

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAKURU**

**ELRC APPEAL NO. E038 OF 2025**  
***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**WINSTAR OKWARA GUARDS LTD.....**  
**APPELLANT**

**VERSUS**

**FRANCIS OKWARA EMUNGOR.....**  
**RESPONDENT**

***(Being an Appeal from the Judgment and Order of  
the Honourable A.P Ndege, Senior Principle  
Magistrate, delivered on 14<sup>th</sup> November 2023 in  
Nakuru CM ELRC No. E144 of 2021)***

**JUDGMENT**

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable A.P Ndege, Senior Principle Magistrate, filed this appeal vide a Memorandum of Appeal dated 13<sup>th</sup> December 2023, on the following grounds that:-

*1. The trial Magistrate erred in law and fact by granting the Respondent an exorbitant award of Kshs. 881,363.86/= despite making a finding that the Respondent's evidence on unlawful*

*termination and/or redundancy is substantially contradictory.*

- 2. The trial Magistrate erred in fact and law by failing to consider that the award is subject to statutory deductions.*
- 3. The trial Magistrate erred in law and fact by awarding the Respondent a maximum of 12 months' compensation for unfair termination which is manifestly excessive and high despite the fact that the Respondent was employed for a period of 3 years.*
- 4. The trial Magistrate erred in fact and law by failing to give reasonable grounds for awarding the Respondent the maximum compensation of 12 months' for unlawful termination.*
- 5. The trial Magistrate erred in fact and law by finding that the Respondent was underpaid without considering the provisions of the Regulation of Wages Order and specifically in comparison to the year worked and wages earned.*
- 6. The trial Magistrate erred in fact and law by disregarding the Appellant's evidence adduced,*

*submissions and authorities filed hence arriving at an erroneous finding.*

*7. The trial Magistrate erred in fact and law by failing to consider that the Respondent was earning a salary of Kshs. 13,000/= per month when calculating the award.*

*8. The trial Magistrate erred in fact and law by disregarding the evidence adduced in proof that the Respondent went leave and off duty.*

*9. The trial Magistrate erred in fact and law by failing to consider the provision of section 90 of the Employment Act in granting the award for overtime.*

*10. The trial Magistrate erred in fact and law by rendering a decision that went against the weight of evidence tendered.*

2. The Appellant prays that the Appeal be allowed with costs and the said Judgment be set side and substituted with a judgment of this court.

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

## **Appellant's submissions**

4. The Appellant submitted that the Respondent had in fact absconded duty and argued that the contradictions in the Respondent's own pleadings and testimony: in the Memorandum of Claim and witness statement, he alleged termination on 6<sup>th</sup> May 2020 through a letter of that date, yet in oral testimony he shifted his account, claiming he returned to work on 4<sup>th</sup> June 2020 and was orally terminated then.
5. The Appellant contended that these inconsistencies undermine the credibility of the Respondent's case and demonstrate that the trial magistrate erred in both law and fact by disregarding the evidence of abscondment. The Appellant argued that the Respondent's claim of returning to work on 4<sup>th</sup> June 2020 was an afterthought unsupported by evidence, noting that testimony from the Appellant's witness confirmed the Respondent failed to resume duty after leave. Efforts to reach him through referees also proved futile, yet the Trial Magistrate disregarded this evidence.
6. The Appellant emphasize that desertion or absconding duty amounts to repudiation of the

employment contract, citing **SACWU v Dyasi (2001) 7 BLLR 731 (LAC)** where the court held that “desertion constitutes repudiation of the contract, which the employer is entitled to accept.” Similarly, in **Tabitha Mumbua Kimongo v Shrink Pack Limited [2017] KEELRC 466 (KLR)**, the court held that “where an employee absconds duty, termination cannot be deemed unfair.” The Appellant contended that the Respondent’s contradictory accounts whether redundancy, desertion, or termination failed to discharge the burden of proof on a balance of probabilities.

7. The Appellant submitted that the award of twelve months’ compensation was excessive and unjustified, as **section 49(4) of the Employment Act** requires consideration of factors such as length of service, employee’s conduct, and contribution to termination, none of which supported the maximum award.
8. The Appellant submitted that the trial Magistrate erred in finding that the Respondent was underpaid, arguing that the decision was reached without proper application of the relevant Regulation of Wages Orders or scrutiny of the Respondent’s own evidence.

The Appellant argued that the Respondent admitted earning Kshs.12,000/= per month up to April 2018 and Kshs.13,000/= thereafter, and the Appellant provided detailed computations based on Legal Notice No. 117 of 2015, Legal Notice No. 112 of 2017, and Legal Notice No. 2 of 2018. These calculations showed that the Respondent was either properly remunerated or, in some instances, overpaid, including overtime. The Appellant emphasizes that claims for underpayment and overtime must be strictly proved, yet the Respondent produced no wage orders, independent computations, or documentary evidence. Consequently, the award of underpayment was based on conjecture rather than evidence, and the trial Magistrate misdirected himself by failing to interrogate the applicable wage orders against the relevant years worked.

9. The Appellant submitted that the trial Magistrate erred by disregarding clear, uncontroverted evidence showing the Respondent proceeded on annual leave, off-duty days, and rest days during his employment. Documentary proof, including a leave letter signed by the Respondent and a checklist of leave and off-duty days, was produced, yet the Respondent falsely

alleged he never went on leave. This contradiction undermined his credibility, and his testimony should have been treated with caution. Despite this, the trial court accepted his assertions wholesale. Additionally, the award for overtime was contrary **to section 90 of the Employment Act**, which limits contractual claims to three years. Any overtime claims outside this statutory period were time-barred and ought not to have been awarded, making the trial court's finding erroneous in both fact and law.

10. The Appellant submitted that the trial Magistrate erred by failing to indicate that the monetary awards were subject to statutory deductions, which is a legal requirement to avoid unjust enrichment. The Appellant further submitted that the judgment was against the weight of evidence, as the magistrate disregarded the Appellant's testimony, documentary proof, submissions, and cited authorities.
11. Consequently, the Appellant prays that the Honourable Court allows the appeal in its entirety, sets aside the judgment delivered on 14<sup>th</sup> November 2023, and substitutes it with an order dismissing the Respondent's claim, or alternatively, substantially

reduces the award. The Appellant also seeks costs of both the appeal and the lower court proceedings.

### **Respondent's written submissions**

12. The Respondent submitted that his termination was unlawful both procedurally and substantively, as he was not issued with notice, valid reasons, or subjected to a disciplinary hearing, contrary to **sections 41, 43, 44, and 45 of the Employment Act**. He argues that once prima facie evidence of wrongful termination is shown, the burden shifts to the employer, citing the case of **Peter Otabong Ekisa v County Government of Busia [2017] KEELRC 200 (KLR)** where the court stated:

***“The standard of proof as set out under Section 47(5) Employment Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words, the respondent bears the evidential burden of rebuttal.”***

13. The Respondent submitted that his entitlement to 12 months' compensation calculated as Kshs.16,143.70 × 12 = Kshs 193,724.40/=, supported by ***National Bank of Kenya v Mutonya [2019] KECA 404 (KLR)*** and ***Florence Wambui Gitau v Eclipse International [2019] KEELRC 1765 (KLR)***.

14. On underpayment, the Respondent relied on ***Legal Notice No. 117 of 2015, Legal Notice No. 112 of 2017, and Legal Notice No. 2 of 2018***, tabulating to Kshs.121,095.90/=. The Respondent cited the cases of ***Kathra Hussein Noor & another v Kaderdina Hajee Essak Limited [2016] KEELRC 509 (KLR)*** which quoted ***David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] KEELRC 296 (KLR)***:

***“Where the salary of an Employee remains in arrears, or remains underpaid, recovery of the arrears or the underpayments, is not to be defeated by limitation under Section 90 of the Employment Act; all accrued benefits must be paid to the Employee on termination; arrears of salary and***

***underpayments of salary involve a default of a continuing nature by the Employer, and time would only start running from the date of cessation of the continuous default; every month there is a default by the employer, the time for accrual of the cause of action resets with regard to the cumulative obligations; and so long as the whole claim is not time-barred, there is no reason to bar claims for arrears of salary, salary discrimination and underpayments accruing during the period in employment.”***

15. The Respondent also submitted that he claimed for overtime dues of Kshs.352,852.90/=, off-duty allowances of Kshs 78,411.70/=, public holiday dues of Kshs.70,270.05/=, leave dues of Kshs.46,713.30/=, and unpaid salary for May 2020 of Kshs.16,143.70/=.

16. On leave, reliance is placed on the case of ***Charo vs Shreeji Enterprises Ltd [2025] KEELRC 2684 (KLR)***:

***“The employer must produce work records to prove the employee was not entitled to***

***leave dues. Since the employer failed to submit the records, the court presumed the employee's claim was valid."***

17. Finally, on costs, the Respondent cited the cases of ***Republic Vs Rosemary Wairimu Munene, Ex-parte Applicant vs Ihururu Dairy Farmers for Co-operative Society Ltd Judicial Review No 6 of 2004*** and ***Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] KEHC 7064 (KLR)***, affirming that costs follow the event. The Respondent therefore urges dismissal of the appeal with costs.

### **Analysis and determination**

18. Being the first appeal, it is the court's duty to reassess the evidence presented, conduct its own analysis, and reach independent conclusions in order to determine whether the trial court's findings align with both the evidence and the applicable law. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance. ***(See Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123 and Peters vs Sunday Post Limited (1968) EA 123)***

19. Having looked at the grounds in the memorandum of appeal and the rival submissions by both parties; the issue for determination is whether the appeal is merited.

20. **Sections 107, 108, and 109 of the Evidence Act** provides that whoever allege must prove. In ***Isindu v Lavington Security Guards Ltd [2017] KECA 225 (KLR)*** the Court of Appeal stated as follows:

***“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating***

***reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:***

***“ ..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees..”***

***Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.***

***14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:***

***“(5)***

***For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful***

***dismissal shall rest on the employer."***

***[Emphasis added]***

***So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."***

21. In this instant appeal, the Respondent was verbally engaged by the Appellant as a guard, initially earning Kshs.12,000/= per month until April 2018, and thereafter Kshs.13,000/= from May 2018. He contends that his employment was unfairly terminated on 6<sup>th</sup> May 2020 when he was sent on leave, and further claims that the redundancy declared by the Appellant through the letter of 6th May 2020 was unlawful. Conversely, the Appellant maintains that the Respondent failed to resume duty after his leave ended on 4th June 2020, as indicated in the same letter. The trial court found that the

Respondent had demonstrated wrongful termination, not redundancy, and emphasized that under sections 43, 44, and 45 of the Employment Act, the burden of justifying termination rests with the employer. The law requires only that the employee present prima facie evidence of wrongful dismissal; once that threshold is met, the employer must prove that the separation was lawful. In this respect, the Employment Act effectively reverses the traditional burden of proof under section 107 of the Evidence Act, adopting a reverse burden that places the evidential responsibility squarely on the employer.

22. The evidence in the court shows what the Respondent refers as redundancy letter was indeed a letter that sent him on one-month unpaid leave and he was asked to report to work after the expiration of that unpaid leave. The letter is dated 6<sup>th</sup> May 2020. This was during the COVID season.
23. Hence, there is no clarity if the Respondent resumed work or not. He says he resumed work and was orally terminated. But in the claim he refers to that letter as the termination letter. The court did not see any other termination letter.

24. The Appellant on the other hand alleges the Respondent never resumed work after he was sent on unpaid leave. The Appellant claims the Respondent deserted his employment and so the case of unlawful termination does not apply.

The court is perturbed by the fact that the Appellant has no evidence that the Respondent deserted his employment. It is trite that desertion is a gross misconduct. **Section 44(4) (a) of the Employment Act** provides that one act of gross misconduct is absenting oneself from the place appointed for the performance of his work without leave or lawful cause.

25. In the case of **KABUSIA -VS- KK SECURITY CAUSE 709/2017** the court stated that in citing defence of desertion or absconding places a burden on employer to demonstrate efforts made to notify employee of intention to terminate their services on account of that reason. Case laws has firmly established that an employer alleging an employee has absconded duty is required to show efforts made to reach out to employee with a view of putting him on notice that termination of employment on this ground is being considered.

26. The court is of the view that the trial Magistrate was correct in finding that the Respondent had been unfairly terminated, since the Appellant failed to produce evidence as required under **sections 107, 108, and 109 of the Evidence Act** on proof of desertion of duty. The Appellant also did not provide proof of reporting the issue of desertion to the Labour Office. They did not communicate redundancy to the Labour Office or to the Claimant in compliance with **section 40(1)(b) of the Employment Act**, nor did it justify the termination under **section 47(5) of the Act**. Given these shortcomings, the court found no basis to interfere with the trial court's decision and accordingly upheld it in full.

27. For the relief sought especially compensation for unfair termination, the trial Magistrate was excessive in awarding the Respondent 12 months in terms of compensation of unfair termination since the Respondent worked for 3 years with the Appellant. The court is guided by **section 49(1)(c) of the Employment Act** and it is of the view that a maximum of 6 months will be appropriate compensation. In **Ima Hauliers Limited v Shibanda**

**[2025] KECA 325 (KLR)** the Court of Appeal reduced the compensation of 12 months to 4 months. The court has considered the period the Respondent worked for the Appellant and so awards 6 months as adequate compensation.

28. For the off duty of days, public holidays and leave allowance, this court has carefully perused the record of appeal and noted there is no proof of the alleged reliefs. Therefore, this court will substitute the awards stating that the same were not proved and will not be awarded.
29. Flowing from the foregoing, the court partially allowed the appeal by reducing the award for unfair termination from twelve (12) months' compensation to six (6) months. In addition, the court struck out the claims for underpayments, overtime, off-duty days, public holidays, and leave allowance, noting that these reliefs had not been proved and are disallowed. The total awards are as follows: -

- (a) Six (6) months' compensation 13,000 X 6 =  
Kshs.78,000/=**
- (b) One-month salary in lieu of notice =  
Kshs.13,000/=**
- (c) May 2020 salary  
=Kshs.13,000/=**

**Total**  
**Kshs.104,000/=**

30. The Respondent will have the costs of the appeal and the costs of lower court proceedings and interest at 14% per annum from date of this judgment till full payment.

Orders accordingly.

**Dated, Signed and Delivered virtually at Nakuru  
this 13<sup>th</sup> Day of  
March, 2026.**

**ANNA NGIBUINI MWAURE**  
**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this

course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**  
**JUDGE**