

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E021 OF 2025

BETWEEN

FRANCIS

ISAIAH

SIMIYU.....APPELLANT

AND

PROTECTIVE

CUSTODY

LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the senior resident magistrate court at Nyeri, Hon. Mercyline Lubia dated 5th September 2024)

JUDGMENT

1. The Appellant filed a Memorandum of Claim dated 9th June 2023 at the Chief Magistrate’s Court at Nyeri, in ELRC No. E031 of 2023, in which he averred that he was employed by the Respondent as a night watchman from 30th January 2019 until 27th March 2022, when he was verbally terminated by his immediate supervisor, Mr. Gitonga, who at all material times was an employee and agent of the Respondent.
2. The Appellant’s claim at the trial Court was for the sum of **Kshs 1,603,779.79**, comprising overtime, unpaid house allowance, accrued and unpaid leave,

maximum compensation for unfair termination, unpaid rest days, public holidays worked but not paid, and underpaid salary.

3. In response, the Respondent filed a Statement of Defence dated 15th August 2023, denying that the Appellant was verbally terminated by his supervisor. The Respondent contended that a supervisor does not have the authority to terminate employment and described the Appellant's claims as baseless, exaggerated, and unfounded.
4. The Respondent further asserted that the Appellant's salary of Kshs 7,500.00 exceeded the statutory minimum requirements.
5. The Respondent also disputed the reliefs sought, arguing that the Appellant did not work on Sundays, public holidays, or overtime, as his duties were limited to patrolling and conducting routine checks to ensure the Telkom cables were intact. Accordingly, the Respondent urged the Court to dismiss the claim with costs.
6. The matter was canvassed through oral evidence, submission of exhibits, and written submissions. From the record, the Appellant testified in support of his case while the Respondent called oral evidence through Rodgers Nyumbile Isaac. Upon close of the hearing and filing of written submissions, the trial

Court examined the record and delivered its Judgment on 5th September 2024, dismissing the Appellant's claim with costs.

7. In her judgment, the learned trial Magistrate found that the Appellant had absconded from duty and was not terminated. The Court further denied all reliefs sought by the Appellant, except for the issuance of a certificate of service.

The Appeal

8. The Appellant was aggrieved by the trial Court's Judgment, hence filed the present Appeal, raising the following eight (8) grounds:

- 1) **The learned magistrate erred in law and fact by misdirecting herself that abscondment was one of the methods of terminating employment.**
- 2) **The learned magistrate erred in law in failing to consider and be bound by decided cases cited by the appellant in accordance with the doctrine of stare decisis.**
- 3) **The learned magistrate erred in law and fact in failing to interpret and give effect to Article 41 of the Constitution of Kenya, the provisions of Sections 3,9, 10, 26 of the Employment Act and Section 48 of the Labour Institutions Act, 2007, as read together with Legal Notice No. 2 of 2019.**

- 4) **The learned magistrate erred in law and fact by misdirecting herself on the applicable burden of proof in employment disputes where the employer fails to produce the contract of employment.**
- 5) **The learned magistrate erred in law and fact in failing to frame and decide all the issues in dispute.**
- 6) **The learned magistrate erred in law and fact by considering extraneous matters and especially that the appellant was employed by and receiving salaries from 3rd parties which extraneous matters she ought not to have considered, as there was no evidence or submissions to that effect.**
- 7) **The learned magistrate erred in law for failing to award the appellant costs of the claim and instead awarding them to the respondent.**
- 8) **The learned magistrate erred in law and fact in failing to assess compensation/damages.**

9. Consequently, the Appellant has sought the following orders from this Court:

- 1) **The judgment of the magistrate's court in Nyeri C.M ELRC no. E031 of 2023 be set aside and there be substituted therefore an**

order allowing this appeal, allowing the appellant's claim in Nyeri CM ELRC E031 of 2023 as prayed in the court below.

- 2) A declaration that the respondent has breached the appellant's right to fair labour practices.**
- 3) Kshs 475,325.20 being overtime for normal working days plus interest.**
- 4) Kshs.105,627.60 being unpaid salary for Sundays plus interest.**
- 5) Kshs.465,379.29 being overtime for Sundays not paid plus interest.**
- 6) Kshs. 20,313 being unpaid salary for public holidays plus interest.**
- 7) Kshs. 89,496 being overtime for public holidays plus interest.**
- 8) Kshs. 75,805.20 being house allowance plus interest.**
- 9) Kshs. 42,657.30 being annual leave pay plus interest.**
- 10)Kshs. 329,173.20 being salary underpayments plus interest.**
- 11)Kshs. 14,038 being one month's salary in lieu of notice plus interest.**
- 12)General damages for unfair labour practices with interest.**
- 13)Compensation for unfair termination plus interest.**
- 14)Certificate of service.**

15) That the costs of this appeal and the court below be awarded to the appellant against the respondent.

Submissions

10. The Appeal was canvassed through written submissions. On his part, the Appellant contended that the Respondent did not adhere to or comply with the proper procedures for termination of employment. In this regard, he cited the case of *Maroo Polymers Limited v Winfred Kasvoki Willis (Civil Appeal 176 of 2019) [2023] KECA 84 (KLR) (3 February 2023)*. In the same vein, the Appellant urged the Court to hold that, in the absence of any notice to show cause, disciplinary proceedings, or formal dismissal for the alleged abscondment, it was erroneous for the trial Court to find that he had absconded duty. He further posited that abscondment is not recognized as a method of terminating employment under the Employment Act, 2007.

11. The Appellant further submitted that the trial Court failed to consider the authorities cited, which establish that an employer must demonstrate the reasonable steps taken to locate the employee or to warn him of the risk of losing employment.

12.The Appellant further argued that by failing to produce his employment records, the Respondent did not discharge the burden of proof. He further submitted that by denying him the basic statutory terms and conditions of employment as a night watchman, the Respondent breached the Constitution, the Employment Act, and the Labour Institutions Act.

13.The Appellant posited that, by dismissing his claim, the trial Court misinterpreted and failed to give effect to the relevant legal and constitutional provisions, resulting in an erroneous decision. In support of this position, the Appellant placed reliance on the case of *Manyinsa v Lavington Security Limited (Civil Appeal 55 of 2019) [2023] KECA 1376 (KLR) (24 November 2023)*.

14.The Appellant further submitted that the trial Court erred by failing to address all issues for determination, which led to an error of judgment.

15.It was the Appellant's further submission that by noting that he was employed and paid salaries by third parties during the relevant period, the trial Court considered extraneous matters that had not been pleaded or proved. In support of his argument, the Appellant cited the case of *Eva Wangui Murua v Kigerua Motors & 3 others [2020] KECA 549 (KLR)*.

16. On the other hand, the Respondent submitted that the Appellant failed to substantiate his claims of unfair termination and that the learned trial Magistrate was correct to dismiss the Appellant's claim on this basis. On this score, the Respondent cited the case of *Charles Fundi Njiru v Board of Management, Baricho High School (2020) eKLR*.

17. Referencing the case of *Ngunda v Ready Consultancy Limited (Civil Appeal 129 of 2019) [2022] KECA 577 (KLR)*, the Respondent posited that the Appellant's bank statements clearly showed that he had been employed by various companies during the material period and received salaries, demonstrating that he was not working overtime, as correctly observed by the trial Magistrate.

18. The Respondent further submitted that, having failed to establish a claim of unfair termination, the Appellant is not entitled to damages for unfair termination or to one (1) month's salary in lieu of notice.

Analysis and Determination

19. This being the first appellate Court, it is incumbent that it re-examines the evidence presented before the trial Court, as well as the Judgment, and arrive at

its own independent conclusion. In so doing, the Court ought to be cognizant that it did not have the opportunity to see or hear the witnesses testify firsthand. This duty was reaffirmed in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

20. Bearing the above duty in mind and having considered the record, the rival submissions, the cited authorities, and the applicable law, the Court has distilled the following issues for determination:

- a) **Whether the trial Court erred in holding that the Appellant absconded duty and was not unfairly terminated;**
- b) **Subject to (a), whether the termination, if any, was unfair and unlawful;**
- c) **Whether the Appellant is entitled to the reliefs claimed before the trial Court.**

Abscondment of duty or unfair termination?

21. The record bears conflicting accounts regarding the manner in which the employment relationship came to an end. Whereas the Appellant asserted that

he was verbally terminated by his immediate supervisor, Mr. Gitonga, the Respondent maintained that the Appellant deserted duty on 21st March 2022 for a period of twelve (12) days, after which he was issued a Notice to Show Cause that he allegedly failed to respond to.

22. The Respondent further discounted the Appellant's version of events, arguing that his superior, Mr. Gitonga, is also an employee hence was not capable of terminating the Appellant's employment.

23. It should be appreciated that, as a limited liability company, the Respondent is a legal (non-natural) person and can only act through its agents, who are natural persons. Consequently, any acts such as termination of employment are carried out through those agents. As such, the Appellant's assertions that he was terminated by Mr. Gitonga are not remote. This is bearing in mind that the record does not clearly disclose the extent of the authority exercised over the Appellant by his supervisor (Mr. Gitonga), particularly as to whether he had the power to terminate his employment.

24. From the record, Mr. Gitonga was not called as a witness before the trial court. In view of the parties' diametrically opposite positions, it is only through his testimony that the credibility contest between the Appellant and the Respondent could have been properly resolved.

25.Indeed, it is unclear to the Court why Mr. Gitonga, who had firsthand knowledge of the disputed circumstances surrounding the Appellant's departure from employment, was not called to testify. Instead, the Respondent elected to rely on a second-hand account of events as presented by Mr. Nyumbile (DW1).

26.In view of the Respondent's failure to call Mr. Gitonga as a witness, the Court draws an adverse inference that, had he been called to testify, his evidence would have been unfavorable to the Respondent.

27.In view of the foregoing, the Court is not persuaded that the Appellant absconded duty and instead finds it highly probable that he was asked to leave his employment.

Unfair and unlawful termination from employment?

28.The Respondent's case at the trial Court was premised on the claim that the Appellant absconded duty. Even so, the Respondent was obliged to follow due process as prescribed under the Employment Act. Indeed, absence from work without permission constitutes one of the grounds for summary dismissal under **Section 44(4)(a) of the Employment Act.**

29. Accordingly, even if the Court is to believe the Respondent's version that the Appellant had indeed absconded duty, the Respondent was still required to afford him a fair hearing and comply with the procedures set out under Section 41 of the Employment Act.

30. In this case, the Respondent claimed that the Appellant was issued with a Notice to Show Cause dated 1st April 2022. The letter, which was exhibited in Court, stated that the Appellant had failed to report for duty from 21st March 2022 without approval.

31. The Appellant was further informed through the said letter that he had been declared a deserter with effect from 28th March 2022 and was instructed to return the company uniform and any other property in his possession. Additionally, he was advised to notify the author of the letter if there were any extenuating circumstances regarding the matter, or he would be deemed to have accepted the terms of the said letter.

32. It is notable that the said letter was addressed to the Appellant *through* "**P.O. Box 48, Nyeri.**"

33. From the record, there is no evidence that the postal address to which the letter was sent belonged to the Appellant, nor that the letter was actually dispatched. During cross-examination, Mr. Nyumbile admitted there was no evidence that the letter reached the Appellant.

34. Further to the foregoing, Mr. Nyumbile did not indicate that any other means, such as contacting the Appellant by mobile phone, were employed to reach him. This is bearing in mind that during cross-examination, Mr. Nyumbile stated they had the Appellant's mobile number. Accordingly, it is unclear why the Respondent chose not to contact the Appellant via his phone to collect the said letter. As it is, it cannot be verified that the letter of 1st April 2022 reached the Appellant.

35. Therefore, assuming that the letter of 1st April 2022 marked the initiation of a disciplinary process against the Appellant, it follows that the procedure was defective due to the uncertainty surrounding its service upon the Appellant.

36. Besides the letter dated 1st April 2022, there is no evidence that the Appellant was invited to a disciplinary hearing or given the opportunity to present his defence in the presence of a colleague or union representative. Indeed, it is in

such a forum that the Appellant would have been able to explain the circumstances under which he left employment.

37. Accordingly, the Court finds that the Appellant was not afforded an opportunity to respond to the allegations of desertion and concludes that he was not subjected to the procedure prescribed under Section 41 of the Employment Act.

38. It is instructive to note that Section 41 is couched in mandatory terms and any deviation renders the process unfair and unprocedural. This principle was reaffirmed by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR*.

39. On the whole, the Court finds that the Appellant was unfairly terminated from employment.

40. The finding by the learned trial Magistrate was therefore not consistent with the evidence on record.

Reliefs?

41. With regards to the claim for overtime, rest days and public holidays, it is notable that the Appellant did not adduce evidence to prove that he worked beyond the normal working hours but was not compensated accordingly by the Respondent.

42. On this issue, the Court concurs with the decision in *Rogoli Ole Manadiegi vs General Cargo Services Limited [2016] eKLR*, where it was held that although an employer is the custodian of employment records, an employee does not automatically establish a claim for overtime merely because such records are not produced in court by the employer. As the Court rightly held, the burden remains on the employee to prove that he worked in excess of the legal maximum.

43. In the present case, the Appellant did not demonstrate when he worked extra hours, or when he worked on public holidays or rest days and was not compensated accordingly.

44. On the claim for house allowance, the Appellant asserted in his Memorandum of Claim that he was earning a monthly basic salary of **Kshs 6,680.00** at the time of termination. On the other hand, the Respondent contended that the Appellant received a consolidated salary of **Kshs 7,500.00**. However, as the Appellant's contract of employment was not produced, it is not possible to determine whether the salary was indeed consolidated.

45. Pursuant to **Section 10(7) of the Employment Act**, the Respondent's failure to produce the Appellant's contract of employment placed upon it the burden of proving or disproving the assertion that the salary was not consolidated.

46. In any event, the Respondent produced a document described as a "*payment structure*", which notably reflects a basic salary component of Kshs 7,500.00.

47. In view of the foregoing, the Court finds that the Respondent has failed to disprove the Appellant's assertion that he only earned basic salary exclusive of house allowance.

48. The foregoing finding notwithstanding, it is important to note that failure to pay house allowance as and when it falls due amounts to a continuing injury that accrues on a monthly basis.

49. According to **Black's Law Dictionary (10th Edition, p. 906)**, a continuing injury means "*An injury that is still in the process of being committed.*"

50. Accordingly, for as long as the Appellant remained in employment, a fresh cause of action accrued each month in which house allowance was not paid.

51. By virtue of **Section 89 of the Employment Act**, claims founded on a continuing injury or damage must be instituted within twelve (12) months from the date of cessation of the continuing wrong.

52. In the present matter, the injury ceased upon termination of the Appellant's employment. According to the Appellant, this occurred on 27th March 2022, when he alleges that he was verbally dismissed by his supervisor. Consequently, under **Section 89 of the Employment Act**, the Appellant had up to 27th March 2023 to file a claim in respect of non-payment of house allowance.

53. The record shows, however, that the Appellant filed his claim before the trial Court on 15th June 2023, which was outside the prescribed limitation period for claims based on continuing injury. The claim for house allowance was therefore statute-barred at the time of filing.

54. For that reason, the Appellant's claim for house allowance is not sustainable, being time-barred under Section 89 of the Employment Act.

55. The Appellant further alleged that he was underpaid during the subsistence of the employment with the Respondent. However, the Respondent maintained that the Appellant's remuneration exceeded the statutory minimum wage.

56. It was the Appellant's contention that he was employed as a night guard, whereas the Respondent described his position as that of a night patrol guard. As stated herein, the Respondent did not produce the Appellant's contract of employment. As such, pursuant to **Section 10(7) of the Employment Act**, the burden was on the Respondent to disprove the Appellant's assertion regarding his designation.

57. In the absence of evidence to the contrary, there is no basis for this Court to doubt the Appellant's assertion that he was employed as a night guard.

58. Under **Legal Notice No. 2 of 2018**, the minimum statutory consolidated salary for a night guard working within Nyeri town, classified as a former municipality, was, at the time, **Kshs 14,038.00**. As per the aforementioned legal notice, this amount is inclusive of house allowance. Given that the Respondent did not rebut the Appellant's evidence that he earned a basic salary of Kshs 6,680.00, it follows that he was indeed underpaid.

59. However, as underpayment constitutes a continuing injury, the claim is subject to the same limitation period applicable to the claim for house allowance. Having been filed more than twelve (12) months after cessation of the injury, the claim for underpayment is likewise statute-barred and therefore unsustainable.

60. The Appellant further sought payment for accrued leave for a period of three (3) years on the basis that he was not granted leave. Although the Respondent failed to produce leave records as required under **Section 74(1)(f) of the Employment Act**, the claim is nonetheless capped at eighteen (18) months pursuant to **Section 28(4) of the Act**. Accordingly, the portion of the claim relating to leave accrued beyond eighteen (18) months prior to the termination is declined.

61. Having found that the Appellant's termination was unfair, the Court awards him one (1) month's salary in lieu of notice together with compensatory damages equivalent to eight (8) months' gross salary. In making this award, the Court has taken into account the length of the employment relationship, the circumstances of the termination, and the Respondent's failure to comply with statutory minimum terms and conditions of employment, including payment of the prescribed minimum wage and house allowance.

62. The Appellant also sought an award of general damages for unfair labour practices. The Court has found that the Respondent failed to comply with the minimum statutory terms and conditions of employment, particularly by not paying house allowance and by remunerating the Appellant below the prescribed minimum wage. This conduct amounted to an unfair labour practice

and, in effect, a violation of **Article 41(1) of the Constitution**. The breach was further compounded by its persistence over a period of three (3) years. In the circumstances, the Appellant is entitled to compensation, which is hereby assessed at **Kshs 100,000.00**.

Orders

63. In the final analysis, the Appeal is allowed as follows: -

- a) The judgment of the Trial Court dismissing the Appellant's suit is hereby set aside.**
- b) The Appellant is awarded Kshs 14,038.00, being one (1) month's salary in lieu of notice.**
- c) The Appellant is further awarded compensatory damages in the sum of Kshs 112,304.00, equivalent to eight (8) months' salary based on the consolidated pay applicable at the time of termination.**
- d) The Appellant is awarded Kshs 14,739.90 on account of accrued leave.**
- e) The Appellant is awarded Kshs 100,000.00 as compensation for the violation of his constitutional right to fair labour practices.**
- f) The total award amounts to Kshs 241,081.90.**

g) The sum awarded in (f) shall attract interest at court rates from the date of this Judgment until payment in full.

64. As the Appeal has succeeded, costs in this Court and at the Trial Court shall be borne by the Respondent.

DATED, SIGNED and DELIVERED at NYERI this 24th day of March, 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant

Mr. Waweru

For the Respondent

Ms. Mwai

Court Assistant

Ndati

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE