian of employment records under section 74 ought to have produced records showing the Respondent proceeded on leave. Failure to tender such evidence leads to the conclusion that the Respondent was entitled to the said leave. This court therefore agrees with the trial court on this position. The same was not challenged by the Appellant directly but the trial court awarded Kshs 29,503/= without any calculations.
42. The court notes that the Respondent had worked for 3 years 9 Months. The Act awards 21 days leave for every completed year in this case being 3 years. This means first three years 21 days by daily wage of Kshs 726.55 by 3 years =Kshs 45,772.65/= .The 9 months leave calculated on prorated basis would be  $9/12 \times 21 \times 813$  the new minimum wage= 12,804.75/= hence the unpaid leave would be 58,577/=
43. On the award of housing allowance, the court appreciates that the Respondent was entitled to the same under section 31 of the *Employment Act*. The Respondent was not housed by the Appellant or his salary inclusive of house allowance as per minimum wages. The court agrees with the trial court that the Respondent was entitled to the same. The same would be 15% of 15,141.95/= between November 2019 to April 2022 and 15% of Ksh 16,959.00 between May 2022 to July 2023 which would be as claimed by the Respondent in his claim of Kshs 106,296.45/ not as calculated by the trial court uniformly.
44. On the award of underpayments, under the Minimum Wages the minimum pay was Kshs 15,141.95 between November 2019 to April 2022 and Kshs 16,959 between May 2022 to July 2023 yet the Respondent’s salary was a net pay of Kshs 10,000/= which was an equivalent of gross pay of Kshs 11,244 per month. The trial court was justified in awarding the Respondent the underpayments claimed as he was underpaid but the same had to be based on the minimum wages above and the gross pay of Kshs 11,244/=
45. This means between November 2019 to April 2022 Kshs 15,141.95 – 11,244= 3,897.95 x30 months =Kshs 116,938.5. Then the period between May, 2022 to July 2023 Ksh 16,959.00-11,244= 5,715 x 15 months= Kshs 85,725/=. The total underpayments would be Kshs 202,663.5/=.
46. On the claim for overtime pay the Respondent alleged that he worked from 6pm to 6am which was 4 hours extra per day which means he worked for 24 hours overtime weekly. The Regulation of Wages (Protective Services) Order required him to work for 52 hours per week hence overtime was 20 hours a week not 24 hours as the trial court found. The court also takes judicial notice of the nature of security guards more so the night guards who normally work from 6pm to 6am.The overtime then would be calculated on 20 hours a week that is the first 30 months between November, 2019 to April 2022 which is two years and half since a year has 52 weeks it would be 130 weeks x 20 hours a week at 136.55=Kshs 287,574.3. The second period between May, 2022 to July 2023 of 15 months it would 65 weeks x 20 hours x 153.00= Kshs 198,900/. The total overtime would be Kshs 486,474/=



47. In the upshot the Appeal is found unmerited and is hereby dismissed with costs but the Respondent's reliefs are overturned as follows: -

- a. 6 Months' Compensation for unfair termination.....Kshs 101,754/=
  - b. Notice pay.....Kshs 16,959.00/=
  - c. Paternity leave.... Kshs 20,343.00/=
  - d. Underpayment.... Kshs 202,663.5/=
  - e. Overtime pay..... Kshs 486,474/=
  - f. House allowance.....Kshs 106,296.45/=
  - g. Unpaid leave.....Kshs 58,577.4/=
- TOTAL.....KSHS 993,067/=

48. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2026**

**DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF MARCH 2026**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

